

COURT OF APPEALS OF NEW YORK

Hurrell-Harring v. State¹
(decided May 6, 2010)

The twenty plaintiffs in this consolidated action were indigent criminal defendants who were all assigned public defenders to represent them.² Plaintiffs claimed that New York State “deprive[d] them and other similarly situated indigent defendants . . . of constitutionally and statutorily guaranteed representational rights”³ by leaving them unrepresented or underrepresented during criminal proceedings.⁴ They sought “a declaration that their rights and those of the class they seek to represent are being violated and an injunction to avert further abridgement of their right to counsel”⁵ under both the United States Constitution⁶ and the New York Constitution.⁷ The appellate division dismissed the complaint as non-justiciable, rejecting the allegations that New York’s public defense system denied the right to effective assistance of counsel.⁸ The New York Court of Appeals, construing the allegations in the light most favorable to the

¹ 930 N.E.2d 217 (N.Y. 2010).

² *Id.* at 219. The plaintiffs sought class certification on behalf of other indigent criminal defendants. *Id.* There were twenty plaintiffs from Washington, Onondaga, Ontario, Schuyler, and Suffolk counties. *Id.* at 219, 222.

³ *Id.* at 219. The court noted that in New York, the counties are in charge of providing counsel as required after *Gideon*, however, plaintiffs “contend[ed] that this arrangement” deprived them of their rights.” *Hurrell-Harring*, 930 N.E.2d at 219.

⁴ *Id.* at 222.

⁵ *Id.* at 219. Plaintiffs did not seek relief from the criminal cases that they were facing. *Id.*

⁶ The Sixth Amendment to the United States Constitution reads, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

⁷ Article I, section 6 of the New York Constitution reads, in pertinent part: “In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and the cause of the accusation and be confronted with the witnesses against him or her.”

⁸ *Hurrell-Harring v. State (Hurrell I)*, 883 N.Y.S.2d 349, 351 (App. Div. 3d Dep’t 2009).

plaintiffs,⁹ characterized the complaint as stating “a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*.”¹⁰ In a four-to-three decision, the court held that the plaintiffs stated a cognizable claim for constructive denial of the right to counsel,¹¹ and that arraignment was a critical stage for purposes of the right to counsel, even if a guilty plea was not elicited.¹² The court sought to provide fundamental protection for both the indigent’s right to counsel, and the availability of a remedy when counsel is denied, regardless of guilt or innocence.¹³

There were twenty plaintiffs¹⁴ from five counties—Washington, Onondaga, Ontario, Schuyler, and Suffolk.¹⁵ The plaintiffs were “defendants in various criminal prosecutions ongoing at the time of [the] action’s commencement.”¹⁶ Ten of the plaintiffs were completely without representation at arraignment, and eight of those ten were jailed after they could not make bail.¹⁷ The plaintiffs alleged that such events were “illustrative of what is a fairly common practice . . . of arraigning defendants without counsel and leaving them, particularly when accused of relatively low level offenses, unrepresented in subsequent proceedings where pleas are taken and other critically important legal transactions take place.”¹⁸ One of the

⁹ *Hurrell-Harring*, 930 N.E.2d at 224-25.

¹⁰ *Id.* at 225. The court made clear that the complaint did not claim ineffective assistance of counsel. *See id.* at 224 (“These allegations state a claim not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.”). In making this determination, the court stated that [t]he basic . . . question . . . is whether the State has met its obligation to provide counsel, not whether . . . counsel’s performance was inadequate or prejudicial.” *Id.* at 225.

¹¹ *Id.* at 222.

¹² *Hurrell-Harring*, 930 N.E.2d at 223. However, there is no general acceptance of this conclusion. For example, many states do not provide counsel at the bail hearing. *See, e.g.*, *Rothgery v. Gillespe Cnty.*, 554 U.S. 191 (2008). In *Rothgery*, the defendant was not provided counsel at the article 15.7 hearing, which combined the probable cause determination with the bail hearing. *See id.* at 195-96. *But see* *McNeil v. Wisconsin*, 501 U.S. 171, 173 (1991) (stating that Wisconsin provided counsel at the bail hearing).

¹³ *Hurrell-Harring*, 930 N.E.2d at 227 (“*Gideon*’s guarantee to the assistance of counsel does not turn upon a defendant’s guilt or innocence, and neither can the availability of a remedy for its denial.”).

¹⁴ *Id.* at 222.

¹⁵ *Id.* at 219.

¹⁶ *Id.*

¹⁷ *Id.* at 222.

¹⁸ *Hurrell-Harring*, 930 N.E.2d at 222.

plaintiffs was without counsel for five months.¹⁹

Plaintiffs also alleged what the court referred to as “nominal” representation,²⁰ meaning that the appointed attorneys were unavailable, that they conferred with their clients “little, if at all,” and were “often completely unresponsive to [their client’s] urgent requests from jail, sometimes for months on end.”²¹ Appointed counsel waived important rights without consultation, missed court appearances, were unprepared or unqualified,²² and were “seriously conflicted” in the case.²³

The Albany County Supreme Court denied the State’s motion to dismiss the action as non-justiciable.²⁴ On appeal, the appellate division granted the defendants’ motion,²⁵ viewed the complaint as containing only claims for ineffective assistance,²⁶ and held that there was “no cognizable claim for ineffective assistance of counsel other than one seeking postconviction relief.”²⁷ Furthermore, the court held that a violation of a criminal defendant’s right to counsel could not be brought in a collateral civil proceeding, especially where the object of the proceeding was to “compel an additional allocation of public resources, which the court found to be a properly legislative prerogative.”²⁸

¹⁹ *Id.* See *Hurrell I*, 883 N.Y.S.2d at 357 (Peters, J., dissenting). One plaintiff, James Adams, was charged with robbery in the third degree and burglary in the third degree after stealing several sticks of deodorant from a drug store. *Id.* He was unrepresented at arraignment and unable to meet bail. *Id.* Adams’s attorney repeatedly failed to appear in court and declined to return phone calls. *Id.* The court ultimately reviewed the charges on its own initiative, and found that Adams had been overcharged. *Id.* Adams lost his job as a result of the incarceration, and his wife, two daughters, and granddaughter were evicted from their home. *Hurrell I*, 883 N.Y.S.2d at 357.

²⁰ *Hurrell-Harring*, 930 N.E.2d at 222 (“In addition to the foregoing allegations of outright nonrepresentation, the complaint contains allegations to the effect that although lawyers were eventually nominally appointed for plaintiffs, they were unavailable to their clients . . .”).

²¹ *Id.*

²² *Id.* Counsel did not appear to be prepared, “often because they were entirely new to the case, the matters having previously been handled by other similarly unprepared counsel.” *Id.*

²³ *Id.*

²⁴ *Hurrell-Harring*, 930 N.E.2d at 219-20.

²⁵ *Id.*

²⁶ *Id.* at 220.

²⁷ *Id.* (stating that a “violation of a criminal defendant’s right to counsel” could not be brought in a collateral civil proceeding, especially when the purpose of the action was to “compel” public resources).

²⁸ *Id.*

The New York Court of Appeals ruled in favor of the indigent plaintiffs.²⁹ The court, construing the facts in a light most favorable to the plaintiffs,³⁰ held that the plaintiffs stated cognizable Sixth Amendment claims,³¹ that arraignment was a critical stage of a criminal proceeding, “even if guilty pleas were not then elicited,”³² and ruled that indigent criminal defendants could vindicate their rights to the effective assistance of counsel outside the post-conviction context.³³ Considering the allegations, the court expressed concern that indigent criminal defendants were regularly being denied counsel.³⁴ “The picture which emerges from a fair and procedurally appropriate reading of the complaint is that defendants are with some regularity going unrepresented at arraignment and subsequent critical stages.”³⁵ The court viewed the plaintiffs’ complaint as seeking assurance of the constitutional guarantee of representation at all critical stages of a criminal proceeding.³⁶ Recognizing that such protection existed, the court allowed the case to proceed by establishing arraignment as a critical stage.³⁷

The court began its opinion by referencing the holding in *Gideon*, that indigent criminal defendants have the right to assistance of counsel.³⁸ That right attaches during critical stages of the criminal proceeding.³⁹ In New York, the Legislature has made it the respon-

²⁹ See *Hurrell-Harring*, 930 N.E.2d at 227-28.

³⁰ *Id.* at 224-25.

³¹ *Id.* at 222.

³² *Id.* at 223.

³³ *Id.* at 227 (“*Gideon*’s guarantee to the assistance of counsel does not turn upon a defendant’s guilt or innocence, and neither can the availability of a remedy for its denial.”).

³⁴ *Hurrell-Harring*, 930 N.E.2d at 227.

³⁵ *Id.* at 225. See *id.* at 227 (“[T]here is considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel” (emphasis added)). Of course, nominal representation does not fulfill the constitutional requirement as “[t]he Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.” *Avery v. Alabama*, 308 U.S. 444, 446 (1940).

³⁶ *Hurrell-Harring*, 930 N.E.2d at 224.

³⁷ *Id.* (“In New York, arraignment is, as a general matter, such a [critical] stage.”). The court listed other critical stages, including “the period between arraignment and trial when a case must be factually developed and researched, decisions respecting grand jury testimony made, plea negotiations conducted, and pre-trial motions filed.” *Id.* “[A] bail hearing is a critical stage of the State’s criminal process” as well. *Id.* at 223 (quoting *Higazy v. FBI Agent Michael Templeton*, 505 F.3d 161, 172 (2d Cir. 2007)).

³⁸ See *id.* at 219; see also *Gideon*, 372 U.S. at 344.

³⁹ *United States v. Wade*, 388 U.S. 218, 224 (1967) (“[O]ur cases have construed the Sixth Amendment guarantee to apply to ‘critical’ stages of the proceedings.”).

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sibility of the individual counties to fulfill *Gideon*'s mandate.⁴⁰ The plaintiffs sought a declaration that this arrangement violated their right to the effective assistance of counsel⁴¹ because the counties often left the indigent defendants unrepresented.⁴² Indigent defendants in New York State regularly suffered violations of their established constitutional rights due to "inadequate funding and staffing of indigent defense providers."⁴³ The State argued that an ineffective assistance of counsel claim was not capable of addressing systemic deficiencies⁴⁴ because "effective assistance is a judicial construct designed to do no more than protect an individual defendant's right to a fair adjudication; it is not a concept capable of expansive application to remediate systemic deficiencies."⁴⁵

The court recognized that this argument was rooted in case law such as *Strickland v. Washington*⁴⁶ and its New York counterpart, *People v. Benevento*.⁴⁷ Indeed, it even agreed that "a fair reading" of relevant case law supported the State's position that the effective assistance of counsel was "designed to do no more than protect an individual defendant's right to a fair adjudication,"⁴⁸ and was not capable of curing systemic deficiencies.⁴⁹ Such cases were "notable for their intentional omission of any broadly applicable defining performance standards."⁵⁰

Rather than affirm the appellate division's dismissal, the court determined that the plaintiffs' complaint had strayed too far from the fundamentals of *Gideon*. It observed that an ineffective assistance claim presupposed that the obligation to provide counsel for indigent criminal defendants under *Gideon* was actually being met by the states.⁵¹ The court determined that New York's approach of delegat-

⁴⁰ *Hurrell-Harring*, 930 N.E.2d at 219.

⁴¹ *Hurrell I*, 883 N.Y.S.2d at 350.

⁴² *Hurrell-Harring*, 930 N.E.2d at 222.

⁴³ *Id.* at 224.

⁴⁴ *Id.* at 220.

⁴⁵ *Id.* at 221.

⁴⁶ 466 U.S. 688 (1984).

⁴⁷ 697 N.E.2d 584 (N.Y. 1998).

⁴⁸ *Hurrell-Harring*, 930 N.E.2d at 221.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* ("Strickland's approach is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State in a manner that would justify the presumption that the standard of objective reasonableness will or-

ing responsibility to the counties failed to fulfill *Gideon*'s mandate, and therefore it re-framed the issue by asking "whether the State has met its foundational obligation under *Gideon* to provide legal representation."⁵²

The court reframed the issue in order to remedy the "broad systemic deficiencies" it saw in the allegations.⁵³ It recognized the inability of the ineffective assistance theory to remedy systemic deficiencies,⁵⁴ but was able to proceed in part due to the appellate division's dismissal of the complaint. Considering the procedural posture of the State's motion to dismiss, the court was required to construe the facts in the light most favorable to the plaintiffs.⁵⁵ In doing so, it found that the complaint stated a claim "for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*."⁵⁶

The "constructive denial" language is derived from United States Supreme Court case law.⁵⁷ "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."⁵⁸ In these situations, prejudice is so likely that a case-by-case inquiry is not necessary because it is not worth the cost.⁵⁹ This may occur when counsel is denied at trial, or when counsel "fails to subject the prosecution's case to meaningful adversarial testing."⁶⁰ Recognizing the existence of "broad systemic deficiencies" where indigent defendants regularly went "unrepresented at arraignment and subsequent critical stages,"⁶¹ the court concluded that the facts alleged stated a claim falling within these categories.⁶² Therefore, the plaintiffs did in fact state a cognizable claim under the Sixth Amendment, even though it was in the form of a collateral pre-

dinarily be satisfied.").

⁵² *Id.* at 222-23.

⁵³ *Hurrell-Harring*, 930 N.E.2d at 225.

⁵⁴ *Id.* at 221 (noting that ineffective assistance "is not a concept capable of expansive application to remediate systemic deficiencies").

⁵⁵ *Id.* at 224-25.

⁵⁶ *Id.* at 225.

⁵⁷ *Strickland*, 466 U.S. at 692.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *United States v. Cronic*, 466 U.S. 648, 658-59 (1984).

⁶¹ *Hurrell-Harring*, 930 N.E.2d at 225.

⁶² *Id.* ("The allegations before us state claims falling precisely within this described category.").

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conviction claim.⁶³

The right to counsel and, consequently, the aforementioned prejudice rule, attach at critical stages of the criminal proceeding.⁶⁴ As a result, the court needed to connect *Gideon* to *Cronic's* rules regarding actual and constructive denial of counsel. It did this by holding that arraignment is a critical stage, even if a guilty plea was not elicited.⁶⁵ By establishing arraignment as a critical stage, the court could hold that the right to counsel was violated, presume prejudice under *Cronic* and thereby avoid a case-by-case inquiry, allow the collateral claim to proceed, and ultimately provide a remedy for the systemic deficiencies it saw in the plaintiffs' complaint. Despite the court's holding, it is still unclear how this decision will affect the lives of indigent criminal defendants. It allowed discovery to proceed, and remanded to the appellate division.⁶⁶ The case could return to the Court of Appeals at a later date, at which time important issues in this case could be further developed and the real world implications of this decision will be fully realized.

Judge Pigott, joined by Judges Read and Smith, dissented and provided four main arguments against the majority's position.⁶⁷ First, the issues raised were properly addressed to the Legislature.⁶⁸ Second, the majority mischaracterized the plaintiffs' claims as "constructive denial," because the complaint simply presented ineffective assistance claims.⁶⁹ Third, arraignment was not a critical stage.⁷⁰ Finally, the plaintiffs failed to allege a cause of action for the "deprivation of the right to counsel at arraignment."⁷¹

Judge Pigott believed that the plaintiffs' grievances should be addressed to the Legislature, which it saw as "the proper forum for weighing proposals to enhance indigent defense services in New

⁶³ *Id.* at 222.

⁶⁴ *Wade*, 388 U.S. at 226-27.

⁶⁵ *Hurrell-Harring*, 930 N.E.2d at 223. The court included the language "even if a guilty plea was not then elicited" to address case law holding that there was no Sixth Amendment violation where the defendant was arraigned without counsel and plead not guilty. *See* United States *ex rel.* Combs v. Denno, 357 F.2d 809, 812 (2d Cir. 1966); *Hurrell-Harring*, 930 N.E.2d at 231 (Pigott, J., dissenting).

⁶⁶ *Hurrell-Harring*, 930 N.E.2d at 228.

⁶⁷ *See id.* at 228-32 (Pigott, J., dissenting).

⁶⁸ *Id.* at 232.

⁶⁹ *Id.* at 229.

⁷⁰ *Id.* at 230.

⁷¹ *Hurrell-Harring*, 930 N.E.2d at 231.

York.”⁷² Although the dissent did not focus on this argument, it was reminiscent of the appellate division’s decision to find the claim non-justiciable on the same grounds.⁷³ Judge Pigott also characterized the majority’s “constructive denial” cause of action as “nothing more than an ineffective assistance claim under another name,”⁷⁴ reiterating that ineffective assistance claims under *Strickland* and *Benevento* are limited to the individual, and “cannot be used to attack alleged systemic failures.”⁷⁵ The dissent then turned to *Cronic* and argued that the prejudice holding⁷⁶ may only be applied after the criminal proceeding has ended:

Constructive denial of counsel is a branch from the *Strickland* tree, with *Cronic* applying only when the appointed attorney’s representation is so egregious that it’s as if [the] defendant had no attorney at all. Therefore, whether a defendant received ineffective assistance of counsel under *Strickland* or is entitled to a presumption of prejudice under *Cronic* is a determination that can only be made *after* the criminal proceeding has ended; neither approach lends itself to a proceeding like the one at bar where plaintiffs allege prospective violations of their Sixth Amendment rights.⁷⁷

The dissent next disagreed with the establishment of arraignment as a critical stage in New York because it felt that the “majority’s bare conclusion that any arraignment conducted without the presence of counsel renders the proceedings a violation of the Sixth Amendment flies in the face of reality.”⁷⁸ Section 180.10(3) states that “[t]he defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action.”⁷⁹ It also required the court to provide the criminal defendant with a copy of the

⁷² *Id.* at 232.

⁷³ *Hurrell I*, 883 N.Y.S.2d at 353.

⁷⁴ *Hurrell-Harring*, 930 N.E.2d at 228.

⁷⁵ *Id.*

⁷⁶ *See Cronic*, 466 U.S. at 658-59.

⁷⁷ *Hurrell-Harring*, 930 N.E.2d at 229.

⁷⁸ *Id.* at 230.

⁷⁹ N.Y. CRIM. PROC. LAW § 180.10(3) (McKinney 2010).

charges, and inform the defendant of his rights, including the right to counsel.⁸⁰ Judge Piggot did not interpret this statute as supporting the position that non-representation at arraignment is a violation of the Sixth Amendment because he believed that the statute presupposes that the defendant “may not have yet retained counsel or, due to indigency, requires the appointment of one.”⁸¹ In other words, he believed there may be situations where the absence of counsel at arraignment may not be a violation of the Sixth Amendment, and interpreted the statute as supporting his position because it presupposes that the defendant has yet to retain counsel.

Finally, Judge Piggot believed that the plaintiffs failed to “state a cause of action for the deprivation of the right to counsel at arraignment”⁸² because they did not allege that the failure to have counsel at the first court appearance had an adverse effect on the proceedings.⁸³ Without such a claim, prejudice could not be presumed—“the absence of counsel upon arraignment is [not] an inflexible, per se violation of the Sixth Amendment.”⁸⁴ The dissent also observed that the plaintiffs saw their attorneys shortly after arraignment, further supporting its position that there was no prejudice, presumed or otherwise.⁸⁵ Judge Piggot strongly disagreed with the majority on all major points, and accordingly would have affirmed the decision of the appellate division.

The United States Supreme Court has, since its decision in *Gideon*, protected the right of an accused in all criminal prosecutions to “have the Assistance of Counsel for his defence.”⁸⁶ In *Gideon*, the Supreme Court held that “ ‘the right to the aid of counsel is of . . . fundamental character,’ ”⁸⁷ and applied the right to counsel to the states, like other fundamental Bill of Rights provisions.⁸⁸ Most importantly, *Gideon* established that indigent criminal defendants were

⁸⁰ *Hurrell-Harring*, 930 N.E.2d at 230-31.

⁸¹ *Id.* at 230.

⁸² *Id.* at 231.

⁸³ *Id.*

⁸⁴ *Id.* (quoting *United States ex rel. Caccio v. Fay*, 350 F.2d 214, 215 (2d Cir. 1965)).

⁸⁵ *Hurrell-Harring*, 930 N.E.2d at 231.

⁸⁶ U.S. CONST. amend. VI.

⁸⁷ *Gideon*, 372 U.S. at 342-43 (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)). *See also* *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936).

⁸⁸ *Gideon*, 372 U.S. at 342 (holding that Sixth Amendment rights were fundamental in nature and therefore “obligatory upon the States by the Fourteenth Amendment”).

entitled to counsel in criminal proceedings⁸⁹ because “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.”⁹⁰ The criminal defendant “requires the guiding hand of counsel at every step in the proceedings against him,” because “[w]ithout it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”⁹¹ Subsequent decisions established that the right to counsel attached at critical stages of the criminal proceeding because “depriv[ing] a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.”⁹²

The right of effective assistance was mandated in *Powell v. Alabama*, where the Supreme Court extended Sixth Amendment rights to include effective aid.⁹³ Indeed, “[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.”⁹⁴ Today, the issue is governed by *Strickland*.⁹⁵ In *Strickland*, the Supreme Court set a two-part standard for an ineffective assistance of counsel claim.⁹⁶ The Court held that the Sixth Amendment right to counsel was needed in order to protect the fundamental right to a fair trial,⁹⁷ which is “one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.”⁹⁸ The aid of counsel is

⁸⁹ *Id.* at 344.

[L]awyers in criminal courts are necessities, not luxuries. The right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. . . . This noble ideal cannot be realized if the poor man charged with [a] crime has to face his accusers without a lawyer to assist him.

Id.

⁹⁰ *Id.*

⁹¹ *Id.* at 345.

⁹² *Maine v. Moulton*, 474 U.S. 159, 170 (1985). *See also* *United States v. Ash*, 413 U.S. 300, 310-11 (1973) (quoting *Wade*, 388 U.S. at 224).

⁹³ *See Benevento*, 697 N.E.2d at 586 (citing *Powell* in holding that the Sixth Amendment mandate extends to providing effective aid); *see also* *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (stating that the Constitution guarantees an accused “adequate legal assistance”).

⁹⁴ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

⁹⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁹⁶ *Id.* at 687.

⁹⁷ *Id.* at 685.

⁹⁸ *Id.*

critical to the adversarial system's production of a fair trial,⁹⁹ and therefore, "the right to counsel is the right to the effective assistance of counsel."¹⁰⁰

The Supreme Court held that an ineffective assistance analysis consisted of two parts: (1) an examination to determine whether counsel's performance was deficient, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"¹⁰¹ and (2) there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹⁰² Furthermore, an affirmative showing of prejudice must be made.¹⁰³ There is no "check list," only guides to determine whether effective assistance was rendered.¹⁰⁴

*United States v. Cronin*¹⁰⁵ was decided on the same day as *Strickland*. In *Cronin*, the Supreme Court presented an exception to *Strickland's* "requirement that a defendant asserting an ineffective assistance of counsel claim demonstrate a deficient performance and prejudice."¹⁰⁶ Under *Cronin*, a court may bypass that analysis: (1) where counsel was completely denied or was denied at a critical stage in the proceeding, (2) where counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," or (3) where the "likelihood that any lawyer . . . could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of trial."¹⁰⁷

The Court provided examples of actual or constructive denial of counsel. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."¹⁰⁸ Where prejudice is presumed, there is no need to examine the claim on a

⁹⁹ *Id.* ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

¹⁰⁰ *Strickland*, 466 U.S. at 686 (citing *McMann*, 397 U.S. at 771 n.14).

¹⁰¹ *Id.* at 687.

¹⁰² *Id.* at 694. *See also* *Rosario v. Ercole*, 601 F.3d 118, 124 (2d Cir. 2010); *People v. Turner*, 840 N.E.2d 123, 125 (N.Y. 2005).

¹⁰³ *Strickland*, 466 U.S. at 693.

¹⁰⁴ *Id.* at 688.

¹⁰⁵ 466 U.S. 648 (1984).

¹⁰⁶ *See Hurrell-Harring*, 930 N.E.2d at 229 (Pigott, J., dissenting).

¹⁰⁷ *Id.* (citing *Cronin*, 466 U.S. at 659-60).

¹⁰⁸ *Strickland*, 466 U.S. at 692.

case-by-case basis because prejudice is so likely that such an inquiry is not worth the cost.¹⁰⁹ Therefore, *Cronic's* holding provided the court in *Hurrell-Harring* with the means to presume prejudice when there was constructive denial of counsel, thereby avoiding the need to engage in a case-by-case inquiry of the claims.

The source of the indigent criminal defendant's right to counsel is *Gideon*, where the Supreme Court held that indigent criminal defendants are entitled to counsel in criminal proceedings.¹¹⁰ After *Gideon*, the Court considered a line of cases concerning when and under what circumstances the right to counsel attached. The Court held that the right attaches when the prosecution commences,¹¹¹ which has been described as attaching at the initial appearance before a judicial officer,¹¹² or simply at the first formal proceeding.¹¹³ Put simply, commencement is "pegged" to the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,"¹¹⁴ because this is when "the government has committed itself to prosecute . . . [and] a defendant finds himself faced with the prosecutorial forces of organized society."¹¹⁵

The right to counsel applies during "critical" stages of the criminal proceedings.¹¹⁶ The Court applies the "critical" rule in recognition of the difference between the realities of modern criminal prosecution and the state of prosecution at the time the Bill of Rights was written.¹¹⁷ In *United States v. Ash*, the Court explained the test

¹⁰⁹ *Id.*

¹¹⁰ *Gideon*, 372 U.S. at 344.

¹¹¹ *McNeil*, 501 U.S. at 175.

¹¹² See *Rothgery*, 554 U.S. at 200 (quoting *Brewer v. Williams*, 430 U.S. 387, 399 (1977)).

¹¹³ See *McNeil*, 501 U.S. at 180-81.

¹¹⁴ *Rothgery*, 554 U.S. at 198 (quoting *United States v. Goiveia*, 467 U.S. 180, 188 (1984)) (internal quotation marks omitted).

¹¹⁵ *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion).

¹¹⁶ *Ash*, 413 U.S. at 310-11; *Wade*, 388 U.S. at 244.

¹¹⁷ *Wade*, 388 U.S. at 224.

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these reali-

for determining whether the stage was critical: If defects of the confrontation cannot be cured at trial, then the stage was critical.¹¹⁸ In analyzing *United States v. Wade*, the Court in *Ash* saw “that there were times when the subsequent trial would cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant. In other words, such stages were not ‘critical.’”¹¹⁹ The Supreme Court has considered a number of confrontational stages and indicated that interrogation¹²⁰ and preliminary plea hearings¹²¹ could be critical.

Second Circuit case law also provides guidance on this issue. For example, the Second Circuit in *Higazy* held that a bail hearing was a critical stage of the proceeding.¹²² In citing to a number of federal cases to establish the attachment of the right to counsel at critical stages, the court in *Hurrell-Harring* recognized that “a bail hearing is a critical stage of the State’s criminal process.”¹²³ This language comes from the Supreme Court.¹²⁴ Second Circuit case law was also used to support the dissent’s position. The dissent argued that the court could not find a Sixth Amendment violation where the plaintiffs failed to allege an adverse effect on the proceedings,¹²⁵ because the “Second Circuit has rejected the assertion ‘that the absence of counsel upon arraignment is an inflexible, per se violation of the

ties of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to ‘critical’ stages of the proceedings.

Id.

¹¹⁸ *Ash*, 413 U.S. at 316 (“[T]he opportunity to cure defects at trial causes the confrontation to cease to be critical.”).

¹¹⁹ *Id.* at 315.

¹²⁰ See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009); *Massiah v. United States*, 377 U.S. 201, 204-05 (1964).

¹²¹ See *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970); *White v. Maryland*, 373 U.S. 59, 60 (1963). The Court in *Rothgery* also indicated that arraignment could be a critical stage. There, the Court considered Texas’s article 15.7 hearing and noted that the Court “had twice held that the right to counsel attaches at the initial appearance before a judicial officer.” *Rothgery*, 554 U.S. at 199. The Court did not hold that arraignment is a critical stage. Rather, it held that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.” *Id.* at 213.

¹²² *Hurrell-Harring*, 930 N.E.2d at 223 (citing *Higazy*, 505 F.3d at 172).

¹²³ *Id.* (quoting *Higazy*, 505 F.3d at 172).

¹²⁴ *Coleman*, 399 U.S. at 9-10.

¹²⁵ *Hurrell-Harring*, 930 N.E.2d at 231 (Pigott, J., dissenting).

Sixth Amendment.’¹²⁶ Similarly, another Second Circuit case held that there is no Sixth Amendment violation when the criminal defendant is arraigned without counsel and pleads not guilty.¹²⁷ This precedent was used to argue against the majority opinion.¹²⁸

Hurrell-Harring presents two important issues: the indigent defendant’s right to counsel, and the right of effective assistance of counsel. New York naturally follows the constitutional mandates of *Gideon* and its progeny, but the state also has its own case law concerning the right to counsel.¹²⁹ The New York Court of Appeals held that the right to counsel applied to pre-trial proceedings and the trial.¹³⁰ It is significant that the court recognized the importance of having access to counsel during the pre-trial proceedings, because without it defendants may lose their liberty before the trial even begins. “The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pre-trial examination.”¹³¹ New York also requires the presence of counsel at critical stages.¹³²

Under Supreme Court case law, the right to counsel includes the right to the effective assistance of counsel.¹³³ “The State and Federal constitutional right to counsel, so fundamental to our form of justice, is the right to effective assistance of counsel, meaning the reasonably competent services of an attorney devoted to the client’s best interests.”¹³⁴ In *Benevento*, the New York Court of Appeals noted that the existence of the right to effective assistance of counsel reflects the fact that “our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or inno-

¹²⁶ *Id.* (quoting *Caccio*, 350 F.2d at 215).

¹²⁷ *See Combs*, 357 F.2d 809.

¹²⁸ *See Hurrell-Harring*, 930 N.E.2d at 231 (Pigott, J., dissenting) (citing *Combs*, 357 F.2d at 812).

¹²⁹ *See Benevento*, 697 N.E.2d 584.

¹³⁰ *Donovan*, 13 N.Y.2d at 152.

¹³¹ *Id.* (quoting *In re Groben*, 352 U.S. 330, 344 (1957) (Black, J., dissenting)) (internal quotation marks omitted).

¹³² *See Hurrell-Harring*, 930 N.E.2d at 223 (holding that the right to counsel attaches at arraignment and “entails the presence of counsel at each subsequent ‘critical’ stage of the proceedings” (quoting *Montejo*, 129 S. Ct. at 2085)).

¹³³ *People v. Bennett*, 280 N.E.2d 637, 639 (1972) (“[T]he right . . . to be represented by an attorney means more than just having a person with a law degree nominally represent [the defendant] upon trial and ask questions.”). *See also Benevento*, 697 N.E.2d at 586.

¹³⁴ *People v. Ortiz*, 564 N.E.2d 630, 632 (N.Y. 1990).

cence.”¹³⁵ It also presented the standard for analyzing ineffective assistance of counsel in New York,¹³⁶ which may be described as “meaningful representation.”¹³⁷ The defendant must show that the attorney’s performance “fell below the objective standard of reasonableness.”¹³⁸ Prejudice to the defendant is not explicitly required, but rather is included in the meaningful representation standard.¹³⁹ The analysis uses a flexible case-by-case inquiry¹⁴⁰ rather than “specific, generally applicable performance standards.”¹⁴¹ The federal and New York approaches to ineffective assistance share some similarities. Both reject rigid guidelines in favor of a more flexible analysis.¹⁴² Although the New York Court of Appeals has declined to adopt *Strickland*,¹⁴³ the approaches are consistent with one another in that both require a showing that the attorney’s performance fell below an objective standard of reasonableness.¹⁴⁴ The *Strickland* approach takes the analysis one step further by requiring the defendant to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.”¹⁴⁵

The court’s decision in *Hurrell-Harring* represents an important step for indigent criminal defendants. Recognizing years of inadequate representation in the criminal justice system, the court looked to the most fundamental representational rights under *Gide-*

¹³⁵ *Benevento*, 697 N.E.2d at 588 (quoting *People v. Donovan*, 13 N.Y.2d 148, 154 (1963)) (internal quotation marks omitted).

¹³⁶ See also *Rosario*, 601 F.3d at 123-24; *People v. Turner*, 840 N.E.2d 123, 125-26 (N.Y. 2005).

¹³⁷ See *Benevento*, 697 N.E.2d at 587-88 (“The core of the inquiry is whether [the] defendant received ‘meaningful representation.’ . . . The question is whether the attorney’s conduct constituted ‘egregious and prejudicial’ error such that defendant did not receive a fair trial” (quoting *People v. Flores*, 639 N.E.2d 19, 21 (N.Y. 1994) (internal quotation marks omitted))); see also *People v. Baldi*, 429 N.E.2d 400, 404 (N.Y. 1981) (stating that the right “varies according to the unique circumstances of each representation”).

¹³⁸ See *Strickland*, 466 U.S. at 688.

¹³⁹ *Benevento*, 697 N.E.2d at 588 (“Under the State Constitution, ‘prejudice’ is examined more generally in the context of whether defendant received meaningful representation.”).

¹⁴⁰ *Id.* at 587.

¹⁴¹ *Hurrell-Harring*, 930 N.E.2d at 221.

¹⁴² *Strickland*, 466 U.S. at 688-89; *Hurrell-Harring*, 930 N.E.2d at 221.

¹⁴³ *Benevento*, 697 N.E.2d at 589.

¹⁴⁴ *Rosario*, 601 F.3d at 123-24; *Turner*, 840 N.E.2d at 125-26.

¹⁴⁵ *Strickland*, 466 U.S. at 694.

on.¹⁴⁶ In doing so, it bypassed *Strickland's* requirement that the defendant suffer prejudice, yet still took advantage of the rule that prejudice is presumed when there has been a constructive denial of counsel.

Much has been made of *Strickland's* failure to provide adequate protection for indigent criminal defendants.¹⁴⁷ In *Hurrell-Harring*, the New York Court of Appeals indirectly addressed that issue. Indeed, it seems as if the majority wanted to find for the plaintiffs in spite of Supreme Court case law—it saw deficiencies in the system, and recognized that *Strickland* was not capable of addressing systemic ineffective assistance claims. The result was a dramatic re-reading of the plaintiffs' complaint by the court. In holding that the plaintiffs' stated a claim for constructive denial of counsel, the court indicated that the plaintiffs had incorrectly relied on *Strickland*, and reframed the issue based on constructive denial under *Gideon*. By re-reading the plaintiffs' complaint, the court rendered a decision in favor of the indigent criminal defendants.

The difference between the majority and the dissent lies in the desire to protect the constitutional rights of the indigent defendants. The majority wanted to find a way to address the facts alleged in the complaint. As a result, it was willing to look past strict construction of statutes and case law in order to find for the plaintiffs. For example, the majority dealt with *Strickland's* inability to address systemic deficiencies by looking to *Cronic* and presuming prejudice. It bypassed persuasive precedent by holding that arraignment was critical even when a guilty plea was not elicited. It was unable to force the legislature to pay for indigent services, so it provided a judicial remedy for indigent criminal defendants.

This important decision could be an indication of what is to come in other jurisdictions. There are currently two approaches to addressing this issue. The first, like *Hurrell-Harring*, uses litigation as the means for bringing about reform. The second goes directly through the legislature for statutory changes. Both are worth considering.

¹⁴⁶ See *Hurrell-Harring*, 930 N.E.2d at 222-23.

¹⁴⁷ See Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999) (observing that "the *Strickland* Court interpreted the requirements of the Sixth Amendment's right to effective assistance of counsel in such an ultimately meaningless manner as to require little more than a warm body with a law degree standing next to the defendant").

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In *Duncan v. Michigan*,¹⁴⁸ like *Hurrell-Harring*, the lawsuit was a class action brought by indigent criminal defendants.¹⁴⁹ The complaint alleged that the indigent defendants, “as well as future indigent defendants subject to felony prosecutions, are being denied state and federal constitutional rights to counsel and the effective assistance of counsel.”¹⁵⁰ After the circuit judge granted class certification and denied the state’s motion for summary judgment, the Court of Appeals of Michigan affirmed.¹⁵¹ The Supreme Court of Michigan initially issued an order affirming the decision of the Court of Appeals,¹⁵² but in July 2010 the court vacated that decision.¹⁵³ The court stated that the defendants were entitled to summary judgment because the plaintiffs’ claims were non-justiciable.¹⁵⁴ In yet another stunning about-face, the court in November 2010 vacated the July order and reinstated the original decision because reconsideration had been “improperly granted.”¹⁵⁵ In December 2010, the court denied a request to reconsider the November opinion.¹⁵⁶ This granted class

¹⁴⁸ (*Duncan II*), 784 N.W.2d 51 (Mich. 2010).

¹⁴⁹ *Id.* at 53.

¹⁵⁰ *Id.*

¹⁵¹ *Duncan v. Michigan (Duncan I)*, 774 N.W.2d 89, 98 (Mich. Ct. App. 2009).

We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully.

Id.

¹⁵² *See Duncan II*, 784 N.W.2d at 53.

¹⁵³ *Id.* at 51 (majority order) (vacating the order dated April 30, 2010). The weak economy probably played a role in this stunning reversal of a decision that had been handed down just three months earlier. The concurrence states that allowing the litigation to proceed would issue “an open invitation to the trial court to assume ongoing operational control over the systems for providing defense counsel to indigent criminal defendants . . . And with that invitation comes a ‘blank check’ on the part of the judiciary to ‘force sufficient state level legislative appropriations and executive branch acquiescence.’ ” *Id.* at 53.

¹⁵⁴ *Id.* The court took the position of the Court of Appeals dissent from *Duncan I*, which argued that the “plaintiffs lacked standing, that their claims were neither ripe nor justiciable, and that the class had been erroneously certified.”

¹⁵⁵ *Duncan v. State*, 790 N.W.2d 695 (Mich. 2010).

¹⁵⁶ *Duncan v. State*, 791 N.W.2d 713, 713 (Mich. 2010). Political motives and changing government likely lie at the heart of these events. In the December order, Justice Corrigan stated that the majority wanted to act “before the end of the calendar year with clear intent to prevent the newly constituted Court after January, 2011, from considering defendants’ motion.” *Id.* at 713 (Corrigan, J., dissenting).

certification and allowed the case to proceed to trial.¹⁵⁷ *Duncan* illustrates the unpredictability that comes with protecting constitutional rights through litigation, and suggests that seeking reform through the legislature might be a more stable, if not less likely, means of achieving constitutional protection.

Montana,¹⁵⁸ Georgia,¹⁵⁹ and Texas¹⁶⁰ all have statewide public defense systems. Although none of these systems are perfect, they illustrate a different approach from that in New York. In Montana, for example, the public defense system is governed by the Public Defender Act.¹⁶¹ This system came about in response to a lawsuit brought by the American Civil Liberties Union of Montana on behalf of indigent criminal defendants. The case was never adjudicated because the plaintiffs stipulated that the suit would be postponed in order to seek a legislative solution.¹⁶² The subsequent result was the Public Defender Act, which describes standards for the provision of counsel to indigent defendants, eligibility for state-funded counsel,¹⁶³ and creates an office of the state public defender.¹⁶⁴

In *Simmons v. State Public Defender*,¹⁶⁵ the Supreme Court of Iowa struck down a law limiting attorney's fees for state-appointed defense attorneys.¹⁶⁶ The statute required the state public defender to establish fee caps for certain categories of cases.¹⁶⁷ In striking down this law, the court recognized the indigent criminal defendant's right to effective assistance of counsel.¹⁶⁸ The court stated that fee cap legislation had a "chilling effect" on the constitutional rights of indigent criminal defendants and conflicted with the "legislature's intent to provide indigent defendants with effective assistance of counsel."¹⁶⁹ Although the practical effects of this case are not yet certain,

¹⁵⁷ *Id.* at 718.

¹⁵⁸ Public Defender Act, MONT. CODE ANN. § 47-1-111 (2009).

¹⁵⁹ See Georgia Indigent Defense Act of 2003, GA. CODE ANN., § 17-12-1 (West 2010).

¹⁶⁰ See TEX. CODE CRIM. PROC. ANN. art 1.051 (West 2010).

¹⁶¹ Public Defender Act, MONT. CODE ANN. § 47-1-111 (2009).

¹⁶² Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1499 (Summer 2006).

¹⁶³ Public Defender Act, MONT. CODE ANN. § 47-1-111.

¹⁶⁴ Public Defender Act, MONT. CODE ANN. § 47-1-201 (2009).

¹⁶⁵ 791 N.W.2d 69, 70 (Iowa 2010).

¹⁶⁶ *Id.* at 70.

¹⁶⁷ *Id.* at 71.

¹⁶⁸ *Id.* at 75.

¹⁶⁹ *Id.* at 89.

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it is clear that the state of Iowa will be required to put more money into the state public defender. This could attract more attorneys to public defense, which could improve individual representation by lightening the caseload of each attorney. Greater financial incentive might also attract a higher caliber of attorney to public defense. As a result, *Simmons* is a step towards an improved public defense system in Iowa.

By analyzing the events in Michigan and the steps taken in Montana and Iowa, it is clear that the New York Court of Appeals has put New York at the forefront of this important constitutional issue. Through *Hurrell-Harring*, the court declared that indigent criminal defendants in New York would enjoy the full protection of their constitutional rights. It bypassed the legislature and took it upon the judiciary to protect the indigent criminal defendants. As a result, *Hurrell-Harring* provides a model for courts in other jurisdictions that wish to follow in the footsteps of New York.

Despite its promising holding, *Hurrell-Harring* might also present practical problems in the future. For example, this ruling could inundate the courts with indigent defendants' claims of constructive denial of counsel. Such claims might further overwhelm an already over-worked public defender system.¹⁷⁰ Private defense attorneys are unlikely to become involved in these cases on a long-term, sustained basis because they are unlikely to produce legal fees. Finally, the possibility of indigent defendants bringing constructive denial claims outside the post-conviction context could slow the progress of a given case, resulting in an even more crowded docket.

This is a controversial decision that is unlikely to receive praise in society. The New York Court of Appeals recognized that mandates protecting the rights of criminal defendants are often unpopular, especially when they require public funds.¹⁷¹ Nonetheless, such protections are required under both the United States and New York Constitutions, and are fundamental aspects of the judicial system. It is imperative that the judiciary has a strong adversarial system designed to protect the rights of all parties, especially when an

¹⁷⁰ See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 682-83 (2007) (describing public defenders as "catastrophically overworked").

¹⁷¹ *Hurrell-Harring*, 930 N.E.2d at 219 (recognizing that *Gideon*'s mandate is "largely unfunded and politically unpopular").

individual's liberty may be at stake. *Hurrell-Harring* strengthens that system, and protects the rights of indigent criminal defendants by upholding established Sixth Amendment rights.

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