

probationary period is imposed, on the theory that any future incarceration that occurred would be based on the original uncounseled conviction.<sup>286</sup>

Because the absence of counsel when a defendant is convicted or pleads guilty goes to the fairness of the proceedings and undermines the presumption of reliability that attaches to a judgment of a court, *Gideon* has been held fully retroactive, so that convictions obtained in the absence of counsel without a valid waiver are not only voidable,<sup>287</sup> but also may not be subsequently used either to support guilt in a new trial or to enhance punishment upon a valid conviction.<sup>288</sup>

***Limits on the Right to Retained Counsel.***—*Gideon v. Wainwright*<sup>289</sup> is regarded as having consolidated a right to counsel at trial in the Sixth Amendment, be the trial federal or state or counsel retained or appointed.<sup>290</sup> The Sixth Amendment cases, together with pre-*Gideon* cases that applied due process analysis under the Fourteenth Amendment to state proceedings, point to an unquestioned right to retain counsel for the course of a prosecution, but also to circumstances in which the choice of a particular representative must give way to the right's fundamental purpose of ensuring the integrity of the adversary trial system.

The pre-*Gideon* cases often spoke of the right to retain counsel expansively. Thus, in *Chandler v. Fretag*, when a defendant appearing in court to plead guilty to house-breaking was advised for the first time that, because of three prior convictions, he could be sentenced to life imprisonment as a habitual offender, the court's denial of his request for a continuance to consult an attorney was a

<sup>286</sup> *Alabama v. Shelton*, 535 U.S. 654 (2002).

<sup>287</sup> *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963); *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Kitchens v. Smith*, 401 U.S. 847 (1971). See *Linkletter v. Walker*, 381 U.S. 618, 639 (1965).

<sup>288</sup> *Burgett v. Texas*, 389 U.S. 109 (1967) (admission of record of prior conviction without the assistance of counsel at trial, with instruction to jury to regard it only for purposes of determining sentence if it found defendant guilty, but not to use it in considering guilt, was inherently prejudicial); *United States v. Tucker*, 404 U.S. 443 (1972) (error for sentencing judge in 1953 to have relied on two previous convictions at which defendant was without counsel); *Loper v. Beto*, 405 U.S. 473 (1972) (error to have permitted counseled defendant in 1947 trial to have his credibility impeached by introduction of prior uncounseled convictions in the 1930s; Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented); *But see Nichols v. United States*, 511 U.S. 738 (1994) (as *Scott v. Illinois*, 440 U.S. 367 (1979) provides that an uncounseled misdemeanor conviction is valid if defendant is not incarcerated, such a conviction may be used as the basis for penalty enhancement upon a subsequent conviction).

<sup>289</sup> 372 U.S. 335 (1963).

<sup>290</sup> *E.g.*, *Wheat v. United States*, 486 U.S. 153, 158 (1988).