COMMENT

The *Gideon* Split: Preconviction Indigent Defense Reform Litigation in *Hurrell-Harring* and *Duncan*

William H.W. McKenna[*]

Forty-nine years after the U.S. Supreme Court's decision in Gideon v. Wainwright, *many states continue to fail to effect its guarantee. Recently, some indigent defendants have challenged states' systemic neglect of indigent defense through pre-conviction class action suits seeking prospective relief, like* Hurrell-Harring v. State, *in New York, and* Duncan v. State, *in Michigan. This Comment argues that pre-conviction civil claims alleging systemic Sixth Amendment deprivations and seeking prospective relief are not properly treated as ineffective assistance of counsel claims. Rather, such claims present the justiciable question of whether the state has enabled* Gideon*'s guarantee at all. In essence, when states systemically neglect indigent defense, thereby preventing public defenders from fulfilling their ethical obligations in individual cases, those states categorically deprive indigent defendants of their Sixth Amendment right to counsel, and courts must intervene.*

TABLE OF CONTENTS

 Senior Articles Editor, UC Davis Law Review; J.D. Candidate, UC Davis School of Law, 2012; B.A. Politics and Legal Studies, UC Santa Cruz, 2006. I am indebted to Christopher Relos for the countless hours he spent helping me write this piece as well as Maytak Chin, Connor Boyd, and Lawrence Lin for their superb editing assistance. Thanks especially to my mom and step dad for their unwavering love and support.

INTRODUCTION

> Not only . . . 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.
>
> — *Justice Hugo Black*[1]

Now, nearly fifty years after the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*, most states have yet to live up to its promise.[2] Although courts today universally recognize indigent defendants' right to state-appointed counsel, underfunding and structural deficiencies that plague public defenders often render that right illusory.[3] Public defenders cannot zealously represent their clients when states routinely underfund indigent defense.[4]

When defendants do not receive effective assistance of counsel, they can pursue a postconviction ineffective assistance of counsel ("IAC") claim under *Strickland v. Washington*.[5] In practice, though, the high standard for evaluating an IAC claim renders it a largely meaningless remedy, one that routinely undermines postconviction challenges while categorically proscribing preconviction ones.[6] Yet some courts nevertheless apply *Strickland* to preconviction challenges.[7] In *Duncan*

---

[1] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[2] *See, e.g.*, Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 245-47(1997) (chronicling "permanent crisis" of indigent defense in the United States); Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 241-300 (2010) (studying differences in quality of indigent defense systems across Arizona based on population density); *see also, e.g.*, Dripps, *supra*, at 253-54 (explaining problem of vertical conflict of interest where states reduce funding to public defenders baed on their success); *cf. Gideon*, 372 U.S. at 340 (requiring states provide indigent defendants with defense counsel in most criminal cases).

[3] *See* Dripps, *supra* note 2, at 245-47; Pruitt & Colgan, *supra* note 2, at 222 & n.15.

[4] *See* Dripps, *supra* note 2, at 245-51; *see, e.g.*, People v. Jones, 111 Cal. Rptr. 3d 745, 763-66 (App. Ct. 2010) (considering systemic deficiencies of county indigent defense system in finding individual case of IAC).

[5] *See* Strickland v. Washington, 466 U.S. 668, 685-87 (1984). *But cf.* United States v. Cronic, 466 U.S. 648 (1984) (presuming prejudice in IAC claim where state denies defendant counsel at critical stage in proceedings or proceeding lacks meaningful adversarial testing).

[6] *See* Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Preconviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 446, 467-68 (2010); *infra* Part I.A.

[7] *See* Chiang, *supra* note 6, at 446; *see, e.g.*, Platt v. State, 664 N.E.2d 357, 362-63

v. State, for example, the Michigan Supreme Court initially barred a preconviction class action suit seeking systemic prospective relief, holding the claim nonjusticiable under *Strickland*.[8] Other courts, like the New York Court of Appeals, have resisted employing the *Strickland* standard to pre-conviction civil claims alleging systemic Sixth Amendment deprivations.[9] In one such case, *Hurrell-Harring v. State*, the court refused to apply *Strickland* to a preconviction claim, opining that systemic deficiencies might compel prospective relief.[10]

This Comment argues that preconviction systemic Sixth Amendment claims are not IAC claims; rather, systemic preconviction claims present a more basic question of whether a state has fulfilled *Gideon*'s guarantee at all. Part I provides a background on the indigent defendant's right to assistance of counsel, IAC claims, and justiciability. Part II explicates the split in approaches to preconviction civil claims for systemic deprivation of the right to counsel, using *Hurrell-Harring* and *Duncan* as examples. Part III sets forth three reasons why courts must treat preconviction Sixth Amendment claims for prospective relief as alleging violations of *Gideon*'s guarantee altogether, not IAC: First, *Gideon* deprivations accrue preconviction while IAC claims can accrue only postconviction.[11] Second, *Gideon*

(Ind. Ct. App. 1996) (finding that *Strickland*'s prejudice prong presents per se bar to preconviction claims of effective systemic denial of indigent defendants' right to counsel); Duncan v. State, 774 N.W.2d 89, 151-54, 157-61 (Mich. Ct. App. 2009) (Whitbeck, J., dissenting) (applying *Strickland* framework to bar preconviction Sixth Amendment claims for systemic injuries seeking declaratory and prospective injunctive relief), *adopted by* 784 N.W.2d 51 (Mich.) (mem.), *vacated on reconsideration*, 790 N.W.2d 695 (Mich. 2010) (mem.).

[8] *See Duncan*, 774 N.W.2d at 151-70. The Michigan Supreme Court subsequently reversed itself, purportedly on procedural grounds, and allowed the claim to proceed. Duncan v. State, 790 N.W.2d 695 (Mich. 2010) (mem.). This Article nevertheless uses *Duncan* as an example because Judge Whitbeck's dissent in the Michigan Court of Appeals decision is thorough and representative of the argument against justiciability for preconviction civil claims alleging deprivation of the Sixth Amendment right to counsel.

[9] *See, e.g.*, *Cronic*, 466 U.S. 648 (presuming prejudice when accused does not receive counsel at critical stage in proceedings or proceeding lacks meaningful adversarial testing); United States v. Morris, 470 F.3d 596, 603 n.6 (6th Cir. 2006) (finding constructive denial of counsel under *Cronic* when state appoints defense counsel only moments before pre-preliminary examination); *Jones*, 111 Cal. Rptr. 3d 745 (holding that counsel's failure to investigate due to state's inadequate funding of indigent defense counsel constituted IAC).

[10] *See* Hurrell-Harring v. State, 930 N.E.2d 217, 225-27 (N.Y. 2010) (interpreting *Strickland* to depend on assumption that state satisfied *Gideon* obligations and distinguishing *Hurrell-Harring* as having stated claim for denial of *Gideon*'s guarantee, not IAC); *infra* Part II.B.

[11] *See infra* Part III.A.

deprivations often evince broad systemic problems, while — under *Strickland* — IAC can never be systemic.[12] Third, ongoing *Gideon* deprivations compel prospective relief.[13]

I. BACKGROUND

This Part first explains the Sixth Amendment right to counsel post-*Gideon* and the IAC doctrine under *Strickland*. Second, it explains relevant concepts of remedial law, including the right to a remedy and equitable remedies. Third, it explains the concept of justiciability.

A. The Sixth Amendment Right to Counsel

The Sixth Amendment's Right to Counsel Clause guarantees the assistance of counsel to criminal defendants.[14] It is a procedural safeguard essential to fair trials and the substantive constitutional rights of life, liberty, and justice.[15] Denial of the right to counsel renders a criminal proceeding unconstitutional and presumptively unjust.[16]

Gideon v. Wainwright is the seminal case on indigent defendants' right to state-appointed counsel in state criminal cases.[17] Prior to *Gideon*, the Supreme Court recognized indigent defendants' right to government-provided counsel only in federal court, not in state court.[18] In *Gideon*, the Court extended the guarantee of counsel to

[12] *See infra* Part III.B.

[13] *See infra* Part III.C.

[14] U.S. CONST. amend. VI; *see also* Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (quoting Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938)).

[15] *See Gideon*, 372 U.S. at 343-44; Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); Powell v. Alabama, 287 U.S. 45, 67-68 (1932) ("[T]he right [to assistance of counsel] is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . .' " (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926))).

[16] *See, e.g.*, United States v. Cronic, 466 U.S. 648, 659-60 (1984) (presuming prejudice, i.e., that trial is unfair, when actor denies right to counsel altogether, at critical stage, or constructively); *Gideon*, 372 U.S. at 343-44 (holding that any indigent person authorities hale into court may not receive fair trial if state does not provide him counsel); *Powell*, 287 U.S. at 68-69 (describing lay defendant's inability to mount defense in criminal case without assistance of counsel).

[17] *See, e.g.*, Timothy H. Everett, *Post*-Gideon *Developments in Law and Lawyering*, 4 CONN. PUB. INT. L.J. 20, 29 (2004) (identifying *Gideon* as seminal contemporary Sixth Amendment right to counsel decision); *cf. Gideon*, 372 U.S. at 340 (requiring states provide indigent defendants with defense counsel in most criminal cases).

[18] *See Gideon*, 372 U.S. at 339, 342-43 (holding Due Process Clause of Fourteenth Amendment incorporated the Sixth Amendment and requiring states provide counsel

indigent criminal defendants in state courts, laying the foundation for today's public defense systems.[19] Nearly fifty years after *Gideon*, however, legal scholars recognize that chronic underfunding and structural deficiencies leave most states' public defenders systemically ineffective.[20]

The Court recently applied *Gideon* to preconviction contexts in *Rothgery v. Gillespie County* and *Maine v. Moulton*.[21] In *Rothgery*, police arrested Walter Rothgery for possessing a firearm as a felon after a criminal records check incorrectly indicated he had a felony conviction.[22] Too poor to hire a lawyer, Rothgery spent three weeks in jail before the magistrate granted his repeated requests for counsel.[23] Only after the court appointed a lawyer was Rothgery able to prove he had no felony conviction and obtain a dismissal.[24] After his release,

to indigent defendants); Betts v. Brady, 316 U.S. 455, 461-62 (1942) (holding Sixth Amendment applies only to federal court proceedings and that Due Process Clause of Fourteenth Amendment does not incorporate the Sixth Amendment), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963); *Johnson*, 304 U.S. at 463 (recognizing right to government provided counsel for indigent defendants under the Sixth Amendment, but not recognizing incorporation of Sixth Amendment by the Fourteenth Amendment).

[19] *See Gideon*, 372 U.S. at 340, 343. Courts read *Gideon* as protecting defendants at their first judicial proceeding and terminating after a final judgment. Generally, *Gideon*'s guarantee does not extend to convicts in postconviction appeals. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 201-03 (2008) (reaffirming that right to counsel and *Gideon* attach at first court proceeding against accused); Lawrence v. Florida, 549 U.S. 327, 337 (2007) (citing Coleman v. Thompson, 501 U.S. 722, 752, 756-57 (1991)); Murray v. Giarratano, 492 U.S. 1, 7-8 (1989); *see also* Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987); *cf.* Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972) (recognizing right to counsel in cases with maximum sentences of less than six months despite no right to jury); *Gideon*, 372 U.S. at 340 (requiring states to provide indigent defendants with defense counsel in most criminal cases); *Johnson*, 304 U.S. at 465-68 (holding that Sixth Amendment right to assistance of counsel is essential jurisdictional element except in unusual case where defendant intelligently and competently waives it).

[20] Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004) (responding to shortage of defense attorneys creating systemic crisis of constitutional proportions); Dripps, *supra* note 2, at 245-51 (discussing contemporary problems in indigent defense); Everett, *supra* note 17, at 40-44; Pruitt & Colgan, *supra* note 2, at 241-300; Note, Gideon's *Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2063-66 (2000); Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1809-10 (2000) (same).

[21] *See Rothgery*, 554 U.S. at 198-213; Maine v. Moulton, 474 U.S. 159, 168-77 (1985).

[22] *See Rothgery*, 554 U.S. at 195.

[23] *See id.* at 196.

[24] *See id.* at 196-97.

Rothgery sued the county for denying his right to counsel, an action the Court permitted despite the claim's preconviction nature.[25]

In *Moulton*, police arrested Perley Moulton and Gary Colson for theft by receiving stolen vehicles.[26] After the superior court enlarged Colson and Moulton on bail, Colson confessed to police and agreed to testify against Moulton.[27] Encouraged by the police, Colson solicited inculpatory statements from Moulton while surrepticiously recording their conversations.[28] Based on those statements, the prosecution formally charged Moulton.[29] When the prosecution subsequently offered the conversations as evidence against Moulton at trial, Moulton objected, claiming that their use violated his right to counsel.[30] The Court agreed, holding that the State used Colson to circumvent Moulton's right to have his attorney present during preconviction state interrogations.[31]

The Court also interprets the Sixth Amendment right to assistance of counsel as a right to effective assistance of counsel.[32] In *Strickland v. Washington*, the Court addressed a postconviction appeal seeking reversal for deficient representation.[33] The Court prescribed a fact-sensitive, case-by-case analysis for determining whether assistance of counsel is effective.[34] No federal court has since applied *Strickland* to permit preconviction IAC claims.[35]

To lodge a successful IAC claim, the *Strickland* Court held that a defendant must satisfy a two-prong cause and prejudice test.[36] First, a defendant must show that defense counsel's performance was not objectively reasonable.[37] Under this step, the court ordinarily

[25] *See id.* at 196-97, 198-213.

[26] *See Moulton*, 474 U.S. at 161-62.

[27] *See id.* at 162-63.

[28] *See id.* at 163-66.

[29] *See id.* at 163-66.

[30] *See id.* at 166.

[31] *See id.* at 176-77.

[32] *See* Strickland v. Washington, 466 U.S. 668, 686-87 (1984); McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970); Glasser v. United States, 315 U.S. 60, 67-68 (1942); Powell v. Alabama, 287 U.S. 45, 71 (1932).

[33] *See Strickland*, 466 U.S. at 687.

[34] *See id.* at 690; *see also* Wiggins v. Smith, 539 U.S. 510, 521 (2003).

[35] *See* LexisNexis Shepard's Analysis of *Strickland*, 466 U.S. 668, LexisNexis (Jan. 19, 2011) (revealing 148 U.S. Supreme Court decisions and more than 10,000 Courts of Appeals decisions citing to *Strickland*, none of which occurred preconviction).

[36] *See Strickland*, 466 U.S. at 682.

[37] *See id.* at 688-90.

presumes that counsel's conduct was objectively reasonable.[38] Second, a defendant must show that the alleged deficiency actually prejudiced the defense, depriving the defendant of a fair trial.[39] Prejudice in this case is defined as a reasonable probability that the outcome would have been different if not for the deficiency in the defense counsel's conduct.[40] The remedy for finding IAC under *Strickland* is reversal of the defendant's conviction.[41]

Legal scholars observe that *Strickland*'s IAC test substantially burdens an appealing defendant.[42] *Strickland* itself describes its first

[38] *See id.* at 689.

[39] *See id.*

[40] *See id.* at 694.

[41] *See id.* at 682

[42] *See* Chiang, *supra* note 6, at 467; Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 438-40 & nn.72-77 (1996). CUNY Law School Professor Jeffrey Kirchmeier explained well the common position among legal scholars in his article, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*:

> Justice Blackmun recently noted, "Ten years after the articulation of that standard, practical experience establishes that the Strickland test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.' " Strickland created an "almost insurmountable hurdle for defendants claiming ineffective assistance." Commentators have noted that although the Court stressed the importance of the Sixth Amendment right to effective assistance of counsel, the strong deference given to a trial counsel's performance indicates the Court's great concern for judicial economy and attorneys' reputations. Further, the prejudice test adopted by the Court in Strickland placed substantial emphasis on whether the defendant was factually culpable and insufficient emphasis on whether the defendant received a fair trial and was legally guilty. As one critic observed, "the Sixth Amendment right to effective assistance of counsel exists mainly to aid the factually innocent defendant convince the jury or judge of his legal innocence."

Id. at 438-39 (citations omitted). Legal scholars have proposed myriad alternatives to *Strickland*'s cause and prejudice requirement for both pre-conviction and post-conviction Sixth Amendment claims. *See, e.g.*, Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. REV. L. & SOC. CHANGE 425 (2004) (suggesting standard that presumes prejudice on appeal when trial court incorrectly fails to inquire into effectiveness); Chiang, *supra* note 6 (proposing standard based on showing of constitutional injury and systemic deficiencies which make future similar injuries unavoidable); Dripps, *supra* note 2, at 290-97 (proposing that in IAC claims, courts substitute comparison of defense's institutional capacity to advocate with prosecution's for *Strickland* standard); Pruitt & Colgan, *supra* note 2, at 300-03 (advocating for IAC standard based on resource parity of defense and prosecution); Richard J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of*

prong as "highly deferential" to defense counsel.[43] Defendants must overcome a presumption that their counsel's performance was reasonable in the context of prevailing professional norms.[44] Even if this first prong is satisfied, the actual prejudice requirement of the second prong presents a nearly insurmountable obstacle to relief because convicts must affirmatively show the impact of the deficient conduct on the outcome of their cases.[45] Compounding the difficulty, most indigent convicts must pursue their IAC claims without counsel as *Gideon*'s guarantee does not apply postconviction.[46]

Constructive denial of counsel provides an exception to *Strickland*'s burdensome IAC test.[47] In *United States v. Cronic* — decided concurrently with *Strickland* — the Court recognized that deficiencies in assistance of counsel may rise to the level of constructive denial of the right to counsel altogether.[48] Constructive denial occurs when counsel fails to represent the defendant at a critical stage or if defense counsel fails to perform as a meaningful adversary.[49] Where constructive denial occurs, *Cronic* controls, bypassing *Strickland*'s second prong by presuming prejudice.[50] Thus, the Court has

Counsel in Criminal Cases, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986) (suggesting several possible solutions including pro bono services, litigation, lobbying, and promulgation of mandatory professional standards); Lemos, *supra* note 20, at 1822-42 (suggesting civil challenges to indigent defense systems as possible solution to structural problems, such as low-bid contract systems, that lead to chronic ineffective assistance of counsel); Note, *supra* note 20 (advocating for reform through litigation).

[43] *Strickland*, 466 U.S. at 689-90.

[44] *See id.* at 688-90. *But see* Bobby v. Van Hook, 130 S. Ct. 13, 17 & n.1 (2009) (reiterating importance of "prevailing norms of practice and standard practice," but clarifying that ABA guidelines are " 'only guides to what reasonableness means, not its definition," and "must not be so detailed [as to] 'interfere with the . . . independence of counsel.' " (citations omitted)). Although the *Strickland* test relies on an objective reasonableness standard, the test itself is subjective, looking to defense counsel's particular conduct in the underlying case. *See* Wiggins v. Smith, 539 U.S. 510, 521 (2003); *Strickland*, 466 U.S. at 690; *see also* Chiang, *supra* note 6, at 469 (explaining that *Strickland* asks whether attorney's individual conduct was objectively reasonable).

[45] *See Strickland*, 466 U.S. at 690-91 (describing counsel's strategic choices after analysis of law and investigation of fact as essentially unchallengeable); Platt v. State, 664 N.E.2d 357, 362-63 (Ind. Ct. App. 1996) (explaining that deficient conduct must prejudice defense and deprive defendant of fair trial); Chiang, *supra* note 6, at 467; *supra* note 42.

[46] *See* Murray v. Giarratano, 492 U.S. 1, 7-8 (1989); Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987).

[47] *See* United States v. Cronic, 466 U.S. 648, 658-60 (1984).

[48] *See Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658-60.

[49] *See Cronic*, 466 U.S. at 659, 666-67.

[50] *See Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 659 & n.25.

recognized that a Sixth Amendment claim for deprival of the right to counsel can exist outside of *Strickland*'s framework.

B. The Right to a Remedy

Ubi jus, ibi remedium.[51] Where there is a right, there is a remedy.[52] This long-standing common law principle, rooted in the Magna Carta,[53] dictates that every legal injury must have a coordinate legal remedy.[54] As a result, courts have a basic duty to remedy violations of individuals' constitutional rights.[55] The Supreme Court consistently

[51] 3 WILLIAM BLACKSTONE, COMMENTARIES *51, *123; *see also* Tex. & P.R. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916); United States v. Loughrey, 172 U.S. 206, 232 (1898) (White, J., dissenting); Tracy A. Thomas, Ubi Jus, Ibi Remedium*: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636 (2004).

[52] *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (recognizing Court's protection of traditional common law rights as within scope of substantive due process); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 & n.12 (1986); Kendall v. United States, 37 U.S. (12 Pet.) 524, 624 (1838) (describing right without remedy as monstrous absurdity); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (providing remedy to enforce every right is essential to legal system); 1 BLACKSTONE, *supra* note 51, at *23 (same); Thomas, *supra* note 51, at 1636-40; Donald H. Zeigler, *Rights, Rights Of Action, And Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71-105 (2001) (tracing development of rights and remedies from early English cases to its evolution in 1970s); *cf.* Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (explaining that courts will not easily revisit long-standing two hundred year old practices); Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010) (regarding its precedent as obligating it to remedy violations of constitutional rights).

[53] *See* Magna Carta, 1297, 25 Edw., c. 29 (Eng.); Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 593 & n.91 (2009); James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1, 24-25 (2006); William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 359-60 (1997).

[54] *See Bowen*, 476 U.S. at 681 & n.12; *Kendall*, 37 U.S. (12 Pet.) at 624; *Marbury*, 5 U.S. (1 Cranch) at 163; 1 BLACKSTONE, *supra* note 51, at *23; Thomas, *supra* note 51, at 1636-40; Zeigler, *supra* note 52, at 71-105; *see also* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310-11 (2003) (finding that 40 state constitutions embody right to remedy).

[55] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (observing that writ of habeas corpus, which protects individuals' freedoms from legislative or executive intrusion, preceded adoption of Bill of Rights); Hamdi v. Rumsfeld, 542 U.S. 507, 536-37 (2004) (finding that regardless of Executive branch's disapproval of detainee's challenge to detention, nothing abrogates detainee's ability to bring such challenge before court); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (concluding, despite absence of like statutory authorization, that Court's inherent powers include considering constitutional torts that federal actors commit); Miranda

endorses this philosophy, holding that one of the judicial branch's primary constitutional functions is to safeguard individuals' constitutional rights against legislative or executive encroachment.[56] One way courts carry out this function is through judicial review, which the Court first recognized in *Marbury v. Madison*.[57] In doing so, it held that the Court possessed supreme authority in constitutional interpretation and, thus, could invalidate unconstitutional acts by other branches.[58]

Deprivation of some constitutional rights impedes a victim's ability to challenge the deprivation itself.[59] For that reason, alleged deprivations of those rights warrant more exacting scrutiny.[60] The Sixth Amendment right to counsel is one such right because depriving individuals of their right to counsel makes it more difficult for them to complain of the deprivation.[61] The Court has repeatedly noted an affirmative and especially strong duty to protect individuals from state encroachment of their Sixth Amendment right to counsel.[62]

Prospective relief is a specific type of remedy that may be available for Sixth Amendment deprivations, particularly systemic preconviction

v. Arizona, 384 U.S. 436 (1966) (promulgating requirement that government actors advise suspect of rights prior to questioning out of concern that executive branch may otherwise violate suspect's constitutional rights); *see also Hurrell-Harring*, 930 N.E.2d at 227.

[56] *See, e.g.*, *Boumediene*, 553 U.S. 723 (same); *Hamdi*, 542 U.S. at 536-37 (same); *Bivens*, 403 U.S. 388 (same); *Miranda*, 384 U.S. 436 (same).

[57] *See* INS v. Chadha, 462 U.S. 919, 941 (1983); Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980); *Marbury*, 5 U.S. (1 Cranch) at 177-78.

[58] *See Marbury*, 5 U.S. (1 Cranch) at 177-78, 180.

[59] *See* United States v. Cronic, 466 U.S. 648, 658-59 (1984); Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932); *see also* Strickland v. Washington, 466 U.S. 668, 690 (1984).

[60] *See Strickland*, 466 U.S. at 690; *Cronic*, 466 U.S. at 658-59 (presuming trial is unfair if accused denied counsel at critical stage of trial); *Gideon*, 372 U.S. at 342-43 (recognizing right to aid of counsel is fundamental right); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done."); *Powell*, 287 U.S. at 68-69 (right to aid of counsel is of a fundamental character and included in conception of due process of law).

[61] *See Gideon*, 372 U.S. at 344-45; *Johnson*, 304 U.S. at 465-68; *see also Powell*, 287 U.S. at 68-69.

[62] *See* Mickens v. Taylor, 535 U.S. 162, 185 (2002); *Cronic*, 466 U.S. at 653-54; Von Moltke v. Gillies, 332 U.S. 708, 721-26 (1948); Avery v. Alabama, 308 U.S. 444, 447 (1940) (noting that, in claims for state denial of right to counsel, right to counsel's peculiar sacredness obliges courts to review record scrupulously); *see also* Norris v. Alabama, 294 U.S. 587, 590 (1935).

claims.[63] Prospective relief includes forms of equitable relief that affect future conduct.[64] However, courts are more reluctant to provide equitable relief than other remedies;[65] courts have long held that equitable relief is available only when a serious risk of irreparable harm exists and remedies at law are inadequate.[66] Nevertheless, courts have provided prospective relief as a systemic remedy where no alternative systemic remedy exists.[67] One example is *Gideon* itself, where the Court required states to provide indigent defendants with counsel at the states' expense.[68] The Court reasoned that assistance of counsel is integral to the legitimacy and fairness of criminal proceedings, and thus must be guaranteed for all indigent defendants.[69]

Two other examples of courts providing prospective relief as a systemic remedy are *Monell v. New York City Department of Social Services* and *Plata v. Schwarzenegger*.[70] In *Monell*, the Court permitted

[63] *See* Lewis v. Casey, 518 U.S. 343, 350-51 (1996) (explaining when courts provide relief to individual or class claimants); *see also* Duncan v. State, 774 N.W.2d 89, 157 (Mich. Ct. App. 2009) (Whitbeck, J., dissenting) (detailing standard for injunctive relief and finding that claim did not meet injunctive relief standard). *See generally* Pulliam v. Allen, 466 U.S. 522, 533-36 (1984) (reviewing history of prospective relief and tracing it to King's Bench and prerogative writs).

[64] *See* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2982 n.6 (2010); Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002); United States v. Mitchell, 463 U.S. 206, 227 (1983); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982); *Ex parte* Young, 209 U.S. 123, 162 (1908), *superseded on other grounds by statute*, Administrative Procedure Act of 1982, 5 U.S.C. § 702, *as recognized in* Presbyterian Church v. United States, 870 F.2d 518, 524 n.7 (9th Cir. 1989).

[65] *See Lewis*, 518 U.S. at 350-51; *Weinberger*, 456 U.S. at 311-12; O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Younger v. Harris, 401 U.S. 37, 43-44 (1971); *see also* Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996). Some forms of equitable relief are injunctions, mandamus, and declaratory judgments.

[66] *See Lewis*, 518 U.S. at 350; *O'Shea*, 414 U.S. at 499; *Younger*, 401 U.S. at 43-44; *see also Platt*, 664 N.E.2d at 363.

[67] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 338 (1963) (providing systemic prospective remedy to rectify state's systemic denial of Sixth Amendment right to counsel); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694-95 (1978) (recognizing municipal liability for constitutional torts resulting from municipalities' policies or customs); Plata v. Schwarzenegger, No. C01-1351 THE, 2005 U.S. Dist. LEXIS 43796, at *4-7 (N.D. Cal. Oct. 3, 2005) (appointing receiver to California Department of Corrections' medical unit in response to Eighth Amendment violations), *aff'd in part*, 603 F.3d 1088 (9th Cir. 2010); *see also* L.A. Cnty. v. Humphries, 131 S. Ct. 447, 451-52 (2010) (holding that *Monell* also permits prospective relief).

[68] *See Gideon*, 372 U.S. at 338; *supra* text accompanying notes 14-20.

[69] *See Gideon*, 372 U.S. at 340.

[70] *See Monell*, 436 U.S. at 694-95; *Plata*, 2005 U.S. Dist. LEXIS 43796, at *4-7; *see also Humphries*, 131 S. Ct. at 451-52.

suit against New York City for prospective relief from employment discrimination because the municipality's policies infringed individuals' constitutional rights.[71] In *Plata*, the Ninth Circuit affirmed a district court's finding of constitutional deficiency in California's prison healthcare system and its subsequent appointment of a receiver.[72] These two modern examples exemplify the availability of systemic prospective relief — a controversial remedy available only in extraordinary circumstances.

C. Justiciability

Justiciability requires the presence of an actual case or controversy.[73] A case must be justiciable in order for a court to hear it and provide a remedy.[74] In determining justiciability, courts evaluate four relevant considerations: standing, ripeness, separation of powers, and collateral adjudication.[75] The first two are easily determined, though if either is lacking the case is nonjusticiable.[76] Standing, for example, exists when the plaintiff has personally suffered an injury that gives rise to a valid claim.[77] A case is ripe for review when the injury has already occurred or is certainly impending.[78]

A claim is also nonjusticiable if the plaintiff seeks a remedy that would exceed the court's authority or encroach on the authority of another branch of government; thus, courts also consider separation of powers when determining justiciability.[79] The doctrine of justiciability

---

[71] *See Monell*, 436 U.S. at 694-95; *see also Humphries*, 131 S. Ct. at 451-52.

[72] *See* Plata v. Schwarzenegger, 603 F.3d 1088, 1096-98, 1099 (9th Cir. 2010), *aff'g* 2005 U.S. Dist. LEXIS 43796; *Plata*, 2005 U.S. Dist. LEXIS 43796, at *4-7.

[73] *See* sources cited *supra* note 74.

[74] *See* Babbitt v. UFW Nat'l Union, 442 U.S. 289, 298-99 (1979); Muskrat v. United States, 219 U.S. 346, 356 (1911).

[75] *See* Travelers Indem. Co. v. Bailey, 129 S. Ct. 2195, 2204 (2009) (collateral attacks); Nixon v. United States, 506 U.S. 224, 228-29 (1993) (separation of powers); Renne v. Geary, 501 U.S. 312, 321 (1991) (standing and ripeness); Baker v. Carr, 369 U.S. 186, 215 & n.43 (1962).

[76] *See Renne*, 501 U.S. at 321, 323; Allen v. Wright, 468 U.S. 737, 751 (1984); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471-72 (1981); Longshoremen v. Boyd, 347 U.S. 222, 224 (1954); *see also Babbitt*, 442 U.S. at 297-99, 306.

[77] *See Renne*, 501 U.S. at 321; *Allen*, 468 U.S. at 751; *Valley Forge Christian Coll.*, 454 U.S. at 471-72.

[78] *See Renne*, 501 U.S. at 323; *Babbitt*, 442 U.S. at 297-99, 306; *Longshoremen*, 347 U.S. at 224.

[79] *See Nixon*, 506 U.S. at 228-29; Powell v. McCormack, 395 U.S. 486, 513 & n.35, 517 (1969); *Baker*, 369 U.S. at 210-11.

generally prohibits courts in equity from engaging in traditionally legislative functions, like creating laws and allocating state money.[80] Conversely, the judicial branch is the final authority on constitutional interpretation.[81]

Civil claims are also generally nonjusticiable if their adjudication would interfere with a collateral pending criminal case.[82] Courts generally deem claims that risk collateral adjudication nonjusticiable for two reasons.[83] First, different courts reaching different conclusions on the same case or controversy would undermine the legitimacy of the legal system.[84] Second, a verdict in one proceeding may imply standing to challenge a verdict in a collateral proceeding.[85] Such inconsistency impedes judicial economy and denies verdicts appropriate deference.[86] However, where judicial review and enforcement of constitutional protections are at issue, the Court often permits collateral adjudication.[87] Writs of habeas corpus, actions under 42 U.S.C. § 1983, and other similar litigation against federal actors are all examples of such collateral adjudication.[88]

[80] *See Nixon*, 506 U.S. at 228-29; *Powell*, 395 U.S. at 513 & n.35, 517; *Baker*, 369 U.S. at 210-11; s*ee also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[81] *See Baker*, 369 U.S. at 211; Cooper v. Aaron, 358 U.S. 1, 18 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

[82] *See* Brecht v. Abrahamson, 507 U.S. 619, 634 (1993); Younger v. Harris, 401 U.S. 37, 43-45 (1971); *Ex parte* Young, 209 U.S. 123, 162 (1908), *superseded on other grounds by statute*, Administrative Procedure Act of 1982, 5 U.S.C. § 702, *as recognized in* Presbyterian Church v. United States, 870 F.2d 518, 524 n.7 (9th Cir. 1989).

[83] *See* sources cited *supra* note 82.

[84] *See* sources cited *supra* note 82.

[85] *See* sources cited *supra* note 82.

[86] *See* sources cited *supra* note 82.

[87] *See, e.g.*, Haywood v. Drown, 129 S. Ct. 2108 (2009) (holding that state courts may, and in most cases must, entertain 42 U.S.C. § 1983 claims); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (applying 42 U.S.C. § 1983 in collateral review of state proceeding and setting basis for most future § 1983 claims); Miranda v. Arizona, 384 U.S. 436 (1966) (reversing criminal conviction of three defendants in state criminal cases on basis of Fifth Amendment deprivations).

[88] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (writ of habeas corpus); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (*Bivens* actions); *Tinker*, 393 U.S. 503 (42 U.S.C. § 1983 litigation).

II. JUSTICIABILITY AND PROSPECTIVE RELIEF FOR PRECONVICTION SIXTH AMENDMENT CLAIMS: A SPLIT BETWEEN THE HIGH COURTS OF NEW YORK AND MICHIGAN

Both *Hurrell-Harring*, a New York case, and *Duncan*, a Michigan case, involve preconviction civil litigation seeking structural reform of public defense through prospective relief.[89] In *Hurrell-Harring*, the New York Court of Appeals found the plaintiffs' claims justiciable and allowed the case to go forward.[90] Conversely — despite similar claims and facts — the Michigan Supreme Court in *Duncan* initially held that the nature of the claims and the relief the plaintiffs sought rendered the claims nonjusticiable.[91] The New York and Michigan courts disagreed upon whether preconviction Sixth Amendment challenges are justiciable at all and, if so, whether prospective relief was available.[92]

A. Hurrell-Harring v. State*: Denial of the Right to Counsel Under* Gideon v. Wainwright

In *Hurrell-Harring*, twenty indigent defendants in concurrently pending criminal cases across New York sued the State for denying their Sixth Amendment right to counsel.[93] They alleged that lack of funding, oversight, and written practice standards for public defenders created a severe risk of ineffective assistance of counsel.[94] They sought class certification for all indigent defendants with pending criminal cases in the state and requested declaratory and injunctive relief.[95] Finding the claims justiciable, the New York Court of Appeals reversed the lower court's summary judgment dismissal and remanded the case for further proceedings.[96]

The New York Court of Appeals acknowledged that preconviction civil claims are necessarily unripe under the conventional *Strickland*

---

[89] *See* Duncan v. State, 774 N.W.2d 89, 97 (Mich. Ct. App. 2009); Hurrell-Harring v. State, 930 N.E.2d 217, 219 (N.Y. 2010).

[90] *See Hurrell-Harring*, 930 N.E.2d at 228.

[91] *See* Duncan v. State, 784 N.W.2d 51, 51 (Mich.) (citing *Duncan*, 774 N.W.2d at 151-70 (Whitbeck, J., dissenting)), *vacated on reconsideration*, 790 N.W.2d 695 (Mich. 2010) (mem.); s*ee also supra* note 8.

[92] *See id.*; *Hurrell-Harring*, 930 N.E.2d 217.

[93] *See Hurrell-Harring*, 930 N.E.2d at 219.

[94] *See* Complaint at 57-98, Hurrell-Harring v. State, 866 N.Y.S.2d 92 (Sup. Ct. 2008) (No. 8866-07), 2008 WL 7801315.

[95] *See id.* at 99-100, 102.

[96] *See Hurrell-Harring*, 930 N.E.2d at 227-28.

IAC framework.[97] However, the court found that framework inappropriate for such claims.[98] The court reasoned that the plaintiffs' claims were not alleging IAC under *Strickland*, but rather constructive denial of the right to counsel altogether.[99] The court also held that the plaintiffs' factual allegations were sufficient to make out a preliminary claim for constructive denial of the right to counsel.[100] These critical determinations permitted the court to find the case justiciable.[101]

In finding the case justiciable, the court considered three factors that the State had argued rendered it nonjusticiable.[102] First, the State argued that preconviction claims are necessarily unripe because no cognizable IAC claim can occur preconviction or in civil court.[103] Second, the State claimed that the plaintiffs' pending criminal cases presented a problem of collateral adjudication.[104] Third, the State contended that the systemic relief the plaintiffs sought required the court to involve itself in traditionally legislative functions.[105]

The court first found that the claims' preconviction nature had no bearing on their ripeness.[106] Because constructive denial results in a presumption of prejudice under *Cronic*, a plaintiff could make out a valid Sixth Amendment claim preconviction.[107] The presumption of prejudice meant that the lack of a final judgment in the plaintiffs' criminal cases was inconsequential to ripeness in their civil claims.[108] Their claims ripened contemporaneously as the State deprived them of their right to counsel.[109]

Second, the New York Court of Appeals held that the generalized nature of the *Gideon* claims defeated concerns of collateral

[97] *See id.* at 220-22.

[98] *See id.* at 221-22.

[99] *See id.* at 221-22, 224.

[100] *See id.* at 221-22.

[101] *See id.* at 225-28.

[102] *See id.* at 220.

[103] *See id.* at 220-21; Memorandum of Law in Support of Defendant's Motion to Dismiss at 18-23, Hurrell-Harring v. State, 866 N.Y.S.2d 92 (Sup. Ct. 2008) (No. 8866-07), 2008 WL 7801294 [hereinafter Memorandum of Law].

[104] *See Hurrell-Harring*, 930 N.E.2d at 226; Memorandum of Law, *supra* note 103, at 1-2, 8-15.

[105] *See Hurrell-Harring*, 930 N.E.2d at 220; Memorandum of Law, *supra* note 103, at 6-7.

[106] *See Hurrell-Harring*, 930 N.E.2d at 225-26.

[107] *See id.* at 221, 225-27.

[108] *See id.* at 225-27; *see also* Strickland v. Washington, 466 U.S. 668, 692 (1984); United States v. Cronic, 466 U.S. 648, 659 & n.25 (1984).

[109] *See* sources cited *supra* note 108.

adjudication.[110] The court reasoned that their resolution could not jeopardize the legitimacy of concurrent individual criminal cases.[111] Because finding for the plaintiffs' civil claim did not necessitate prejudice, it could not affect subsequent criminal appeals.[112] Thus the court found that concerns of collateral adjudication presented no justiciability bar to filing the claim as a preconviction civil action.[113]

Third, the court conceded that the doctrine of separation of powers limited its authority to force the hand of the legislature.[114] If the plaintiffs prevailed, remedial measures could foreseeably affect the State's appropriation of funds and shift legislative priorities.[115] However, the court explained that it also had a stronger countervailing duty in the instant case to enforce clear constitutional mandates.[116] The court's duty to protect *Gideon*'s guarantee outweighed other considerations counseling against justiciability, the *Hurrell-Harring* court reasoned.[117] The court concluded that preconviction public defense reform suits were not subject to the *Strickland* standard.[118] Moreover, it concluded that these claims were not categorically nonjusticiable.[119]

B. Duncan v. State*: The Ineffective Assistance of Counsel Approach in* Strickland v. Washington

Like *Hurrell-Harring*, *Duncan v. State* involved a preconviction class action challenge to indigent defense in Michigan alleging denial of counsel and seeking prospective relief.[120] Unlike *Hurrell-Harring*, however, the *Duncan* court initially treated the action as an IAC claim and applied *Strickland*'s cause and prejudice standard.[121] The Michigan

---

[110] *See Hurrell-Harring*, 930 N.E.2d at 226.

[111] *See id.*

[112] *See id.*

[113] *See id.*

[114] *See id.* at 220, 227.

[115] *See id.*

[116] *See id.*

[117] *See id.*

[118] *See id.* at 221, 224-25.

[119] *See id.* at 220-27.

[120] *See* Duncan v. State, 774 N.W.2d 89, 97 (Mich. Ct. App. 2009).

[121] *See id.* at 151-66 (Whitbeck, J., dissenting), *adopted by* 784 N.W.2d 51 (Mich.) (mem.), *and vacated on reconsideration*, 790 N.W.2d 695 (Mich. 2010) (mem.); *see also supra* note 8.

Supreme Court found the claims nonjusticiable, interpreting *Strickland*'s prejudice prong as fatal to preconviction claims.[122]

In *Duncan*, the indigent-defendant plaintiff class alleged that, through underfunding, the State of Michigan and its Governor systematically denied the plaintiffs their Sixth Amendment rights.[123] The plaintiff class sought prospective relief through systemic reform and increased funding of indigent defense.[124] The trial court agreed with the plaintiffs, denying the defendants' motion for summary judgment and granting class certification.[125] The Michigan Court of Appeals affirmed, permitting the case to continue.[126] On appeal, the Michigan Supreme Court affirmed the denial of summary judgment (though reversing and vacating class certification).[127] Less than three months later, the Michigan Supreme Court reconsidered and reversed its decision, granting summary judgment for the State and the Governor.[128] Another four months later the court *again* reversed itself, ultimately permitting the claims to procede.[129]

In its analysis, the Michigan Supreme Court interpreted *Strickland* as defeating preconviction claims categorically.[130] Unlike *Hurrell-Harring*, *Duncan* did not differentiate between an IAC claim and a claim for denial of *Gideon*'s guarantee altogether.[131] Instead, it equated a *Gideon* deprivation with an IAC claim and applied the *Strickland* standard, even though it recognized that by doing so it was effectively

---

[122] *See* Duncan v. State, 784 N.W.2d 51, 51 (Mich.) (citing *Duncan*, 774 N.W.2d at 151-70), *vacated on reconsideration*, 790 N.W.2d 695 (Mich. 2010) (mem.).

[123] *See Duncan*, 774 N.W.2d at 97 (majority opinion).

[124] *See id.*

[125] *See* Duncan v. State, LC No. 07-000242-CZ (Mich. Cir. Ct.) (denying defendants' motion for summary judgment and affirming plaintiffs' motion for class certification), *aff'd*, 774 N.W.2d 89 (Mich. Ct. App. 2009).

[126] *See Duncan*, 774 N.W.2d at 97.

[127] *See* Duncan v. State, 780 N.W.2d 843, 844 (Mich. 2010) (mem.).

[128] *See* Duncan v. State, 784 N.W.2d 51, 51 (Mich.) (mem.), *vacating on reconsideration* 780 N.W.2d 843 (Mich. 2010) (mem.) *rev'g and adopting dissent in* 774 N.W.2d 89 (Mich. Ct. App. 2009), *vacated on reconsideration*, 790 N.W.2d 695 (Mich. 2010) (mem.). Unlike its initial decision, the court was sharply divided on reconsideration; failing to agree to an opinion of its own, it cited the dissent below instead. *See id.*; *see also id.* at 51-52 (Markman, J., concurring); *id.* at 53-55 (Kelly, C.J., dissenting).

[129] *See* Duncan v. State, 790 N.W.2d 695, 695 (Mich. 2010) (mem.), *vacating on reconsideration* 784 N.W.2d 51 (Mich. 2010) (mem.) *and reinstating* 780 N.W.2d 843 (Mich. 2010) (mem.); *see also supra* note 8.

[130] *See Duncan*, 784 N.W.2d at 51 (citing *Duncan*, 774 N.W.2d at 151-70 (Whitbeck, J., dissenting)); *Duncan*, 774 N.W.2d at 151-66 (Whitbeck, J., dissenting).

[131] *See Duncan*, 774 N.W.2d at 145-47.

proscribing any preconviction claim.[132] The inevitable result was that, unlike the *Hurrell-Harring* court, the *Duncan* court found *Strickland* rendered the plaintiffs' claims nonjusticiable and granted summary judgment against the plaintiffs.[133]

III. ANALYSIS

The *Duncan* decision is incorrect; preconviction Sixth Amendment litigation seeking systemic indigent defense reform does not present an IAC claim under *Strickland*.[134] Rather, the question is whether the state has satisfied its obligation under *Gideon* at all, as the court recognized in *Hurrell-Harring*.[135] This is true for three reasons: First, constitutional deprivations of *Gideon*'s guarantee accrue preconviction, whereas under *Strickland*, IAC accrues only postconviction.[136] Second, *Gideon* deprivations reflect a systemic failure, whereas IAC reflects an individual case-specific failure.[137] Third, although *Strickland* proscribes prospective relief, ongoing constitutional injuries like *Gideon* deprivations compel prospective relief.[138]

A. Constitutional Deprivations of Gideon*'s Guarantee Accrue Preconviction While Ineffective Assistance of Counsel Claims Can Only Accrue Postconviction*

Hurrell-Harring correctly analyzed the systemic claim under *Gideon* rather than *Strickland* because IAC claims never accrue preconviction.[139] A state's duty under *Gideon* to provide counsel to indigent defendants facing criminal charges attaches at the defendant's first formal appearance.[140] Thus, when an indigent defendant appears

[132] *See id.* at 124-25 (majority opinion).

[133] *See Duncan*, 784 N.W.2d at 51. *Compare Duncan*, 774 N.W.2d at 147 (Whitbeck, J., dissenting) (claiming preconviction Sixth Amendment deprivation claims are nonjusticiable), *with* Hurrell-Harring v. State, 930 N.E.2d 217, 225-26 (N.Y. 2010) (finding preconviction Sixth Amendment deprivation claims justiciable).

[134] *See Duncan*, 774 N.W.2d at 151-70; infra Part III.A-C.

[135] *See Hurrell-Harring*, 930 N.E.2d at 221-22, 224-25; *see also infra* Part III.A-C.

[136] *See infra* Part III.A.

[137] *See infra* Part III.C.

[138] *See infra* Part III.C.

[139] *See* Strickland v. Washington, 466 U.S. 668, 693-95 (1984) (explaining that prejudice requirement for IAC claims requires defendant to affirmatively prove prejudice, which would be impossible before final verdict); Hamilton v. Alabama, 368 U.S. 52, 55 (1961); *Hurrell-Harring*, 930 N.E.2d at 220-21; LexisNexis Shepard's Analysis, *supra* note 35; *supra* Part I.A; *see also Duncan*, 774 N.W.2d at 159-60.

[140] *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 203 (2008). Notably, the

in criminal court without counsel, the state has failed to comply with *Gideon*'s essential requirement.[141]

Because those unrepresented appearances occur preconviction, the *Gideon* deprivation also accrues preconviction.[142] For example, in *Rothgery v. Gillespie County*, a Texas magistrate denied the defendant's written and oral requests for counsel, resulting in his unjust incarceration for three weeks.[143] Although the district attorney never pursued the charges through to conviction, the Court nevertheless permitted the defendant to allege wrongful deprivation of his right to counsel.[144] In *Maine v. Moulton*, the Court dealt with another preconviction Sixth Amendment deprivation.[145] There, the Court ruled that the State's preconviction use of one codefendant to elicit inculpatory statements from another violated the confessor's right to counsel.[146] The Supreme Court's frequent emphasis of the importance of providing counsel at preconviction hearings, including trial, underscores this principle.[147] *Strickland* itself supports this notion in that it presumes that a state has fulfilled its *Gideon* obligations.[148]

However, IAC claims under *Strickland* can never accrue preconviction.[149] *Strickland* concerned a convict's motion to reverse his conviction on the grounds of defective assistance of counsel;[150] it did not address a preconviction Sixth Amendment claim.[151] Not once

Supreme Court has also held that indigent defendants' right to appointed counsel does *not* extend to indigent defendants in postconviction proceedings. *See* Lawrence v. Florida, 549 U.S. 327, 337 (2007); Coleman v. Thompson, 501 U.S. 722, 752, 756-57 (1991); Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987).

[141] *See Rothgery*, 554 U.S. at 194; *supra* Part I.A.

[142] *See* sources cited *supra* note 141.

[143] *See Rothgery*, 554 U.S. at 195-97; *supra* Part I.A.

[144] *See Rothgery*, at 196-97, 213 (by considering preconviction case at all, court implicitly recognized valid § 1983 claim *could* accrue preconviction); *supra* Part I.A.

[145] *See* Maine v. Moulton, 474 U.S. 159, 161 (1985); *supra* Part I.A.

[146] *See Moulton*, 474 U.S. at 168; *supra* Part I.A.

[147] *See, e.g.*, *Rothgery*, 554 U.S. at 194 (citing several cases supporting this proposition).

[148] *See* Strickland v. Washington, 466 U.S. 668, 682, 685-86 (1984); Hurrell-Harring v. State, 930 N.E.2d 217, 221-22 (N.Y. 2010).

[149] *See Strickland*, 466 U.S. at 693-95; Hamilton v. Alabama, 368 U.S. 52, 55 (1961); *see also Hurrell-Harring*, 930 N.E.2d at 220-21 (suggesting that *Strickland* does not bar instant litigation because not claim for IAC but rather denial of right to counsel); Duncan v. State, 774 N.W.2d 89, 159-60 (Mich. Ct. App. 2009) (Whitbeck, J., dissenting).

[150] *See Strickland*, 466 U.S. at 687; *supra* Part I.A.

[151] *See Strickland*, 466 U.S. 668 *passim* (addressing postconviction criminal appeal only and addressing preconviction appeals nowhere in opinion).

in the nearly 150 Supreme Court opinions citing *Strickland* has the Court ever applied *Strickland* to a preconviction case.[152] Likewise, no U.S. Court of Appeals has applied *Strickland* preconviction.[153]

Indeed, the very nature of *Strickland*'s cause and prejudice requirements categorically excludes preconviction IAC claims.[154] *Strickland*'s prejudice prong requires defendants to show that a different outcome would have been reasonably probable but for defense counsel's deficient conduct.[155] Plainly, a defendant can only make such a showing after the decision in his case — postconviction.[156] *Cronic* also alludes to this premise by distinguishing IAC, which it analyzes under the *Strickland* standard, from denial of counsel altogether.[157]

Although IAC claims under *Strickland* only accrue postconviction, that is not true of all right to counsel claims.[158] Justice Black did not condition *Gideon*'s guarantee on a defendant's guilt.[159] *Gideon* deprivations can and do accrue preconviction because the right attaches with the commencement of a formal criminal proceeding.[160] Therefore, *Strickland* cannot apply and these claims necessarily cannot be for IAC; rather, they allege deprivation of *Gideon*'s guarantee altogether.[161]

Critics might claim that preconviction litigation of Sixth Amendment claims is not justiciable because it aberrates from

---

[152] *See* LexisNexis Shepard's Analysis, *supra* note 35 (revealing 148 U.S. Supreme Court decisions and over 10,000 Courts of Appeals decisions citing *Strickland*, none of which occurred preconviction).

[153] *See id.*

[154] *See Darden*, 477 U.S. at 184; *Strickland*, 466 U.S. at 693-95; *see also Hamilton*, 368 U.S. at 55; *Duncan*, 774 N.W.2d at 160; *Hurrell-Harring*, 930 N.E.2d at 220-21.

[155] *See Darden*, 477 U.S. at 184; *Strickland*, 466 U.S. at 693-95; *see also Hurrell-Harring*, 930 N.E.2d at 227-28.

[156] *See Hamilton*, 368 U.S. at 54-55; *see also Hurrell-Harring*, 930 N.E.2d at 227-28.

[157] *See Strickland*, 466 U.S. at 687; United States v. Cronic, 466 U.S. 648, 658-60 (1984); *supra* Part I.A.

[158] *See Darden*, 477 U.S. at 184; *Strickland*, 466 U.S. at 693-95; *Hamilton*, 368 U.S. at 55; *see also Hurrell-Harring*, 930 N.E.2d at 220-21; *Duncan*, 774 N.W.2d at 160.

[159] *See* Gideon v. Wainwright, 372 U.S. 335 *passim* (1963) (providing no requirement that court convict defendant prior to defendant asserting deprivation).

[160] *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 201-03 (2008) (citing Coleman v. Alabama, 399 U.S. 1, 8 (1970)); *supra* Part I.A.

[161] *See Rothgery*, 554 U.S. at 201-03; *Darden*, 477 U.S. at 184; *Strickland*, 466 U.S. at 693-95 (stating that deficiencies in representation alone are insufficient for reversal on IAC grounds absent prejudicial effect on defense); *Hamilton*, 368 U.S. at 55; *see also Duncan*, 774 N.W.2d at 97 (majority opinion); *id.* at 160 (Whitbeck, J., dissenting); *Hurrell-Harring*, 930 N.E.2d at 220-21; *supra* Part I.A.

common-law principles counseling against collateral adjudication.[162] These critics would argue that litigating a civil case concurrently with its underlying criminal case risks upsetting the judgment in that criminal case.[163] Courts are concerned with collateral adjudication because simultaneous conflicting judgments implicate comity and finality — essential components of a reliable and just judicial system.[164]

However, as the *Hurrell-Harring* court correctly observed, preconviction civil litigation of generalized Sixth Amendment deprivations does not automatically implicate plaintiffs' individual underlying criminal cases.[165] Additionally, even if preconviction civil litigation did implicate underlying state criminal cases, it would not categorically bar the civil claims.[166] In fact, federal courts routinely engage in collateral review of issues concerning federal constitutional rights despite state courts' prior and concomitant consideration of the same issue.[167] The Supreme Court has even recognized state courts' ability to engage in collateral review of its own cases to remedy certain federal constitutional deprivations.[168] Thus, the possibility of collateral

[162] *See Strickland*, 466 U.S. at 690; Lemos, *supra* note 20, at 1818-19, 1822-23, 1825-29 (discussing impact of finality and comity on review and federal review of state criminal cases); Note, *supra* note 20, at 2068, 2071, 2077-78 (same); *see also* Complaint, *supra* note 94, at 61, 88-90, 95-98.

[163] *See supra* Part I.C.

[164] *See* Brecht v. Abrahamson, 507 U.S. 619, 634 (1993); Younger v. Harris, 401 U.S. 37, 45 (1971); *Ex parte* Young, 209 U.S. 123, 162 (1908), *superseded on other grounds by statute*, Administrative Procedure Act of 1982, 5 U.S.C. § 702, *as recognized in* Presbyterian Church v. United States, 870 F.2d 518, 524 n.7 (9th Cir. 1989).

[165] *See Younger*, 401 U.S. at 45; *Ex parte Young*, 209 U.S. at 162; *supra* notes 110-13 and accompanying text.

[166] *See, e.g.*, Haywood v. Drown, 129 S. Ct. 2108 (2009) (holding that states generally must entertain claims brought under 42 U.S.C. § 1983 even if they implicate other state court proceedings); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (applying 42 U.S.C. § 1983 in collateral review of state proceeding and setting basis for most future § 1983 claims); Miranda v. Arizona, 384 U.S. 436 (1966) (reversing criminal conviction of three defendants in state criminal cases on basis of Fifth Amendment deprivations).

[167] *See, e.g.*, *Brecht*, 507 U.S. at 633-35 (discussing collateral review through habeas proceeding in context of comity, finality, and federalism); *Tinker*, 393 U.S. 503 (reviewing collateral state proceeding under § 1983); *Miranda*, 384 U.S. 436 (reversing collateral state criminal conviction); *Ex parte Young*, 209 U.S. at 143, 156-57 (holding that Court must take jurisdiction when it can and that federal courts may enjoin state officers from enforcing unconstitutional acts).

[168] *See, e.g.*, *Haywood*, 129 S. Ct. 2108 (holding that state courts may, and in most cases must, entertain 42 U.S.C. § 1983 claims).

review does not bar preconviction litigation because courts routinely engage in collateral review where constitutional rights are at issue.[169]

B. Although Gideon *Deprivations Often Evince Systemic Problems,* Strickland *Categorically Prevents Systemic IAC Claims*

Gideon deprivations often evince broad underlying problems in indigent defense systems.[170] In particular, insufficient state funding leads public defender offices to overwork their staff, lowering the quality of representation.[171] In many cases, the disparity between funding of public defense and prosecution is stark.[172] Facing tight budgets and an incentive to appear aggressive on crime, politically savvy lawmakers almost invariably cut public defenders' budgets before district attorneys'.[173] Stark financial disparities jeopardize *Gideon*'s guarantee for entire counties or states.

Structural problems with indigent defense systems commonly implicate individuals' right to counsel as well.[174] For example, many

---

[169] *See, e.g.*, *Tinker*, 393 U.S. 503 (illustrating Court's application of collateral review); *Miranda*, 384 U.S. 436 (same).

[170] *See, e.g.*, Lemos, *supra* note 20, at 1809-10 (documenting overwhelming caseloads and grossly inadequate funding at public defenders across nation despite constitutional mandate of effective assistance of counsel); Note, *supra* note 20, at 2063-66 (exposing perpetual crisis of indigent defense and advocating for reform through litigation); *see also, e.g.*, Complaint, *supra* note 94, at 61, 88-90, 95-98 (discussing impact of inadequate funding, inadequate salaries, inadequate support services, and excessive workloads on quality of representation in New York State).

[171] *See* Dripps, *supra* note 2, at 247-48, 263, 305 (discussing impacts of low funding on indigent defense services); Pruitt & Colgan, *supra* note 2, at 241-300 (studying differences in quality of indigent defense systems across Arizona based on population density); Lemos, *supra* note 20, at 1809-10; Note, *supra* note 20, at 2063-66; *see also* Complaint, *supra* note 94, at 61, 88-90, 95-98.

[172] *See, e.g.*, Dripps, *supra* note 2, 290-97 (arguing for IAC determination based on whether state has institutionally equipped defense to litigate as well as prosecution); Pruitt & Colgan, *supra* note 2, at 300-03 (identifying disparity between defense and prosecution).

[173] *See* Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 415 & n.46 (2001); Dripps, *supra* note 2, 290-97; Pruitt & Colgan, *supra* note 2, at 300-03 (identifying disparity between defense and prosecution); Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEGAL ETHICS 199, 203-06 (1999).

[174] *See, e.g.*, People v. Jones, 111 Cal. Rptr. 3d 745, 763-66 (App. Ct. 2010) (considering systemic deficiencies of county indigent defense system in finding individual case of IAC); Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004) (responding to shortage of defense attorneys creating systemic crisis of constitutional proportions); Pruitt & Colgan, *supra* note 2, at 241-

small rural counties utilize low-bid contract systems to provide public defense, and studies have shown that the use of low-bid contract systems correlates with significantly less effective representation.[175] A similar structural problem was the impetus for *Hurrell-Harring* itself.[176] In New York, the State abdicates responsibility for compliance with *Gideon* to individual counties.[177] The consequence is that quality and models of indigent defense vary a great deal between different New York counties.[178] Despite resulting in multiple *Gideon* deprivations for individual criminal defendants in their respective cases, at the root are systemic problems: cronic underfunding and structural issues.[179]

Under *Strickland*, however, IAC can never be systemic.[180] *Strickland* prescribes a fact-sensitive and case-by-case analysis.[181] In *Strickland*, the Court applied its IAC test to the particular conduct of the defense counsel in an individual defendant's criminal case.[182] The subjective nature of the cause and prejudice test does not allow for systemic claims.[183] The reasonableness of defense counsel's conduct and its prejudice to the defendant's case are both fact-specific inquiries.[184] Consequently, because *Gideon* deprivations are often systemic,

300 (documenting disparity in funding, structure, and quality of indigent defense between rural and urban areas).

[175] *See, e.g.*, Pruitt & Colgan, *supra* note 2, at 241-300 (documenting disparity in funding, structure, and quality of indigent defense between rural and urban areas); Lemos, *supra* note 20 (analyzing adverse impact of low-bid contracting for county indigent services on quality of representation for indigent defendants).

[176] *See* Complaint, *supra* note 94, at 61, 85-90, 95-98 (discussing impact of inadequate funding, inadequate salaries, inadequate support services, and excessive workloads on quality of representation in New York State).

[177] *See* Complaint, *supra* note 94, at 58 (explaining structure of New York state's county-based public defense system); *cf.* Brief of Appellant at 6, Duncan v. State, 790 N.W.2d 695 (Mich. 2010) (Nos. 139345, 139346, 139347) (summarizing Michigan's 100-year history of local public defense). *But see id.* at 7 (describing pending legislation to create statewide public defender system in Michigan and noting ongoing concern of how to fund such system).

[178] *See, e.g.*, Complaint, *supra* note 94, at 58-59 (reviewing different indigent defense systems that various New York counties employ, including assigned counsel, legal aid, and public defender offices, and their respective problems).

[179] *See* Lemos, *supra* note 20, at 1809-10; Note, *supra* note 20, 2063-66; *cf.* Complaint, *supra* note 94, at 61, 88-90, 95-98 (documenting inadequate resources and structural deficiencies in New York indigent defense services).

[180] *See* Strickland v. Washington, 466 U.S. 668, 689-90 (1984).

[181] *See id.*

[182] *See id.* at 698-700.

[183] *See id.* at 690.

[184] *See id.*

Strickland necessarily cannot provide the standard of analysis for their deprivation.[185]

C. Ongoing Gideon *Deprivations Compel Prospective Relief*

As the *Gideon* Court illustrated, courts must provide prospective relief when confronting constitutional injuries that will likely recur if the court provides no remedy.[186] Equitable relief is available when there is a serious risk of irreparable harm for which no adequate remedy exists at law.[187] Because both recurrent constitutional injuries and a serious risk of irreparable harm exist when ongoing *Gideon* deprivations occur, equitable relief must be an available remedy.[188]

Courts consistently provide systemic prospective relief in response to systemic deprivations of constitutional rights.[189] *Gideon* dealt with an individual defendant in an individual criminal appeal, but the Court recognized the deficiency was systemic and required a systemic remedy.[190] In *Monell v. New York City Department of Social Services*, a second example, the Court found municipalities can incur liability when their policies or customs cause constitutional torts.[191] The Court subsequently recognized that *Monell*'s holding included prospective relief.[192] *Plata v. Schwarzenegger* presents a third example of systemic prospective relief. In *Plata*, California prison inmates brought a class action suit alleging Eighth Amendment deficiencies in prison health care.[193] Agreeing with the plaintiffs, the district court issued

[185] *See Strickland*, 466 U.S. at 690; Lemos, *supra* note 20, at 1809-10; Note, *supra* note 20, at 2063-66; *supra* text accompanying notes 179, 183; *see also* Complaint, *supra* note 94, at 61, 88-90, 95-98.

[186] *See* Gideon v. Wainwright, 372 U.S. 335, 338 (1963).

[187] *See* Lewis v. Casey, 518 U.S. 343, 350-51 (1996); *see also* Duncan v. State, 774 N.W.2d 89, 157 (Mich. Ct. App. 2009) (Whitbeck, J., dissenting); sources cited *supra* note 66.

[188] *See Strickland*, 466 U.S. at 687.

[189] *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 308-10 (1991) (recognizing that certain structural defects in trial mechanism are not subject to harmless error review but rather warrant automatic reversal); *Gideon*, 372 U.S. 335 (concluding that indigent defendants' right to counsel was illusory because of inability to pay and responding with systemic requirement that states provide indigent defendants counsel); Avery v. Alabama, 308 U.S. 444, 447 (1940) (requiring that Courts remedy constitutional deprivations, even through novel means if no other remedies are available); Tumey v. Ohio, 273 U.S. 510, 532 (1927) (explaining that every procedure that might allow judicial bias denies due process of law).

[190] *See Gideon*, 372 U.S. at 338; *supra* text accompanying notes 17-19.

[191] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694-95 (1978).

[192] *See* L.A. Cnty. v. Humphries, 131 S. Ct. 447, 451-52 (2010).

[193] *See* Plata v. Schwarzenegger, No. C01-1351 THE, 2005 U.S. Dist. LEXIS 43796,

prospective relief through appointment of a receiver to California Correctional Health Care Services, the agency responsible for California inmates' health care.[194]

These conclusions counsel courts to provide equitable relief for Sixth Amendment deprivations.[195] For prejudicial IAC claims, *Strickland* does just that, mandating reversal.[196] However, reversal of a criminal conviction is not an available remedy for ongoing *Gideon* deprivations because the constitutional injuries are ongoing; the only effective remedy is prospective relief.[197] Thus, under the doctrine of *ubi jus, ibi remedium*, prospective relief must be available for ongoing *Gideon* deprivations.[198]

The *Strickland* Court did not address application of its test to civil claims seeking prospective relief.[199] The Supreme Court has only

at *4-7 (N.D. Cal. Oct. 3, 2005), *aff'd in part*, 603 F.3d 1088 (9th Cir. 2010).

[194] *See id. passim*.

[195] *See* Lewis v. Casey, 518 U.S. 343, 350-51 (1996); Strickland v. Washington, 466 U.S. 690, 687 (1984); O'Shea v. Littleton, 414 U.S. 488, 499, 503 (1974); Younger v. Harris, 401 U.S. 37, 43-44 (1971); *see also* Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996).

[196] *See, e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003) (reversing defendant's capital conviction where defense counsel failed to investigate defendant's family background for mitigation); *Strickland*, 466 U.S. 668 (finding defense counsel's performance deficient but not so deficient as to be prejudicial); United States v. Cronic, 466 U.S. 648, 648 (1984) (recognizing possibility of presumption of prejudice but finding counsel's conduct insufficiently egregious to warrant presumption in instant case); People v. Jones, 111 Cal. Rptr. 3d 745, 763-66 (App. Ct. 2010) (reversing defendant's conviction on IAC grounds and finding that inadequate investigation prejudiced determinative Fourth Amendment evidence suppression hearing).

[197] *See Lewis*, 518 U.S. at 350-51; *O'Shea*, 414 U.S. at 499; *Younger*, 401 U.S. at 43-44; *see also Strickland*, 466 U.S. at 687 (providing reversal as remedy); *Platt*, 664 N.E.2d at 363.

[198] *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (recognizing Court's protection of traditional common law rights as within scope of substantive due process); Webster v. Doe, 486 U.S. 592, 599 (1988) (recognizing right of individual alleging constitutional deprivation by executive branch to judicial review in absence of other remedies); Kendall v. United States, 37 U.S. (12 Pet.) 524, 624 (1838) (describing right without remedy as monstrous absurdity); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (requiring remedy to enforce right as fundamental to legal system); 1 BLACKSTONE, *supra* note 51, at *23 (same); Thomas, *supra* note 51, at 1636-40; Zeigler, *supra* note 52, at 71-105 (tracing development of rights and remedies from early English cases to its evolution in 1970s); *see also* Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (explaining that court will not easily revisit long-standing 200-year-old practices); *cf.* Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010) (regarding its precedent as obligating it to remedy violations of constitutional rights).

[199] *See Strickland*, 466 U.S. at 687 (explaining that *Strickland*'s two prong test determines merits of individual convicted defendant's claim that ineffective assistance

applied *Strickland* in criminal cases, and the only relief it has recognized for IAC is reversal of a criminal conviction.[200] Because *Strickland* does not allow prospective relief but ongoing *Gideon* deprivations require it, *Gideon* deprivations cannot be claims for ineffective assistance of counsel under *Strickland*.[201]

Critics argue that claims seeking prospective relief for *Gideon* deprivations are nonjusticiable because providing prospective relief requires courts to encroach on functions the Constitution reserves to a coordinate branch of government.[202] For instance, prospective relief might involve appropriation of funds or statutory revisions, both legislative functions.[203] As a result, these critics argue, courts cannot issue prospective relief for *Gideon* deprivations and claims seeking that sort of relief are nonjusticiable.[204]

This counterargument is unpersuasive because the judicial branch's authority to remedy coordinate branches' constitutional violations includes reviewing those branches' exercise of their own constitutional authority.[205] Since legislative action (or inaction) itself causes the constitutional deprivations, courts considering those deprivations do so under their power of judicial review.[206] Courts do not exceed their own constitutional authority merely by holding that the legislature exceeded its constitutional authority.[207] This is precisely what prospective relief for preconviction systemic Sixth Amendment deprivations entails.[208] Prospective relief for *Gideon* deprivations recognizes that legislatures have created the structural deficiencies and

of counsel in his case requires reversal of conviction).

[200] *See id.* at 691-92 (stating that deficiencies in representation alone are insufficient for reversal on IAC grounds absent prejudicial effect on defense).

[201] *See id.* at 687; *see also Hurrell-Harring*, 930 N.E.2d at 221-22, 227.

[202] *See Hurrell-Harring*, 930 N.E.2d at 220; Memorandum of Law, *supra* note 104, at 6-7.

[203] See sources cited *supra* note 202.

[204] See sources cited *supra* note 202.

[205] *See Ex parte* Young, 209 U.S. 123, 152 (1908), *superseded on other grounds by statute*, Administrative Procedure Act of 1982, 5 U.S.C. § 702, *as recognized in* Presbyterian Church v. United States, 870 F.2d 518, 524 n.7 (9th Cir. 1989); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

[206] *See* INS v. Chadha, 462 U.S. 919, 941 (1983); Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980); *Ex parte Young*, 209 U.S. at 152; *Marbury*, 5 U.S. (1 Cranch) at 177-78.

[207] *See* sources cited *supra* note 206.

[208] *See, e.g.*, Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010) (recognizing that finding for plaintiffs may require court to modify legislative spending or priorities).

inadequate funding that cause the deprivations.[209] For that reason, providing effective relief for *Gideon* deprivations may require contradicting legislative decisions, but does not affect those claims' justiciability.[210]

CONCLUSION

Gideon deprivations can and do occur preconviction.[211] They are a distinct form of constitutional violation from the IAC claims that *Strickland* governs, and it is incorrect to analyze preconviction *Gideon* claims under the IAC framework.[212] Moreover, just as courts must answer individual constitutional deprivations with individually sufficient relief, they must answer systemic constitutional deprivations with systemic relief.[213] Thus — reluctant as courts may be to encroach on the legislature's domain — when a state fails to effect *Gideon*'s mandate, courts must intervene prospectively.[214]

[209] *See Ex parte Young*, 209 U.S. at 152; *Marbury*, 5 U.S. (1 Cranch) at 177-78; Dripps, *supra* note 2, at 247-48, 263, 305; Pruitt & Colgan, *supra* note 2, at 241-300; Lemos, *supra* note 20, at 1809-10; Note, *supra* note 19, at 2063-66; *see, e.g.*, People v. Jones, 111 Cal. Rptr. 3d 745, 763-66 (App. Ct. 2010) (documenting systemic deficiencies of county public defender); Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004) (identifying systemic crisis of constitutional proportions in indigent defense).

[210] *See Ex parte Young*, 209 U.S. at 152; *Marbury*, 5 U.S. (1 Cranch) at 177-78; Dripps, *supra* note 2, at 247-48, 263, 305; Pruitt & Colgan, *supra* note 2, at 241-300; Lemos, *supra* note 20, at 1809-10; Note, *supra* note 20, at 2063-66.

[211] *See Hurrell-Harring*, 930 N.E.2d at 227-28; *supra* Part III.A.

[212] *See supra* Part III.

[213] *See supra* Part III.B.

[214] *See supra* Parts I.C, III.C.