

## ARTICLES

### MEMORIES OF AND REFLECTIONS ABOUT *GIDEON v. WAINWRIGHT*

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This Article is an outgrowth of remarks that I gave at American University School of Law in 1993 at the Conference on the Thirtieth Anniversary of the United States Supreme Court’s decision in *Gideon v. Wainwright*, 43 Am. U. L. Rev. 1, 33–43 (1993), and remarks to the members of the St. Andrew Bay American Inn of Court, Panama City, Florida, on September 14, 2000. I wish to thank Professor, then Dean, and later Interim President of American University, Elliott S. Milstein. Also, I would like to thank Jerry W. Gerde and the members of the Inn of Court for inviting me to speak about the landmark case that began and ended in their county, Bay County, Florida. Meeting with them gave me the opportunity to talk with several lawyers who had known Judge Robert L. McCrary, Jr., and attorney William E. Harris, participants in the two trials of Clarence Earl Gideon that took place there. I was able to meet Judge W. Fred Turner, the defense lawyer who won an acquittal for Gideon in the second trial that occurred in Panama City, in 1963. I wish to thank Andrew Rosin and Kelly Kuljol for their research assistance, and Laura Turbe, of the *Stetson Law Review*, for her excellent editorial contributions. Further thanks go to Connie Evans, Director of the Faculty Support Services Department at Stetson, and Sharon Gisclair, Shannon Mullins, and Barbara Lernihan, of that office, and to Beth Curnow, the executive secretary for the *Stetson Law Review*. I also thank my daughter, Lee Ann Gun of Ashland, Massachusetts, for her assistance, and faculty colleagues Professors Robert R. Batey, Mark R. Brown, and Jerome C. Latimer for reading the manuscript and making suggestions for improvement. I wish to give particular thanks to good friend Professor Krishna Mohan Sharma, until recently with the Law School of the University of New South Wales, Sydney, Australia, for his invaluable insights, and editorial and substantive help. He has been a close friend since we shared office space as fellow graduate students at the Harvard Law School in the late 1960s.

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### I. INTRODUCTION

During the summer of 1957, after completing my first semester of law school, I worked in Panama City, Florida, on a Dr. Pepper truck, selling soft drinks. The driver of the truck and I stopped at every grocery store, gas station, motel, hotel, restaurant, bar, and “juke joint”<sup>1</sup> in that area, including a place called the Bay Harbor Poolroom. The poolroom was named for the small community in which it was located, just a few miles east of the center of Panama City.

The Panama City area was dominated by a huge paper mill located at Bay Harbor. The paper manufacturing process caused a smell that was pervasive for miles in every direction; no one in

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1. This term is used to refer to places that have “juke boxes.”

Panama City or in its environs could escape the caustic odor that stung and burned the eyes, the throat, and the face. Anthony Lewis, in *Gideon's Trumpet*,<sup>2</sup> described the paper mill and the adjacent area in the following words:

Just outside the city limits, twenty minutes from the motels and restaurants and Post Office that make "downtown," is a gigantic International Paper Company plant, its tall chimneys spewing out sulphurous smoke. Huddled near the plant fence, within sight and smell of the chemical fumes, is the community of Bay Harbor. Community is too grandiose a word for it; Bay Harbor is a bitter, decayed parody of a movie set for a frontier town. It is just a few dilapidated buildings separated by dirt roads and alleys and weed-filled empty lots: a bar, a two-story "hotel," a grocery and the Bay Harbor Poolroom. One who happened onto that dark street would be eager to drive back through the dank countryside to the highway and its neon. Gideon had no illusions about Bay Harbor; he called it "Tobacco Road."<sup>3</sup>

It was the place where some of the mill workers lived and spent their free hours. During my summer of selling soft drinks, I did not like going to Bay Harbor. It reminded me not of a movie set for a frontier town, but of a macabre site for an Alfred Hitchcock film. It was a run-down, bedraggled, dingy group of rooming houses and other buildings very close to the paper mill and its foreboding presence, hovering overhead, belching smoke high into the sky. The area appeared to be a sleazy and high-crime district, a place one would want to leave as quickly as possible. I would not have wanted to be stranded there at night.<sup>4</sup>

Four years after my summer in Panama City, the Bay Harbor Poolroom was the scene of a burglary. It took place at about 5:30 a.m., on June 3, 1961. A cigarette machine and the juke box were broken into and coins were taken, along with some wine and beer.<sup>5</sup> The proprietor of the Bay Harbor Poolroom, Ira Strickland,

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2. Anthony Lewis, *Gideon's Trumpet* (Vintage Bks. 1964).

3. *Id.* at 101.

4. It was only some forty-three years later that my wife Ann and I were taken to this place again, as mentioned toward the end of this Article. *Infra* pt. X(B).

5. There is a dispute about what was taken during the break-in. At Gideon's first trial, the testimony showed that coins were taken from the juke box and from the cigarette machine, as well as a small amount of beer and wine. The proprietor of the Bay Harbor Poolroom was uncertain how much had been taken and its value, and that may have been

was uncertain how much had been taken and its value. Clarence Earl Gideon, a man in his early 50s who lived in a rooming house nearby, was arrested later that morning and charged with the crime. He was tried and convicted without the benefit of counsel. The case went to the Florida Supreme Court, and then, to the United States Supreme Court, where the conviction was set aside in the landmark right-to-counsel case of *Gideon v. Wainwright*.<sup>6</sup> The case was sent back to Panama City for a second trial. W. Fred Turner represented Gideon at the second trial and, with Turner defending him, he was acquitted.

At the time, I was an Assistant Attorney General of Florida and was involved in the portion of the case that took place in the United States Supreme Court. I did not participate in either trial. I have been asked many times what it was like to argue before the Supreme Court in the *Gideon* case as a young Assistant Attorney General of Florida. This Article will begin by briefly looking at the background of the case—the historical developments that set the stage for the *Gideon* decision. It will discuss the first trial, followed by the proceedings before the United States Supreme Court, then the second trial, and finally some questions that people often ask me about the case and my role in it will be attempted to be answered.

I have included a smattering of personal data throughout this Article to give the reader a flavor of the extent to which my involvement in this case has had ramifications in my life. This work on *Gideon* nurtured my interest in teaching law, particularly in the fields of criminal law and procedure and post-conviction remedies, including criminal defense work and prison reform efforts. It has now been over forty years since my involvement in *Gideon*, but I still have strong feelings about some of the issues in the case.

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why Gideon was charged with breaking and entering with intent to commit petit larceny, rather than grand larceny. Petit larceny, in 1961, in Florida, consisted of taking money or property of a value of less than fifty dollars. At the second trial, there was testimony by an investigating officer to the effect that, in addition, some Cokes had been taken. This statement conflicted with the testimony of the proprietor, who at both trials mentioned only the coins from the juke box and the cigarette machine and a small amount of beer and wine. Consult *infra* nn. 345–360 and accompanying text.

6. 372 U.S. 335 (1963).

## II. RIGHT TO COUNSEL: BACKGROUND OF THE GIDEON DECISION

### A. Early Developments

Throughout English and American legal history, distinctions have been drawn between the hiring or retaining of counsel, on the one hand, and, on the other hand, the appointment of counsel to represent a defendant who is too poor to pay for a lawyer. In England, centuries ago, a person charged with a misdemeanor could appear with retained counsel, but there was no right to have counsel appointed at public expense if the defendant could not afford to hire a lawyer.<sup>7</sup> And in a felony case, the defendant had no right to counsel whatsoever, either retained or appointed.<sup>8</sup> Apparently, the thinking was that, in a very serious criminal case, the defendant should not be acquitted just because of a defense lawyer's skill.<sup>9</sup> The courts did, however, allow persons charged with a felony to raise legal questions and to consult with a lawyer for the purpose of obtaining answers to those questions.<sup>10</sup>

By the time this Country was formed, it was recognized that a defendant in any criminal case should have the right to be represented by retained counsel. Also, by that time, several states, in their constitutions, provided for appointment of counsel in capital cases or in cases of treason.<sup>11</sup> In Connecticut, appointment took place in noncapital cases, not because of a constitutional provision

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7. *E.g. Betts v. Brady*, 316 U.S. 455, 466 (1942); *Powell v. Ala.*, 287 U.S. 45, 62 (1932).

8. William Blackstone, *Commentaries* vol. 5, \*355 ("it is a settled rule at common law, that no counsel shall be allowed to a prisoner, upon his trial upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated"); Sir Edward Coke, *Institutes* vol. 3, \*137 ("Where any person is indicted of Treason or Felony, and pleadeth to the Treason or Felony, not guilty, . . . it is holden that the party in that case shall have no counsell"). The common-law rule was altered to allow representation of counsel in treason cases, 7 Will. 3, ch. 3, § 1 (1695) (Eng.), but was not entirely abandoned until 1836, when a statute was enacted to provide the following: "all persons tried for Felonies shall be admitted, . . . to make full Answer and Defence . . . by Counsel learned in the Law, or by Attorney in Courts where Attornies practise as Counsel." 6 & 7 Will. 4, ch. 114, § 1 (1836) (Eng.).

9. Lewis, *supra* n. 2, at 104, 109. However, by the mid-eighteenth century, all American colonies, though some initially applying the common-law rule, abandoned it, thereby recognizing that legal assistance was necessary to protect against the conviction of innocent individuals. Anton-Hermann Chroust, *The Rise of the Legal Profession in America* vol. 1, 42-44 (U. Okla. Press 1965).

10. *Betts*, 316 U.S. at 466.

11. *Id.* at 465-466.

or statute, but as a matter of practice and custom.<sup>12</sup> When the Sixth Amendment to the United States Constitution was adopted in 1791, its purpose was to ensure that a person charged with any federal crime should have the right to be represented by a retained lawyer.<sup>13</sup> It applied only in the federal courts, and it did not include a right to have counsel appointed if the defendant was indigent and unable to obtain retained counsel.<sup>14</sup> However, shortly before the Bill of Rights was adopted, including the Sixth Amendment, Congress enacted a statute requiring federal courts to provide defendants charged with treason or other capital crimes with assigned counsel upon request.<sup>15</sup>

The Fourteenth Amendment was adopted following the Civil War to provide protection to individuals against denials of due process or equal protection of the laws by the states; however, it was not intended to require the specific protections of the Fourth, Fifth, Sixth, and Eighth Amendments to be provided to defendants in state courts.<sup>16</sup> It did not provide a right to counsel of any kind, retained or appointed, in state courts.<sup>17</sup> However, even

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12. *Id.* at 467 n. 20.

13. *Id.* at 464, 466. This conclusion is substantiated by Justice Joseph Story, who commented on the right to counsel as being a right to “employ” counsel. Joseph Story, *Commentaries on the Constitution of the United States* 667 (Carolina Academic Press 1987) (originally published in 3 vols. Hilliard, Gray & Co. 1833; 5th ed., Little Brown & Co. in 2 vols. 1891; 1905); e.g. *U.S. v. Van Duzee*, 140 U.S. 169, 173 (1890); *Sanford v. Robbins*, 115 F.2d 435, 438 (5th Cir. 1940); *Saylor v. Sanford*, 99 F.2d 605, 607 (5th Cir. 1938) (Sibley, J., concurring).

14. See *Bute v. Ill.*, 333 U.S. 640, 662–663 (1948); *Betts*, 316 U.S. at 461–462; Alexander Holzoff, *The Right of Counsel under the Sixth Amendment*, 20 N.Y.U. L.Q. Rev. 1, 7 (1944). As originally understood, the Sixth Amendment guaranteed “the assistance of counsel of [the defendant’s] own selection.” *Andersen v. Treat*, 172 U.S. 24, 29 (1898); see *Powell*, 287 U.S. at 53, 60–65 (explaining that “the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice”); Bruce J. Winick, *Forfeiture of Attorneys’ Fees under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. Miami L. Rev. 765, 786–799 (1989).

15. 1 Stat. 118 (1790). That statute, in pertinent part, reads as follows:

[E]very person so accused and indicted for any of the crimes aforesaid, [treason and other capital offenses], shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire.

The current version of this statute can be found at Title 18 United States Code Section 3005 (2000).

16. *Betts*, 316 U.S. at 461–462.

17. *Id.*; see *Gaines v. Wash.*, 277 U.S. 81, 85 (1928); *Howard v. Ky.*, 200 U.S. 164, 172

though the federal Constitution did not do so, state legislatures enacted statutes that provided an absolute right to counsel in capital cases.<sup>18</sup> Also, courts in both the federal and state legal systems took the position that they had the inherent power to appoint counsel for indigent defendants in any criminal case.<sup>19</sup> And, it was the responsibility of every lawyer to accept appointment without fee.<sup>20</sup> This was expected of each lawyer as part of the privilege of being allowed to practice law.

### B. The “Scottsboro” Case

The first major case dealing with the question of counsel in criminal cases in this Country was *Powell v. Alabama*,<sup>21</sup> decided in 1932. This was the infamous case of the “Scottsboro Boys,” black youths who, during the Great Depression, were riding on a freight train through rural Alabama.<sup>22</sup> A group of white youths were also on the train, plus two young white women.<sup>23</sup> A dispute arose and the black group threw all the white boys off the train except one.<sup>24</sup> The white boys went to local police.<sup>25</sup> The police radioed or telegraphed ahead and had the train stopped; the young black boys were arrested and charged with rape, a capital offense at that time in Alabama.<sup>26</sup> The women went along with the rape claim, but provided few details.<sup>27</sup> There almost seemed to be an

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(1906); *West v. La.*, 194 U.S. 258, 262 (1904); *Eilenbecker v. Dist. Ct. of Plymouth County*, 134 U.S. 31, 34 (1890); *Brooks v. Mo.*, 124 U.S. 394, 397 (1888); *In re Sawyer*, 124 U.S. 200, 219 (1888); *Spies v. Ill.*, 123 U.S. 131, 166 (1887).

18. *Powell*, 287 U.S. at 73.

19. William M. Beaney, *The Right to Counsel in American Courts* 77 (U. of Mich. Publications 1955).

20. *Powell*, 287 U.S. at 73; Beaney, *supra* n. 19, at 77.

21. 287 U.S. 45. For interesting narrative accounts, which describe *Powell* and deal with the major issues raised—radicalism, racism, and the operation of a southern court system—see generally Dan T. Carter, *Scottsboro: A Tragedy of the American South* (2d rev. ed., La. St. U. Press 1969); Allan Knight Chalmers, *They Shall be Free* (Doubleday 1951); James Goodman, *Stories of Scottsboro* (Pantheon Bks. 1994); Clarence Norris & Sybil D. Washington, *The Last of the Scottsboro Boys: An Autobiography* (Putnam 1979); Haywood Patterson & Earl Conrad, *Scottsboro Boys* (Doubleday 1950); Quentin James Reynolds, *Courtroom: An Autobiography of Samuel Leibowitz* 248–314 (Bks. for Libs. Press 1970) (originally published by Farrar, Straus 1950).

22. *Powell*, 287 U.S. at 50.

23. *Id.*

24. *Id.* at 50–51.

25. *Id.* at 51.

26. *Id.*

27. *Id.*



assumption that, if black men and white women had been together on that train, the black men must have committed a sex crime against the women. The lone white boy who had remained on the train was called at trial as a rebuttal witness for the defendants.<sup>28</sup>

Because it was a capital case in the South involving young black men who allegedly raped white women, the case attracted worldwide attention. Reporters from all over the Nation and the world congregated at the courthouse on the day of arraignment.<sup>29</sup> Because it was a capital case, the defendants were entitled, under Alabama statutory law, to the appointment of counsel.<sup>30</sup> The trial judge, however, did not appoint a specific lawyer to represent each individual defendant. Instead, the judge appointed “all the members of the bar” of the county to represent the defendants as a group.<sup>31</sup> And since the appointment was indefinite, with no lawyer specifically assigned to provide a defense for any particular defendant, it was easy for the lawyers to do very little. None of the lawyers in the county took responsibility for providing more than a token defense.<sup>32</sup> Also, the appointment was “close upon the trial” and, for that reason, was ineffective.<sup>33</sup> The representation provided was almost nonexistent, and the trial, which took place in a grotesque, carnival-like atmosphere with the defendants under military guard to protect them,<sup>34</sup> was a farce.

The Alabama Supreme Court affirmed the convictions, but the United States Supreme Court reversed.<sup>35</sup> The Court asserted that the defendants had been denied the ability to consult with counsel and to have the opportunity to prepare for trial, and indicated that the trial court should have granted a continuance to allow the defendants to secure their own counsel, saying,

In the light of . . . the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . we think the failure of the trial court to give them reasonable time

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28. *Id.*

29. Lewis, *supra* n. 2, at 112.

30. *Powell*, 287 U.S. at 59.

31. *Id.* at 49, 53–55.

32. *Id.* at 58.

33. *Id.* at 53.

34. *Id.* at 51. The Supreme Court later said that the “proceedings, from beginning to end, took place in an atmosphere of tense, hostile and excited public sentiment.” *Id.*

35. *Id.* at 50, 73.

and opportunity to secure counsel was a clear denial of due process.<sup>36</sup>

Therefore, the State had violated their right to retain counsel.

Then, the Court discussed their right to have counsel appointed and said that, under the facts of the case, the trial court should have assigned counsel to represent the defendants, whether requested or not. This was a capital case, and state law required appointment of counsel. Furthermore, the defendants were ignorant, strangers in the place of trial, and rushed to trial without retained counsel and without the effective appointment of counsel. In this situation, counsel was essential if the defendants were to receive a fair hearing, and the right to counsel meant the right to effective assistance of counsel, not a mere pro forma appointment. The Court reviewed all of the facts and circumstances, and announced that,

in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.<sup>37</sup>

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36. *Id.* at 71.

37. *Id.* However, the rationale of the opinion strongly suggests the need for counsel generally:

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

*Id.* at 68–69. Nevertheless, a right to counsel had been heralded, but only in the context of capital punishment. Initially, *Powell* protected capital defendants who labored under special infirmities such as “ignorance, feeble mindedness, illiteracy, or the like.” *Id.* at 71. Later, the Court, in *Avery v. Alabama*, 308 U.S. 444 (1940), stated that if a capital defendant has been denied counsel, the denial violates “the Fourteenth Amendment’s guarantee of assistance of counsel” and that this requirement was based on both Alabama law and the Fourteenth Amendment. *Id.* at 445–446. These words were written by Justice Hugo LaFayette Black, who cited *Powell* as authority for this conclusion. *Id.* Later, in *Betts*, the Court pointed out that the holding of *Powell* was predicated on its facts, including the fact that Alabama state law required appointment in capital cases, and indicated that in *Pow-*

*Powell* involved a capital charge of rape. In the 1930s, 1940s, 1950s, and even the 1960s, at the time of *Gideon*, there were some crimes, in addition to murder, that were punishable by death in some states. Kidnapping, rape, burglary of a dwelling at night, armed robbery, and other crimes, which we now think of as non-capital crimes, were punishable by death in certain states, particularly Southern states.<sup>38</sup> Thus, in some jurisdictions, the holding of *Powell* applied to indigents in a fairly large proportion of felony cases.<sup>39</sup>

*Powell* was based on the circumstances of the case, and the fact that it was a capital case was just one of the circumstances that led to the decision. But, over time, the decision took on a larger meaning. It began to be cited for the principle that due process required the automatic appointment of counsel in every capital case if the defendant was indigent.<sup>40</sup> *Powell* did not establish a flat rule, but, as a practical matter, because all states that allowed capital punishment had statutes requiring counsel, it understandably came to be incorrectly cited as an automatic rule requiring counsel in every capital case.

### C. Expansion of the Sixth Amendment in Federal Courts

In 1938, the Supreme Court, in *Johnson v. Zerbst*,<sup>41</sup> expanded the Sixth Amendment and held that, not only was there a right to retain counsel under that provision, but that in federal courts, an attorney must be appointed if the defendant was unable to afford one.<sup>42</sup> It was not difficult, as a practical matter, to implement such

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*ell*, it had not held that the Fourteenth Amendment automatically requires appointment. 316 U.S. at 461–464. The Court, in *Betts*, also mentioned *Avery* and made it clear that the fact that state law required the appointment of counsel was the critical factor in that case. *Id.* at 464. Justice Black dissented in *Betts*. *Id.* at 474.

38. *E.g.* Ga. Code Ann. § 27-2534.1 (1977).

39. *Coker v. Georgia*, 433 U.S. 584 (1977), virtually put an end to the use of capital punishment in crimes other than homicides. In particular, the Court held that the imposition of the death penalty for rape violated the Cruel and Unusual Punishment Clause of the Eighth Amendment of the Constitution. *Id.* at 592.

40. *Betts*, 316 U.S. at 462–464.

41. 304 U.S. 458 (1938).

42. *Id.* at 467–469. Moreover, the Court decided that defendants who could afford to engage counsel, but nevertheless appeared unrepresented, had to be first apprised of their Sixth Amendment right to counsel; otherwise, they could not be tried, unless they voluntarily and knowingly relinquished that right. *Id.* Later, in *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942), a lower federal court indicated that the phrase “all criminal prosecutions” in the Sixth Amendment was not to be narrowly construed to include only felony prosecu-

a requirement. This was long before drug cases had begun to clog the federal court system. For example, in 1940, only 31,823 criminal cases were commenced in all of the federal districts throughout the United States.<sup>43</sup> Lawyers who accepted the privilege of practicing before the federal courts could easily be imposed upon to represent indigent defendants without fee.<sup>44</sup> The great mass of crimes—larcenies, robberies, burglaries, and assaults—are state crimes, not federal. By comparison, in 1926, 31,439 cases were commenced in Pennsylvania’s four largest cities,<sup>45</sup> about the same amount as the total number of federal prosecutions throughout the Country fourteen years later.<sup>46</sup> Obviously, providing free attorneys in federal criminal cases was far more manageable than attempting to provide free attorneys to indigents in state prosecutions. *Johnson*, of course, being an interpretation of the Sixth Amendment, did not apply in state courts.<sup>47</sup>

The Supreme Court has supervisory power over the lower, or “inferior,” federal courts.<sup>48</sup> Therefore, the Supreme Court probably

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tions. *Id.* at 637–638. *Johnson* did not apply in federal military prosecutions. Those charged with the most serious military crimes were assigned an officer in the Judge Advocate General’s Corps, a licensed attorney. In less serious cases, the person appointed was an officer, but not a legally trained or licensed attorney. These observations are based on my experience as an Army clerk-typist in a “Courts and Boards” office at Fort Jackson, South Carolina, in 1960. See generally David Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 Neb. L. Rev. 559 (1951) (discussing the Sixth Amendment right to counsel).

43. *Rpt. of the Jud. Conf. of Sr. Cir. Judges, Annual Rpt. of the Dir. of the Admin. Off. of the U.S. Cts. 1940*, at 113 tbl. 10 (U.S. Govt. Printing Off. 1941).

44. When I was first admitted to practice in federal court—in the United States District Court for the Middle District of Florida, in Tampa, in 1962—the United States district judge had scheduled arraignments in criminal cases of indigent defendants at the same time as the swearing-in ceremonies for newly admitted attorneys. As we were sworn in, the judge instructed us to stand by so that each of us could be assigned to represent a defendant during the arraignments. I was assigned to represent a client charged with “dodging” the military draft, who told me that he wanted to enter the military. He had tried to volunteer, but had been turned down repeatedly. When the draft notice arrived, he had not acted on it because he thought that because he had repeatedly been turned down, the notice was a mistake. We were able to get him into the Army, and the criminal charge was dropped. This method of assigning cases to newly admitted attorneys was probably used by many federal judges as the way of complying with *Johnson*.

45. Natl. Commn. on L. Observance & Enforcement, *Report on Prosecution* 186 tbl. I (U.S. Govt. Printing Off. 1931). In 1925, the number of prosecutions in New York City was 19,084. *Id.* Even as late as 1968, the number of criminal cases commenced in the United States District Courts was only 30,714. *Rpts. of the Proceedings of the Jud. Conf. of the U.S., Annual Rpt. of the Admin. Off. of the U.S. Cts. 1968*, at 117–119 (1969).

46. *Supra* n. 43 and accompanying text.

47. 304 U.S. at 458.

48. 28 U.S.C. § 2072(a) (2000). The statute states that “the Supreme Court shall have

could have required appointment of counsel in federal district courts as part of its power to make rules for the lower courts.<sup>49</sup> *Johnson*, though, was based on the Sixth Amendment.<sup>50</sup> However, the Court could have reached a similar result through the adoption of a court rule alone, but such a power did strengthen its resolve in imposing such a constitutional requirement in *Johnson*.

#### D. The *Betts v. Brady* Decision

In 1942, the Supreme Court, in *Betts v. Brady*,<sup>51</sup> was confronted with the issue of whether an indigent in state court in a noncapital felony case should have the right to appointed counsel.<sup>52</sup> In other words, should the decision regarding federal defendants in *Johnson* apply in state courts? It was one thing to impose such a requirement under the Sixth Amendment in federal courts where the volume of cases was small, but it would have been quite another to impose the same requirement under the Fourteenth Amendment in state courts, where the everyday, garden-variety crimes were prosecuted. It would have been difficult, as a practical matter in 1942, to require all state courts to provide free attorneys to every indigent defendant. Therefore, in *Betts*, the Court did not impose a flat, absolute rule that counsel must be appointed for every indigent, criminal defendant in a noncapital case.<sup>53</sup> Rather, the Court held that state trial courts must appoint counsel whenever the circumstances were such that due process required counsel to provide a fair trial.<sup>54</sup>

Some commentators have criticized *Betts* on the grounds that it was a departure from the principles of *Powell*.<sup>55</sup> In reality, however, *Betts* was an extension of *Powell* to noncapital felony cases, for *Powell* had not imposed a flat requirement that counsel must be provided for indigents in all capital cases.<sup>56</sup> The Court's holding

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the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals." *Id.*

49. *Id.*

50. 304 U.S. at 459.

51. 316 U.S. 455.

52. *Id.* at 461.

53. *Id.* at 471.

54. *Id.* at 471–472.

55. *E.g.* Yale Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 Mich. L. Rev. 219, 254–255 (1962).

56. *Powell*, 287 U.S. at 73.

was based on the particular facts and circumstances involved. The fact that it was a capital case was one of the elements that the Court considered in determining whether counsel should have been effectively appointed and whether sufficient preparation time was provided to ensure a fair trial for the defendants.<sup>57</sup> *Powell* established the “special circumstances” principle, and *Betts* extended that principle to noncapital cases.<sup>58</sup> However, as has been pointed out, the legal world began to cite *Powell*—though incorrectly—as imposing a flat rule requiring automatic appointment under the Due Process Clause in all capital cases,<sup>59</sup> and some therefore erroneously believed that *Betts* was a step backward from the central holding of *Powell*.<sup>60</sup>

The State of Maryland had indicted the defendant in *Betts* for robbery, a noncapital felony.<sup>61</sup> The defendant was unable to employ counsel, and he asked for an appointed attorney, but the trial judge advised him that counsel would not be appointed.<sup>62</sup> After a trial in which *Betts* represented himself and was convicted, he applied for a state writ of habeas corpus.<sup>63</sup> The court denied relief, and *Betts* petitioned the United States Supreme Court for a writ

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57. *Id.* at 71–73.

58. *Id.* at 71; *Betts*, 316 U.S. at 472–473.

59. In *Gideon*, 372 U.S. at 342, Justice Black, in the majority opinion, indicated that *Betts* was an erroneous decision from its inception. However, Justice John Harlan did not “subscribe to the view that *Betts v. Brady* represented ‘an abrupt break with its own well-considered precedents.’” *Id.* at 349 (Harlan, J., concurring). He pointed out that the holding of *Powell* had been limited to its own facts and circumstances even though the defendants involved had been charged with capital crimes. *Id.* He further stated as follows:

[W]hen this Court, a decade later, decided *Betts v. Brady*, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions . . . but to have imposed these requirements on the States would indeed have been “an abrupt break” with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in *Powell v. Alabama*, was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

*Id.* at 350. Justice Harlan nevertheless voted with the majority in *Gideon*. *Id.* He pointed out that, since 1950, the Supreme Court had found the existence of special circumstances in all cases that involved the right to appointment of counsel in noncapital felonies, and said that, “[t]he Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality.” *Id.* at 351.

60. Kamisar, *supra* n. 55; *Gideon*, 372 U.S. at 342–343.

61. 316 U.S. at 456.

62. *Id.* at 457.

63. *Id.*

of certiorari.<sup>64</sup> The Supreme Court granted certiorari, but affirmed the state ruling.<sup>65</sup>

According to Justice Owen Roberts, speaking for the majority, the issue was whether due process of law demanded that, in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defendant.<sup>66</sup> To answer the question, Justice Roberts reviewed the constitutional and statutory provisions in the colonies and states before the inclusion of the Bill of Rights in the Constitution, and the constitutional, legislative, and judicial history of the states before 1942.<sup>67</sup> His legal research showed that, as of 1942, nineteen states were providing counsel in some situations to indigents in noncapital felonies and twenty-three states were not.<sup>68</sup> The requirements in the remaining states apparently were not known. Justice Roberts said,

This material demonstrates that, in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy.<sup>69</sup>

Because the research showed that the states had not considered appointment of counsel for indigents to be “fundamental,”<sup>70</sup> the Court decided that the Fourteenth Amendment did not incorporate, as such, the specific right-to-counsel guarantee found in the Sixth Amendment.<sup>71</sup> Because the concept of due process under the Fourteenth Amendment is more flexible than the specific requirement of the Sixth Amendment, Justice Roberts said that, the Fourteenth Amendment’s

application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice,

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64. *Id.*

65. *Id.*

66. *Id.* at 467–471.

67. *Id.*

68. *Id.*

69. *Id.* at 471.

70. *Id.*

71. *Id.*

may, in other circumstances, and in the light of other considerations, fall short of such denial.<sup>72</sup>

Justice Roberts further reasoned that, although not every denial of counsel by a state court violates due process, such denial may, in certain circumstances or in connection with other elements in a given case, deprive a defendant of due process of law under the Fourteenth Amendment.<sup>73</sup>

In *Betts*, the crime was robbery, and the accused was a forty-three-year-old man “of ordinary intelligence, and ability to take care of his own interests” in that particular instance, because the “simple issue was the veracity of the testimony for the State and that for the defendant.”<sup>74</sup> The accused “was not wholly unfamiliar with criminal procedure.”<sup>75</sup> Under such circumstances, said the majority, his trial without a jury, resulting in a sentence of eight years,<sup>76</sup> was not lacking in “the common and fundamental ideas of fairness and right” embodied in the Due Process Clause of the Fourteenth Amendment.<sup>77</sup> Justice Black wrote a dissenting opinion that was joined by Justices Frank Murphy and William Douglas. They would have imposed a *Johnson*-type of rule in state court proceedings.<sup>78</sup>

Between 1942—when *Betts* was decided—and the early 1960s, the Supreme Court considered many cases in which an indigent, state defendant charged with a noncapital felony was convicted without counsel and in which the defendant alleged on review that one or more special circumstances were present. In many of these cases, the Court found at least one special circumstance which necessitated that the case be reversed. In those instances, the Court ordered that the defendant be given a second trial, this time with the benefit of appointed counsel. Below is a partial list of the kinds of special circumstances, requiring the appointment of counsel, that the Court developed between 1942 and the *Gideon* decision in 1963:

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72. *Id.* at 462.

73. *Id.*

74. *Id.* at 472.

75. *Id.*

76. *Id.* at 457.

77. *Id.* at 473.

78. *Id.* at 475–476.



1. serious or complex charge against the defendant;<sup>79</sup>
2. ignorance of the defendant;<sup>80</sup>
3. illiteracy or lack of education;<sup>81</sup>
4. extreme youth or lack of experience;<sup>82</sup>
5. unfamiliarity with court procedure;<sup>83</sup>
6. feeble-mindedness or insanity;<sup>84</sup>
7. inability to understand the English language;<sup>85</sup> and
8. prejudicial conduct by the trial judge, prosecuting attorney, or public defender.<sup>86</sup>

#### E. Incorporation of the Bill of Rights into the Fourteenth Amendment and the Right to Counsel

While applying the *Betts* rule in a series of cases between 1942 and 1963,<sup>87</sup> the Court also simultaneously grappled with the question of whether the specific guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments, as a group, should be incorporated into the concept of due process of law under the Fourteenth Amendment and thereby made applicable in the criminal-justice systems of the states. In 1947, four Supreme Court Justices voted for this view in *Adamson v. California*,<sup>88</sup> and if they had pre-

79. *E.g. Chewning v. Cunningham*, 368 U.S. 443 (1962); *Hamilton v. Ala.*, 368 U.S. 52 (1961); *McNeal v. Culver*, 365 U.S. 109 (1961); *Pa. ex rel. Herman v. Claudy*, 350 U.S. 116 (1956); *DeMeerleer v. Mich.*, 329 U.S. 663 (1947); *Rice v. Olson*, 324 U.S. 786 (1945).

80. *Tomkins v. Mo.*, 323 U.S. 485 (1945); *Smith v. O'Grady*, 312 U.S. 329 (1941).

81. *Carnley v. Cochran*, 369 U.S. 506 (1962); *Cash v. Culver*, 358 U.S. 633 (1959).

82. *Moore v. Mich.*, 355 U.S. 155 (1957); *Wade v. Mayo*, 334 U.S. 672 (1948); *Uveges v. Pa.*, 335 U.S. 437 (1948).

83. *McNeal*, 365 U.S. 109; *Wade*, 334 U.S. 672.

84. *Massey v. Moore*, 348 U.S. 105 (1954); *Palmer v. Ashe*, 342 U.S. 134 (1951).

85. *Marino v. Ragen*, 332 U.S. 561 (1947).

86. *Reynolds v. Cochran*, 365 U.S. 525 (1961); *Gibbs v. Burke*, 337 U.S. 773 (1949); *Townsend v. Burke*, 334 U.S. 763 (1948); *White v. Ragen*, 324 U.S. 760 (1945).

87. The “impossibly vague and unpredictable standard,” *Carnley*, 369 U.S. at 517, of *Betts*, looking for aggregate unfairness, continued to expand so much that the effort to apply it on a case-by-case basis “proved to be [a] weariness of flesh and spirit.” Paul A. Freund, *On Law and Justice* ii (Harv. U. Press 1968). For a discussion of the process—and three pre-*Gideon* cases—that led to the Court writing a formal obituary of *Betts*’ “special circumstances” rule in 1963, see Daniel John Meador, *Preludes to Gideon 2–7*, 27–208 (Michie Co. 1967).

88. 332 U.S. 46 (1947). In particular, Justice Black uncompromisingly championed his view that the absorption theory incorporates the Bill of Rights—all of it, lock, stock, and barrel, nothing more or less—into the Fourteenth Amendment. See *Duncan v. La.*, 391 U.S. 145, 162–171 (1968) (Black, J., concurring); *Adamson*, 332 U.S. at 68–123 (Black, J.,

vailed, the Sixth Amendment, as interpreted by the Court in *Johnson*,<sup>89</sup> would have applied to the states. Therefore, counsel would have been required automatically in every state criminal case unless the defendant waived this right. However, this approach was rejected by the majority in *Adamson*.<sup>90</sup> Selective incorporation of the rights contained in the Bill of Rights—incorporation of one right at a time, rather than total incorporation—eventually became the method of deciding which rights had become so fundamental as to become part of the concept of due process of law under the Fourteenth Amendment.<sup>91</sup>

In *Wolf v. Colorado*,<sup>92</sup> the Supreme Court, in 1949, declared that, “[t]he security of one’s privacy against arbitrary intrusion by the police [was] implicit in ‘the concept of ordered liberty’ and as such [was] enforceable against the States through the Due Process Clause.”<sup>93</sup> According to the Court, this was “at the core of the Fourth Amendment”; however, the Fourth Amendment itself was not incorporated into the Fourteenth Amendment.<sup>94</sup> This was made explicit by Justice Harlan, in *Mapp v. Ohio*.<sup>95</sup> “[W]hat was recognized in *Wolf* was not that the Fourth Amendment *as such* is enforceable against the States as a facet of due process . . . but the principle of privacy ‘which is at the core of the Fourth Amendment.’”<sup>96</sup>

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dissenting); *Betts*, 316 U.S. at 474–475 n. 1 (Black, J., dissenting). These views were later systematically developed in his Carpentier Lectures at the Columbia Law School, essentially responding to Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746 (1965), in Hugo LaFayette Black, *A Constitutional Faith* xvi–xvii, 34–42 (Alfred A. Knopf, Inc. 1968). For an excellent discussion of the various models of incorporation—“total incorporation,” “selective incorporation,” and “refined incorporation”—see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1196–1197, 1262–1266, 1272–1284 (1992); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* xiii–xv, 7, 129, 137–140, 172, 180, 187–188, 199, 212–219, 281–283, 289–290 (Yale U. Press 1998); Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 St. Louis U. L.J. 303 (2001).

89. *Supra* nn. 41–42 and accompanying text.

90. *Adamson*, 332 U.S. at 46–59.

91. *Gideon*, 372 U.S. at 339–345.

92. 338 U.S. 25 (1949). *Wolf* was partially overruled by *Mapp v. Ohio*, 367 U.S. 643, 650–656 (1961), to the extent that it did not impose an exclusionary rule regarding evidence obtained in violation of the Fourth Amendment.

93. *Id.* at 27–28 (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937)).

94. *Id.* at 27.

95. 367 U.S. 643.

96. *Id.* at 679 (Harlan, J., dissenting) (emphasis in original).

In *Mapp*, the Court decided to make the exclusionary rule<sup>97</sup> applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>98</sup> In doing so, the Court did not declare that the Fourth Amendment, in its totality, was being incorporated into the Fourteenth Amendment.<sup>99</sup> The core of the Fourth Amendment—that is, arbitrary intrusion of one’s privacy—had already been made part of the Fourteenth Amendment in *Wolf*,<sup>100</sup> and now the exclusionary rule was being engrafted onto the Fourteenth Amendment. However, questions still lingered: Had the Fourth Amendment, in its exact contours, been incorporated or not? Was the core right to privacy, which already had been made part of due process, coextensive with the Fourth Amendment? Could the entire Fourth Amendment, or any specific guarantee of the Fourth, Fifth, Sixth, or Eighth<sup>101</sup> Amendments, become part of due process? Or, was the concept of due process in criminal cases too expansive, undefined, amorphous, and flexible to be equated

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97. The exclusionary rule that federal courts have applied since 1914 was imposed by caselaw, *Weeks v. United States*, 232 U.S. 383 (1914), and was not required by the Constitution until *Mapp*.

98. *Mapp*, 367 U.S. at 655. Justice Tom Clark wrote for the majority: “Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment], it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.” *Id.* Justice Black, on June 15, 1961, wrote Justice Clark that the sentence, quoted above, bothered him, for he had always thought “the Fourth Amendment as a whole is applicable to the States and not some imaginary and unknown fragment designated as ‘the right of privacy.’” William Cohen & David J. Danelski, *Constitutional Law: Civil Liberties and Individual Rights* 769 n.\* (3d ed., Found. Press 1994) (quoting Clark Papers, Texas, Box A115). On being assured by Justice Clark that the *Mapp* opinion matched his views, Justice Black then withdrew his objection to the *Mapp* sentence. *Mapp*, 367 U.S. at 661–666 (Black, J., concurring). However, compare Justice Black’s comments in his dissenting opinion in *Griswold v. Connecticut*, 381 U.S. 479, 508–510 (1965), which seem to run counter to his earlier acquiescence to Justice Clark’s assurance relating to *Mapp*.

99. *Mapp*, 367 U.S. at 660.

100. “[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.” *Wolf*, 338 U.S. at 28.

101. In *Robinson v. California*, 370 U.S. 660, 667 (1962), *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947), and *In re Kemmler*, 136 U.S. 436, 446 (1890), the Supreme Court held that cruel and unusual punishment violates the Due Process Clause of the Fourteenth Amendment. The Court in those cases, however, had not “incorporated” the Eighth Amendment into the Fourteenth Amendment; instead, the Court recognized that the Due Process Clause of the Fourteenth Amendment, independent of the Eighth Amendment, prohibited “inhuman” or “barbarous” or otherwise cruel and unusual punishment. *In re Kemmler*, 136 U.S. at 447.

with or limited to one or more of the specific provisions of the Fourth, Fifth, Sixth, and Eighth Amendments?

The decision in *Gideon* answered these questions, making it clear that the selective incorporation theory had won.<sup>102</sup> The Court had embarked on this process of selectively incorporating the specific guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, one at a time. Naturally, this meant that every time a guarantee of the Bill of Rights was incorporated into the Fourteenth Amendment, all of the federal caselaw interpreting that section of the Bill of Rights also became applicable in state and federal prosecutions.<sup>103</sup>

### III. SYNOPSIS OF THE FIRST GIDEON TRIAL

#### A. Denial of Counsel: Did the Judge Comply with the “Special Circumstances” Test?

The Bay Harbor Poolroom was broken into on June 3, 1961, at about 5:30 a.m. The police arrested Gideon, who lived in a rooming house just a few doors away from the poolroom, and charged him with the felony of breaking and entering with intent to commit petit larceny.

Gideon was tried on August 4, 1961.<sup>104</sup> Assistant State Attorney William E. Harris tried the case, and the judge was Robert L. McCrary, Jr.<sup>105</sup> On the day of trial, the following colloquy took place:

The Court:	What says the State, are you ready to go to trial in this case?
Mr. Harris:	The State is ready, your Honor.
The Court:	What says the Defendant? Are you ready to go to trial?
The Defendant:	I am not ready, your Honor.
	. . . .
The Court:	Why aren't you ready?

102. *Gideon*, 372 U.S. at 339–345; see generally Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929, 942–946 (1965) (explaining interplay of the “incorporation” debate and the “assistance of counsel” doctrine).

103. *Duncan*, 391 U.S. 145.

104. Tr. Transcr. at 6, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

105. *Id.* at 8.

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- The Defendant: I have no Counsel.
- The Court: Why do you not have Counsel? Did you not know your case was set for trial today?
- The Defendant: Yes, sir, I knew that it was set for trial today.
- The Court: Why, then, did you not secure Counsel and be prepared to go to trial?<sup>106</sup>
- . . .
- The Defendant: Your Honor . . . I request this Court to appoint Counsel to represent me in this trial.
- The Court: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense.
- The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel.
- The Court: Let the record show that the Defendant has asked the Court to appoint Counsel to represent him.<sup>107</sup>

The court denied the request and informed the defendant, again, that one was entitled to counsel only in capital cases.<sup>108</sup>

Was Judge McCrary's denial consistent with what other judges in Florida were doing in similar situations? At that time, Florida's largest county, Dade County, had a defender system in place. The total population of the State at the time was 4,951,560, and Dade County, where the City of Miami is located, had a population of 935,047.<sup>109</sup> Thus, the public defender's office was serving almost one-fifth of the State's population. Broward County, where Fort Lauderdale is located, had a public defender office.<sup>110</sup> Additionally, Du-

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106. *Id.*

107. *Id.* at 9.

108. *Id.*

109. Bureau of the Census, U.S. Dept. of Com., *County & City Data Book, A Statistical Abstract Supplement* 52 tbl. 2 (U.S. Govt. Printing Off. 1962).

110. Lewis, *supra* n. 2, at 138.

val County, where Jacksonville is located, had a court-appointed-counsel system.<sup>111</sup> Also, in 1961, before the first *Gideon* trial took place, the Florida Legislature had enacted a “population act” that provided for the establishment of defender offices in counties with populations between 390,000 and 450,000 people.<sup>112</sup> Hillsborough County, where Tampa is located, was the only county that met this requirement, so a public defender office was about to be established there.

When Judge McCrary stated that, under Florida law, the only time he could appoint counsel was in a capital case, he was not accurate. *Betts*, as an interpretation of the Fourteenth Amendment by the Supreme Court, was as much a part of the law of Florida as any statute enacted by that Legislature,<sup>113</sup> and Florida law did not prohibit Judge McCrary from appointing counsel in noncapital felony cases. As a judge, he had the inherent authority to appoint counsel in any case. *Betts* compelled him to appoint counsel in any noncapital felony if the facts of the case or the background of the offender were such that appointment of counsel was essential to provide a fair trial to the defendant.

To comply with *Betts*, a trial judge had to make an inquiry to determine whether an indigent defendant was capable of representing himself. Judge McCrary should have considered Gideon’s age, his educational background, his prior experience in criminal courts, and his mental history, among other factors, before denying his request for counsel. It is possible that these inquiries were made during the arraignment, which took place five days earlier, but unfortunately there is no transcript of that proceeding. The court minutes show that at his arraignment, Gideon was “questioned by the Court concerning his understanding of the charge filed against him and of his rights under the law.”<sup>114</sup> However, two lawyers—Virgil Q. Mayo and Turner—who practiced criminal law before Judge McCrary in those days are uncertain whether he conducted an inquiry into Gideon’s past and his capabilities, because it was not his custom, or the custom of the other two judges

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111. Br. of Pet. at 31, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

112. 1961 Fla. Laws, ch. 61-639.

113. U.S. Const. art. VI. The Supremacy Clause of the Constitution requires state judges to follow the Constitution and the laws of the United States. *Id.* State court judges “shall be bound by Oath or Affirmation, to support this Constitution.” *Id.*

114. Br. of Respt. at 21, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

in that circuit, to do so.<sup>115</sup> If a defendant was obviously incompetent, he or she would be entitled to appointed counsel, but judges ordinarily did not thoroughly examine a defendant to determine whether *Betts* required appointment. Based on what he heard from others who were present at the arraignment, Mayo thinks that, at arraignment, some questions were asked of Gideon to determine whether he was competent, and that Judge McCrary explained to him that he had to be incompetent to be entitled to the appointment of counsel.<sup>116</sup>

Gideon was about fifty-two years old at the time, he had previous experiences before the courts, and he did not appear to have any obvious mental problems. It is possible that Judge McCrary based his decision to deny counsel on these observed facts, and that he believed he was in compliance with the special circumstances requirement of *Betts*, without the necessity for a more detailed inquiry into Gideon's personal background. However, if Judge McCrary had investigated Gideon's background, he would have learned that Gideon had a serious problem with alcohol. Arguably, this might have qualified as a special circumstance under *Betts*.

Another theory about why Judge McCrary denied Gideon's request for counsel is that he may not have been aware of the existence of the *Betts* decision. Panama City is in the Florida Panhandle, a remote, sparsely populated area. It is possible that Judge McCrary had so little contact with fellow judges from other parts of the State, that he was not completely aware of that decision. During an event in Panama City in 2000, I met and talked with several lawyers who had practiced criminal law before Judge McCrary in the early 1960s, and I asked them what he was like. The lawyers agreed that Judge McCrary was a kind and very nice person, but there was some doubt as to whether he was aware of *Betts* at the time. Mayo, however, commented that, if Judge

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115. I spoke with these lawyers on September 14 and 15, 2000, while in Panama City for a meeting of the St. Andrew Bay American Inn of Court. I was the guest speaker at the event. Mayo became the Public Defender for that circuit and served in that capacity from 1963 until the early 1990s. Turner, who obtained an acquittal for Gideon at his second trial, subsequently became a circuit judge for that circuit.

116. Telephone Interview with Virgil Q. Mayo, Pub. Def. (Retired), Panama City, Fla. (Dec. 9, 2002).

McCrary knew about the decision, it might have been only a vague idea somewhere in the back of his mind.<sup>117</sup>

Actually, Judge McCrary would have run into practical problems if he had followed a practice of appointing counsel, because there were so few lawyers in Bay County. According to the 1960 edition of *Martindale-Hubbell*, there were thirty-six lawyers in Bay County that year, thirty-four in Panama City, and one in each of the two outlying towns.<sup>118</sup> One of the thirty-six Bay County lawyers was not admitted to practice in Florida, and another was Harris, the Assistant State Attorney. That would have left thirty-four lawyers, some of whom were not trial lawyers, to handle the caseload of indigent defendants in that county, which at that time had a population of 67,131.<sup>119</sup> The ratio of lawyers who, in theory, could accept appointments was one for every 1,974 people. Based on 1960 figures regarding the ratio of serious crimes per 100,000 inhabitants in Florida, it can be estimated that there were about 1,812 serious crimes committed in Bay County, in 1960.<sup>120</sup> Of course, not all of the perpetrators would have been apprehended, and not all of those who were apprehended would have been indigent. However, if Judge McCrary had attempted to appoint lawyers to provide free legal help even to those whose cases involved special circumstances, in all likelihood, there would not have been enough trial lawyers available to handle the load, and there probably would have been an outcry from the members of the local bar.

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117. *Id.* It should also be mentioned that at the time of the *Gideon* case, I solicited a letter from Judge McCrary that was filed with the United States Supreme Court. *Infra* n. 217 and accompanying text. In the letter, Judge McCrary said, Gideon “had both the mental capacity and the experience in the courtroom . . . to adequately conduct his defense.” Was this an after-the-fact conclusion, or did he make this determination before the trial? We do not know the answer to this question.

Judge McCrary was born in 1915. He graduated from the University of Florida Law School in 1938. He practiced law until 1942, when he entered the U.S. Army and became a member of the 101st Airborne Division. McCrary remained in the U.S. Army Reserve until eventually rising to the rank of Lieutenant Colonel. He resumed the practice of law until 1948, when he was elected to county judge of Jackson County. McCrary was then appointed to the circuit court in 1959.

118. The other two towns were Lynn Haven and Sunnyside.

119. U.S. Bureau of the Census, *Florida Population: A Summary of 1980 Census Results* 26 (U. of Fla. 1981).

120. *Florida Crime Rates 1960–2000, Rothstein Catalog on Disaster Recovery*, <http://www.disastercenter.com/crime/ferime.htm> (Dec. 18, 2002). The number of violent crimes per 100,000 was 223.4, and the number of property crimes per 100,000 was 1,622.4. *Id.*



Furthermore, according to Mayo, we should not be overly critical of Judge McCrary when we consider the circumstances under which he had to operate during the early 1960s. The three judges of the circuit, which consisted of several counties, traveled from county seat to county seat to hear both civil and criminal cases.<sup>121</sup> They each had a secretary, but they had no law clerks in those days.<sup>122</sup> They often had to depend on the state attorneys to ascertain what the law was on a given issue, and the state attorneys “were not always up on the law.”<sup>123</sup> Today, the judges have a law clerk and a court administrator who travel with them.<sup>124</sup>

Before *Gideon*, an attorney appointed by the court to represent a defendant in a capital case was paid a fee of \$100, but the counties did not have any funds to pay lawyers appointed to noncapital cases.<sup>125</sup> This meant that newly admitted, inexperienced members of the local bar were selected whenever an appointment of counsel had to be made in a noncapital case.<sup>126</sup> If the judges had begun appointing counsel more frequently, they would have offended the practicing bar and the local taxing authorities, and this would have been unwise, in view of the fact that they had to run for reelection periodically.<sup>127</sup> Being a judge was, and still is, a highly political job in Florida.<sup>128</sup>

#### B. Why Did Gideon Insist upon Court-Appointed Counsel?

Why did Gideon keep insisting at the outset of the trial that he was entitled to counsel by the United States Supreme Court, even though there were no apparent special circumstances present in his case? One reason may have been that Gideon previously had been tried for a noncapital felony in the federal courts and had served time in a federal correctional institution. In the federal courts, counsel was provided in every criminal case,<sup>129</sup> and Gideon may have insisted that he should have appointed counsel because he thought that was the rule in state courts as well.

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121. Telephone Interview, *supra* n. 116.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Johnson*, 304 U.S. 458.

Gideon's federal conviction took place in 1932, in Missouri. He and others decided to rob a bank and wanted machine guns for the robbery. They broke into a federal armory, got the machine guns, and put them in the back of their old-fashioned-touring car with open sides. Not as many roads were paved in those days as are paved today. The car got stuck in the mud, and a deputy sheriff stopped to help. The sheriff saw the machine guns and arrested them.<sup>130</sup> Gideon was sentenced to three years for the break-in and three years for conspiracy; he was released from federal prison in 1937.<sup>131</sup>

Thus, Gideon's federal conviction took place several years before *Johnson*, and he was released the year before that decision. Because *Johnson* was probably pending while he was in federal custody, he may have known about the case. Or, a federal trial judge, who followed a practice of appointing attorneys, may have appointed counsel for Gideon even though the judge was not required to do so. This may have caused Gideon to think that attorneys were automatically appointed for indigent defendants in all federal prosecutions as early as 1932.

Also, Gideon had been tried for state felonies in the Missouri courts.<sup>132</sup> Missouri had a statute that required appointment of counsel in felony cases,<sup>133</sup> and Gideon may have erroneously thought that the Missouri statutory requirement was based on the United States Constitution.

### C. The Trial Judge's Assistance to Gideon in Conducting His Case

At the trial, Judge McCrary did not give Gideon the opportunity to conduct voir dire; instead, he asked five questions of the prospective jurors on Gideon's behalf,<sup>134</sup> including the following:

The Court:                    Will you give [Gideon] the same fair trial, and consideration, since he is not represented by Counsel, that you would if he were represented by Counsel?<sup>135</sup>

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130. Interview with W. Fred Turner, Sr. Cir. J. (Retired), Panama City, Fla. (Sept. 14–15, 2000).

131. Lewis, *supra* n. 2, at 70.

132. *Id.*

133. Mo. Rev. Stat. § 545.820 (1961).

134. Tr. Transcr. at 10, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

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Then, Judge McCrary said to Gideon,

The Court: Now, Mr. Gideon, look these six Gentlemen over and if you don't want them to sit as a Jury to try your case, just point out the one, or more, all six of them if you want to, and the Court will excuse them and we will call another, or some others, to try your case. You don't have to have a reason, just look them over and if you don't like their looks, that's all it takes to get them excused . . . .<sup>136</sup>

Gideon responded,

The Defendant: They suit me allright, your Honor.  
The Court: You are willing for these six men to try your case?  
The Defendant: Yes, sir.<sup>137</sup>

The jurors were sworn, and Assistant State Attorney Harris made an opening statement. Then, the following took place:

The Court: Mr. Gideon, would you like to tell the Jury what you expect the evidence in your behalf to show?  
The Defendant: Yes, your Honor, I would like to.  
The Court: Allright, you may do so at this time. Just walk right around there where you can see them, and they can see you, and tell them what you expect the evidence to show in your favor. Talk loud enough for them to hear you, now.<sup>138</sup>

Gideon gave an opening statement but, unfortunately, it was not transcribed, and there is no record of what Harris or Gideon said in their opening statements.<sup>139</sup>

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135. *Id.*

136. *Id.* at 10–11.

137. *Id.* at 11.

138. *Id.*

139. Turner has explained that arguments of counsel “were not taken or transcribed unless specifically requested [by one of the parties] and a ten dollar fee was assessed for transcription.” Ltr. from W. Fred Turner, Sr. Cir. J. (Retired) to Bruce R. Jacob, Dean Emeritus & Prof. of L. at Stetson U. College of L. (Oct. 15, 2002) (copy on file with Author).

At the first trial, the evidence showed that someone put a garbage can against a window located in the back of the Bay Harbor Poolroom, broke the window, climbed into the establishment, and stole money from the cigarette machine and the jukebox, along with some beer and wine. The owner of the poolroom was not sure how much money was taken or how much beer or wine was missing.<sup>140</sup>

In both trials, the key witness for the State was Henry Cook, the only person who could actually place Gideon in the Bay Harbor Poolroom at the time of the crime. Cook testified that he had come back from a dance in Apalachicola and had stayed out all night.<sup>141</sup> He walked by the poolroom at about 5:30 a.m., and as he looked in the window, he saw Gideon, whom he knew, inside.<sup>142</sup> Gideon was standing by the cigarette machine.<sup>143</sup> Cook then said he observed Gideon leave from the back of the building and walk along the alley behind the poolroom to a telephone booth by a store nearby.<sup>144</sup> Gideon was carrying a pint of wine and his pockets were bulging.<sup>145</sup> Cook further testified that Gideon appeared to be drunk.<sup>146</sup> Also, Cook saw Gideon get into a cab after making a telephone call from the phone booth.<sup>147</sup> Cook said he went back to the poolroom, looked through the window, and saw that the cigarette machine was open and that “stuff” was lying on the pool table.<sup>148</sup> Cook said the money box was lying on the pool table and the cigarette machine was torn up.<sup>149</sup>

When Gideon cross-examined Cook, he asked whether the witness had ever been convicted of a felony, and Cook answered, “No sir, never have.”<sup>150</sup> Gideon also asked if Cook knew where he, Gideon, lived. Cook responded that Gideon lived across the street from the poolroom at the Bay Harbor Hotel.<sup>151</sup>

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140. Tr. Transcr. at 13, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

141. *Id.* at 19.

142. *Id.* at 17.

143. *Id.*

144. *Id.* at 17–18.

145. *Id.*

146. *Id.* at 21.

147. *Id.* at 17.

148. *Id.* at 18.

149. *Id.*

150. *Id.* at 19. This answer became significant in the second *Gideon* trial in 1963.

151. *Id.* at 20.

Judge McCrary explained to Gideon that he could take the witness stand on his own behalf, but that he did not have to do so.<sup>152</sup> Gideon declined, but he did cross-examine all of the State's witnesses and call several witnesses on his own behalf.<sup>153</sup>

Gideon called Preston Gray, the cab driver, as a witness. Gray said that Gideon did not have any beer or wine with him that morning.<sup>154</sup> He testified that Gideon had not been intoxicated.<sup>155</sup> In Harris' cross-examination, the driver stated that Gideon had paid the fare of one dollar and a tip of fifty cents in quarters.<sup>156</sup> Gray also testified that Gideon worked at the Bay Harbor Poolroom, although he was not sure whether Gideon was paid for that work.<sup>157</sup>

Gideon also called Mrs. Irene Rhodes. She had been sitting on her porch across the street from the telephone booth used by Gideon.<sup>158</sup> Gideon asked the following question, among others:

Q: All you saw me do was emerge from the Alley, go to the Telephone Booth and call a Cab and go away, right?

A: Well, of course, I didn't see you call the Cab, but shortly after you went in the Telephone Booth a Cab came and you got in it and left. . . .<sup>159</sup>

The following exchange took place between the defendant and Rhodes:

Q: When did you first know the place had been broken into?

A: When the young man . . . what's his name, Cook . . . Henry Cook, when he walked up to the porch and told me.

Q: Walked up to your porch?

A: Yes.

Q: Did he leave down there before I left the Telephone Booth?

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152. *Id.* at 22.

153. *Id.*

154. *Id.* at 26.

155. *Id.* at 27.

156. *Id.*

157. *Id.* Lewis reported that Gideon said he had the keys to the poolroom and, therefore, did not need to break in. Lewis, *supra* n. 2, at 78. Of course, if he had wanted it to look like a break-in by someone who did not have keys, someone other than himself, he would not have used his keys.

158. Tr. Transcr. at 29, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

159. *Id.* at 31.

A: Yes. He left and called the “Cops.”

Q: Called the “Cops?”

A: Yes.<sup>160</sup>

On cross-examination, the prosecutor elicited a statement from Rhodes that, after Gideon left in the cab, she walked to the telephone booth and picked up a half-empty wine bottle on the ground outside the booth.<sup>161</sup>

Gideon also called Officer Henry Berryhill, Jr., who had investigated the break-in, to the stand. Officer Berryhill said that Cook was at the scene and reported that he had seen Gideon leave from the rear of the poolroom.<sup>162</sup> Officer Berryhill testified that, when he investigated shortly after the break-in, a door was open in the building.<sup>163</sup> Testimony at the second trial made it clear that the rear door was open.<sup>164</sup>

Was Cook the burglar? This seems unlikely, because immediately after the break-in took place, he walked to Rhodes’ front porch and told her about the break-in. Cook then said he would call the police, and he remained at the scene of the crime to inform the police about the break-in.

Gideon also called the owner of the Bay Harbor Hotel, the place where he lived, as a witness. The owner said that Gideon never got drunk.<sup>165</sup> She also said that Gideon usually used the telephone booth across the street so he would not disturb others at the Hotel.<sup>166</sup>

Figure 1 is a rough diagram of the area around the Bay Harbor Poolroom. It shows the location of the poolroom, the alley behind the poolroom, the telephone booth, the front porch from which Rhodes observed Gideon, and the Bay Harbor Hotel where Gideon lived. This drawing is based on information provided by Turner and from information contained in the transcripts of the two *Gideon* trials.

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160. *Id.* at 30.

161. *Id.* at 31.

162. *Id.* at 23.

163. *Id.*

164. Tr. Transcr. at 63, *Gideon v. Wainwright*, 153 So. 2d 299 (Fla. 1963).

165. Tr. Transcr. at 40, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

166. *Id.* at 39.

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INSERT FIGURE 1 HERE

Harris' closing argument lasted nine minutes, and Gideon's was approximately eleven minutes.<sup>167</sup> As with the opening statements, the closing arguments were not recorded. Gideon was found guilty and, three weeks later, was sentenced to five years in the state penitentiary because of his previous conviction record, including the federal conviction alluded to earlier.<sup>168</sup> The other convictions were Missouri state convictions that included sentences totaling ten years for robbery, three burglary charges, and larceny. The sentences for these 1928 convictions ran concurrently. Furthermore, Gideon served concurrent burglary and larceny sentences of ten years and five years for a 1940 Missouri conviction. He escaped in 1943, but was caught in 1944, and was not released until 1950. In 1951, he also served a two-year sentence for burglary in Texas.<sup>169</sup>

#### IV. PETITIONS TO HIGHER COURTS

##### A. Habeas Corpus before the Florida Supreme Court

Gideon did not take an appeal from his conviction.<sup>170</sup> Instead, he filed a habeas corpus petition in the Florida Supreme Court.<sup>171</sup> At that time, a petition for habeas corpus could be filed with any circuit court judge in the circuit in which the petitioner was incarcerated; in the district court of appeal having jurisdiction over the county in which the petitioner was incarcerated, or with any judge of that court; or directly in the Florida Supreme Court, or before any justice of that Court.<sup>172</sup> Although some inmates filed their petitions in the circuit court in Starke, Florida, where the main state penitentiary was located, and then appealed if the pe-

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167. *Id.* at 41.

168. *Supra* nn. 130–131 and accompanying text.

169. Lewis, *supra* n. 2, at 70–71.

170. This was before the decision in *Douglas v. California*, 372 U.S. 353 (1963), when the Court held that an indigent, convicted defendant has a right to have appointed counsel represent him or her in the first appeal of right from the conviction. At this time, an indigent appellant was entitled to a free transcript, *Griffin v. Illinois*, 351 U.S. 12, 20 (1956), but not a free attorney.

171. *Gideon v. Cochran*, 135 So. 2d 746 (Fla. 1961).

172. The Constitution still contains these provisions. Fla. Const. art. V, §§ 3(b)(9), 4(b)(3), 5(b). However, *see infra* n. 173.



titions were denied, many inmates filed their petitions directly in the Florida Supreme Court.<sup>173</sup>

In the petition, Gideon alleged merely that counsel should have been appointed for him.<sup>174</sup> He did not allege that any special circumstances were present in his case.<sup>175</sup> The Florida Supreme Court denied the habeas petition, for the reason that there was no absolute right to have counsel appointed in every felony case under United States Supreme Court decisions.<sup>176</sup> That decision was correct under the law that existed at that point in time.<sup>177</sup> No opinion was written because none was called for under the principles of *Betts*.

The Florida Supreme Court did not ask for a response from the Florida Attorney General's Office, which represented the State in habeas cases, and that Office was not involved in the case before that Court. The reason for this was that the petition, on its face, did not present any issue that would have entitled Gideon to relief. If an uncounselled inmate did allege a special circumstance before the Florida Supreme Court, such as having only a sixth-grade education, the Court would have asked the Attorney General for a response. In such a situation, if the petitioner had actually graduated from high school and had taken some college courses, the Attorney General's Office would have filed a response containing certified copies of official documents showing that the petitioner had graduated from high school and had taken college-level courses, and based on this, the Court probably would have denied the petition.

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173. On April 1, 1963, the Florida Supreme Court altered this procedure by adopting Rule One of the Florida Rules of Criminal Procedure. *Gideon*, 153 So. 2d at 300. Under Rule One, an incarcerated prisoner who desired post-conviction relief was required to file his petition with the trial court that sentenced him. *Id.* This rule, patterned after Title 28 United States Code Section 2255, was intended to apportion or distribute petitions for post-conviction relief throughout the state rather than place the entire burden on the trial courts located in the counties that had correctional institutions and on the Florida Supreme Court. *Id.* Rule One is now found in Florida Rules of Criminal Procedure 3.850.

174. Lewis, *supra* n. 2, at 36.

175. *Id.*

176. *Id.* at 33; *Gideon*, 153 So. 2d 746.

177. See *Betts*, 316 U.S. 455.

B. Certiorari in the United States Supreme Court and My Involvement with the Case. Also, Why Did Gideon Not Allege Any Special Circumstances?

In January 1962, Gideon filed a petition for certiorari in the United States Supreme Court, seeking review of the Florida Supreme Court's denial. Gideon did not mention *Betts* and did not allege any special circumstances. He alleged simply that,

[w]hen at the time of petitioner's trial he ask the lower court for the aid of counsel. The court refused this aid. Petitioner told the court that this court had made decision to the effect that all citizens tried for a felony crime should have aid of counsel. The lower court ignored this plea.

Your petitioner was compelled to make his own defense, he was incapable adequately of making his own defense. Petitioner did not plead nol contender [b]ut that is what his trial amounted to.<sup>178</sup>

Why did Gideon not allege any special circumstances? Was he ignorant of *Betts*? Did he think he had no special circumstances to allege? Did he idealistically believe that every person should have counsel and that, by not alleging any special circumstances, he could be the catalyst for changing the Constitution? Any of these reasons could explain the decision to allege that counsel should have been provided automatically for him and that counsel should be provided in every case.

Did he prepare the petition for habeas, the petition for certiorari, and the other court documents by himself or did he receive assistance? Turner, Gideon's attorney at the second trial, says Gideon received the assistance of fellow inmate, former attorney, and later municipal judge, Joseph A. Peel, Jr.,<sup>179</sup> a Stetson law graduate! According to Turner, Peel, Gideon's cellmate, stood over

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178. *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* vol. 57, 301–302 (Philip B. Kurland & Gerhard Casper eds., U. Publications of Am. 1975) [hereinafter *Landmark Briefs*].

179. Interview, *supra* n. 130. On April 19, 2001, Turner and I appeared in a panel discussion for students, faculty, and others regarding the *Gideon* case, held at the University of Tampa, and he repeated this to the audience at that time. Others on the panel included University of Tampa Professors Susan F. Brinkley and James A. Beckman. Professor Robert D. Bickel of Stetson University College of Law and Professor Brinkley planned the panel discussion.

his shoulder as Gideon wrote and told him what to say.<sup>180</sup> Peel was the convicted murderer of Circuit Judge Curtis E. Chillingworth and Chillingworth's wife Marjorie, of Palm Beach, Florida.<sup>181</sup>

The Chillingworths disappeared from their oceanfront home one night in 1955, and for five years, their disappearance remained a mystery.<sup>182</sup> Finally, Floyd (Lucky) Holzapfel confessed to their murders<sup>183</sup> and testified—as a star witness—against Peel, who had become a municipal judge in West Palm Beach, that he and Peel had split about \$3,000 a week from gamblers and moonshiners for tip-offs when search warrants were issued for raids on moonshine stills or gambling dens.<sup>184</sup> Peel told Holzapfel that Chillingworth, who had become aware of Peel's operations and was about to “blow the whistle,” had to die.<sup>185</sup> Unfortunately, because Mrs. Chillingworth was with the Judge when he was murdered, according to Holzapfel, she also had to be killed.<sup>186</sup>

Holzapfel and George (Bobby) Lincoln, a moonshiner, drove a small boat to the beach in front of the Chillingworth home.<sup>187</sup> They seized the couple in the beach cottage, bound and gagged them with adhesive tape, and dragged them to the motorboat.<sup>188</sup> The bloodstains were Mrs. Chillingworth's—she struggled and was struck with a pistol butt.<sup>189</sup> Holzapfel and Lincoln drove the boat four miles offshore, where they wrapped the victims with old

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180. Ironically, Gideon's court documents are sometimes treated as treasures of American history. “American Voices: 200 Years of Speaking Out” was an exhibition of letters, petitions, and appeals from private citizens to officials of the United States, held at the National Archives in Washington, D.C., from March 3, 1989, through February 1990. Approximately 100 documents were exhibited, including Gideon's Answer to Respondent's Response to Petition for Writ of Certiorari. Other items in the exhibit included letters or petitions from such persons as Mrs. Abraham Lincoln, Thomas Edison, Elizabeth Cady Stanton and Susan B. Anthony, Sitting Bull, W.E.B. DuBois, Martin Luther King, Jr., and John Steinbeck. *Exhibition Checklist, American Voices: 200 Years of Speaking Out, March 3, 1989 through February 1990* (Nat'l. Archives & Records Admin., Wash., D.C. 1989).

181. *National Affairs*, Newsweek 26, 27 (Mar. 20, 1961).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

army gun belts, weighted the couple with lead weights, and threw Mrs. Chillingworth and the Judge overboard.<sup>190</sup>

Peel was convicted and sentenced to life in prison. On October 21, 1985, I interviewed Ray Jordan as part of our effort to preserve the history of our law school. Jordan had been the librarian for the Stetson University College of Law during the 1940s and early 1950s when the school was still located in DeLand, Florida. I asked if she had known Peel, a law student in those days. She said yes and then elaborated:

Joe Peel? He was the nicest chap, very good looking and a big man on campus. The girls were just crazy about him, and I honestly had a hard time getting it through my head that he could have gotten involved in something like that. I thought back on it and I just wonder if he just must have been one of the early drug users or something because it was completely [out of character].<sup>191</sup>

Peel was a murderer, but he had also been a lawyer. If Turner is right—that Peel helped Gideon with his petition—this might explain why no special circumstance was alleged. Even if Gideon was unaware of *Betts* at the time of the trial, he certainly knew about it after he entered the Florida State Penitentiary. Inmates were filing petitions in large numbers, alleging that special circumstances had existed in their cases. It was widely known that the way to set aside a conviction was to allege lack of counsel and the existence of one or more special circumstances. However, a lawyer such as Peel would have understood that the Supreme Court was on the verge of overruling *Betts* and that the perfect mechanism to enable them to do this would be a petition for habeas alleging no special circumstances, a denial by state courts, and then a petition for certiorari alleging a denial of the right to counsel, but not alleging any special circumstances. Also, a lawyer would have been aware that Gideon lost nothing by “shooting for the moon” in this attempt. If he failed, Gideon could file another petition in the circuit court in Starke, where the prison was located, or in the Florida Supreme Court, alleging a limited education, alcoholism, or some other special circumstance that would have entitled him to counsel.

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190. *Id.*

191. A transcript of the interview of Jordan is available from the Author.

Gideon's petition for certiorari was "written in pencil" and "done in carefully formed printing, like a schoolboy's,"<sup>192</sup> and contained grammatical errors. If Peel did assist Gideon, why was the petition not more polished? A possible answer is that a petition from an unlettered inmate probably makes a greater impact on the members of the Court than a sophisticated piece of legal draftsmanship. Most likely, Peel would have realized this as well.

The Office of the Florida Attorney General, which represented the State in criminal appeals and post-conviction proceedings, was not involved in the case at this point. However, in early March 1962, the United States Supreme Court sent a request to Richard W. Ervin, the Attorney General of Florida, asking for a response to Gideon's petition.

At that time, I was a twenty-six-year-old recent Stetson law graduate, working in the Attorney General's Office in Tallahassee in the Criminal Appeals section, on the ground floor of the old Capitol building. There were four of us in that section. We handled all of the criminal appeals in the State Supreme Court and in the First District Court of Appeal, the intermediate appellate court for the northern third of the State. We also acted as extradition hearing officers for the Governor. We handled all habeas and other post-conviction cases brought by Florida inmates in state and federal courts, and we were legal counsel for the Division of Corrections.

On that day in March 1962, "Judge" Reeves Bowen,<sup>193</sup> the head of our Criminal Appeals section, called me into his office. He had received the request from the Supreme Court and asked me to prepare the response. We had been anticipating such a case, which could probably be used by the Court to overrule *Betts* and to impose an absolute requirement that counsel be appointed in every case involving an indigent defendant charged with a non-capital felony.

Why was I chosen for this task? Some have speculated that, as the newest and youngest lawyer in the office, I was made the "fall guy" or "sacrificial lamb" in an obviously losing cause that no one else wanted to handle. This is not true. One of the possible

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192. Lewis, *supra* n. 2, at 4.

193. Bowen was a county judge, in his hometown of Chipley, located in West Florida, before becoming an Assistant Attorney General.

reasons why Judge Bowen chose me was that he and each of the other lawyers in our office had already briefed and argued cases before the Supreme Court. I was the only one who had not done so, and therefore, it was my turn. Even so, Judge Bowen could have kept the case himself, on the ground that it required an older, more experienced lawyer.

To understand what could be the other possible reason calls for some explanation. There were about twenty full-time lawyers when I joined the Attorney General's Office on June 1, 1960. The Criminal Appeals section was an elite group. A lawyer had to begin in one of the other sections. Then, if a vacancy occurred in Criminal Appeals, the members of that section would vote on a replacement and would invite that person to join them. I began in what might be described as the "general" section, working mostly on state and local tax opinions and opinions regarding local government. There were some other significant matters as well to work on. In those years, "sit-in" demonstrations were taking place throughout the South for the purpose of integrating lunch counters. Attorney General Ervin had received requests for law review articles on the subject of racial demonstrations, and he asked me to work on those articles.<sup>194</sup> He also asked Bowen to oversee my work.

Bowen was born with a deformed hand, and when I knew him in his 50s and 60s, he was nearly blind. However, he did not let these handicaps affect him in any way. His office shades were always drawn shut. There was no light in his office, except for a spotlight over his desk. He could move and guide it by reaching up to follow the words he was reading or writing on his desk. He wore thick glasses and used a large magnifying glass to aid him in his work. When he began work on a new appeal, his secretary would read the entire record, including the transcript, to him. He would listen intently and remember every piece of information in the record, down to the last detail. He argued cases before the courts without any notes. He was an exceptional lawyer.

We began working together on the law review articles. Either he would read the draft of a section that I prepared, or he would

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194. The articles were published as Richard W. Ervin, *Freedom of Assembly and Racial Discrimination*, 10 Clev.-Marshall L. Rev. 88 (1961), and Richard W. Ervin & Bruce R. Jacob, "Sit-In" Demonstrations: Are They Punishable in Florida? 15 U. Miami L. Rev. 123 (1960).

have his secretary read it to him, and then he would come to my office to discuss that section. Listening to him and talking with him about law was like an individualized course on constitutional law, legal history, or jurisprudence. He was a scholar. He had attended the University of Florida College of Law in the 1920s or 1930s, when the LL.B. was the standard law degree. However, if a student had a high enough grade point average, he or she was allowed to remain for a fourth year of law study and receive the J.D. degree, instead of the LL.B. Bowen elected to spend an extra year and obtain the J.D. I liked Bowen very much and enjoyed working with him.

While we were working on these law review articles, the “Freedom Riders,” blacks and whites who rode on a bus together in the South and stopped in each town to conduct sit-in demonstrations, were heading toward Florida. The Governor appointed a committee to hurriedly meet and advise him on how to deal with this group when they entered our state. Bowen and I were appointed to the committee, along with Hugh Taylor, a highly respected circuit judge in Tallahassee. In other states, the sit-in demonstrators were being arrested on breach-of-the-peace or disorderly conduct charges. However, based on principles in such cases as *Cantwell v. Connecticut*<sup>195</sup> and *Feiner v. New York*,<sup>196</sup> we agreed that the rights of these demonstrators to peacefully protest must be protected. We went through several drafts of our recommendations to the Governor and, within a couple of days, gave the final rewrite to the Governor, advising him that the Freedom Riders should be protected and not charged with crimes, but that if onlookers hurled racial epithets at the sit-in demonstrators or became unruly, the onlookers should be charged with the offenses of breach-of-the-peace or disorderly conduct. The Governor sent this information to all sheriffs and police chiefs throughout the State. The Freedom Riders, however, never reached Florida.

An opening developed in the Criminal Appeals section, sometime during the summer of 1961, and Bowen and the other two remaining lawyers in the section voted to offer the job to me. During my one year in that office, I acted as an extradition hearing officer for the Governor and was an advisor to the Division of Cor-

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195. 310 U.S. 296 (1940).

196. 340 U.S. 315 (1951).

rections. Also, I wrote many “returns” (responses) to habeas corpus petitions, briefs, and motions. Some of these were decided without oral arguments, but I orally argued cases before circuit courts and made oral arguments before Florida appellate courts on a total of eighteen occasions.<sup>197</sup> Judge Bowen would assign cases to me, ask me to read the record, including the transcripts, and then return to his office for further discussions. In these inspiring sessions, he would ask me numerous penetrating questions about the testimony, the evidence, and the motions that had been made, etc. If dissatisfied with my answers, he would ask me to return again after rereading the record and knowing it almost by heart. Then, we would discuss the legal issues involved and only after a lengthy discussion, would I begin to write the brief.

The First District Court of Appeal, in North Florida, sometimes sat and heard cases in courthouses of small towns. On one occasion, Judge Bowen and I each had an appeal to argue in Crestview on the same day. We drove there together the day before, spent the night, argued our cases the next morning, and returned the following afternoon. Thus, he had at least that one opportunity to hear me orally argue an appeal creditably. My case was a criminal contempt case involving an unauthorized approach to a member of the grand jury.

Apart from the possible reason suggested earlier—that I was the only lawyer in the Criminal Appeals section in Tallahassee who had not been to the United States Supreme Court—Judge Bowen also knew that I loved legal history, enjoyed the study of law, and worked very hard. In particular, he had read much of my writing—drafts of law review articles and appellate motions and briefs—and had heard me argue at least one appeal. He assigned the *Gideon* case to me because both he and Attorney General Ervin had faith in me.

Ervin did occasionally go to court, but he was not a criminal lawyer, and he left the handling of criminal cases to Judge Bowen and the lawyers in the Criminal Appeals section. That is why he

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197. It has been so long ago, that I cannot now remember how many court appearances there were. The number eighteen is based on information taken from my letter to the Editor, 48 Harv. L. Rec. 9, 11 (Apr. 24, 1969). The letter was written only seven years after my experiences in the Attorney General's Office, so at that time, I was able to remember each of the court appearances. See *infra* n. 261 and accompanying text (explaining an exchange of letters).



did not personally handle the case. Ervin later became an excellent Justice and Chief Justice of the Florida Supreme Court.<sup>198</sup>

In early April 1962, I sent our response to Gideon's petition to the United States Supreme Court. It was typewritten and consisted of thirteen legal-sized pages fastened together with blue paper backing, as required by the Supreme Court rules. The argument simply was that the petitioner had not alleged any special circumstance that would have entitled him to counsel under *Betts*. Gideon filed a response, and then, on June 4, 1962, the Supreme Court issued the following order:

No. 890 Misc. *Gideon v. Cochran*, Correctional Director. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Florida granted. Case transferred to the appellate docket. In addition to other questions presented by this case, counsel are requested to discuss the following in their briefs and oral argument: "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?"<sup>199</sup>

#### C. Work on Florida's Brief, Abe Fortas' Appointment for Gideon, and Filing of the Brief

All of us in the Attorney General's Office, beginning in mid-March 1962, were certain that the Supreme Court would grant certiorari in *Gideon v. Cochran*, for this was probably the case that the Supreme Court would use to overrule *Betts* and impose an absolute requirement that counsel must be appointed in every case involving an indigent defendant charged with a noncapital felony.<sup>200</sup> We hoped, however, that the new rule would not be made retroactive, because we did not want such a decision to result in the release of large numbers of prisoners from the state penitentiary, who had been convicted without counsel. We also

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198. At Stetson University College of Law, having taught, among other things, courses on Florida constitutional law, Florida administrative law, and state and local taxation with an emphasis on Florida, I have had the opportunity to read and analyze opinions written by almost all of the justices who have served on the Florida Supreme Court. That study has led me to believe that Justice Ervin was one of the very best of all the justices on that Court throughout Florida's legal history.

199. 370 U.S. 908 (1962).

200. The expected outcome was so obvious that it had been overwhelmingly predicted by computers. Jerold H. Israel, *Gideon v. Wainwright*, *The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 212 n. 6.

hoped that the new rule would not be extended to misdemeanors, because as a practical and financial matter it would have been very difficult for the states to implement such a requirement.

Preparing the brief in an important case such as this was going to be a demanding task, and I began doing research and discussing the case with Judge Bowen and others in the office beginning in mid-March 1962. My work did not stop with the typewritten response to the Supreme Court in April. The unceasing work on the brief continued, in earnest, from mid-March to shortly before Christmas of that year, when the printed brief was submitted to the Court. While other cases and legal matters entrusted to me were fully dealt with, every spare moment during the work day, every evening, and every weekend was spent on *Gideon*.

In June, shortly after certiorari was granted, I asked the Division of Corrections to conduct a survey in the state prison system records to determine how many prisoners would be affected by the overruling of *Betts*. The study showed that slightly more than 4,500 of approximately 8,000 prisoners then in the Florida prison system had been convicted without the benefit of counsel. Therefore, if the new decision was in *Gideon*'s favor and was made retroactive, more than 4,500 of the 8,000 inmates in Florida could be released and retried, or released without retrial. Of these, 4,065 had been convicted after pleading guilty while 477 had been convicted after going to trial. These findings were included as an appendix to our brief in the case.

Because *Gideon* probably would be the case that would overrule *Betts*, we thought that the other Attorneys General throughout the Country should be aware of this. We knew that, if the Court overruled *Betts*, it might also require the appointment of counsel in misdemeanor cases, which would be of great interest to the other states. Therefore, I prepared a letter for Attorney General Ervin's signature to be sent to the other states, asking them to consider joining us with an amicus brief. The letter, sent in June 1962, read as follows:

Dear General:

Enclosed is a photostatic<sup>201</sup> copy of a letter received by me from the United States Supreme Court stating that certiorari

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201. The term "photostatic copy" originates from the word "photostat," which is "the

has been granted in the case of *Gideon v. Cochran*, and advising that the Court desires briefs on the question of whether the holding of *Betts v. Brady*, 316 U.S. 455, should be reconsidered. Four members of the present Court have expressed the view, at one time or another, that *Betts* should be overruled and that the concept of the right to counsel under the Sixth Amendment should be embraced within the due-process clause of the Fourteenth Amendment. If the minority can obtain one more vote, *Betts* will be overruled and the States will, in effect, be mandatorily required to appoint counsel in all felony cases. Such a decision would infringe on the right of the states to determine their own rules of criminal procedure.

Because of the importance of the question, I am hereby inviting the attorneys general of all states to submit *amicus* briefs in the Gideon case. Also, I would appreciate any advice or aid you can offer, including any statistics or information which you believe would be helpful to us in preparing the main brief.<sup>202</sup>

This letter produced an *amicus* brief on Florida's behalf, written by George D. Mentz, an Assistant Attorney General of Alabama. North Carolina was the only other state to join in the brief. However, the letter also resulted in an *amicus* brief being filed in support of Gideon by twenty-two states, which included at least two states—Hawaii and Maine<sup>203</sup>—that had no statute or court rule requiring appointment of counsel in noncapital felony cases. Another *amicus* brief on Gideon's behalf was filed by Oregon, even though Oregon also had been one of the twenty-two states that signed the other *amicus* brief.<sup>204</sup> Also, we gave permission to the American Civil Liberties Union (ACLU) to file a brief and to take

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proprietary name of a kind of photocopying machine." *The Oxford English Dictionary* 728 (James A.H. Murray et al. eds., 2d ed., Clarendon Press 1989). We used to refer to copies made from copying machines as photostats. The xeroxing process did not become available until late 1963 or 1964.

202. Lewis, *supra* n. 2, at 149. When Lewis interviewed me in the preparation of *Gideon's Trumpet*, I had with me my files, including copies of all of the documents in the case before the Supreme Court. Copies of the documents he asked for were made and sent to him, and he used them in the writing of the book. This letter is one of those documents. Subsequently, in 1981, all of my *Gideon* files, including drafts of the brief, research note cards, letters, and documents such as this, were destroyed accidentally. See *infra* n. 479. I am grateful that some of them have been preserved by Lewis in *Gideon's Trumpet*.

203. Lewis, *supra* n. 2, at 155. Lewis mentioned Rhode Island in this category, but that state had a statute, Rhode Island General Laws Section 12-5-2 (2002), that provided for appointment in the Superior Court. Apparently, Rhode Island did not provide counsel at the bail-setting and preliminary-hearing stages for felonies in the lower trial court.

204. Lewis, *supra* n. 2, at 199.

part in the oral arguments as an amicus. In January 1963, J. Lee Rankin, former Solicitor General of the United States, participated in the oral arguments as the attorney for the ACLU.

When Lewis interviewed me, while preparing to write *Gideon's Trumpet*, he asked whether the letter to the Attorneys General of the other states was a mistake of strategy on my part, in view of the fact that so many states joined in the amicus brief opposing us. I told him then, and I still believe, that it was not a mistake. A couple of years earlier, a colleague in the Florida Attorney General's Office lost a civil case in the United States Supreme Court and was heavily criticized by an Attorney General of another state for not letting the other states know that the issue in that case was before the Supreme Court. Therefore, it was thought important to notify the other states that the right-to-counsel issue was about to be decided and to give them the opportunity to participate. Although *Gideon* involved the right to counsel in felonies and many of the states already were automatically providing counsel in felonies, the decision could have led to a requirement that counsel be provided in all misdemeanors. The Attorneys General of all the states deserved to be made aware of this and deserved to have an opportunity to say what they wished about the issues in the case.

It certainly would have been pleasing if more than two states had joined in an amicus brief in our behalf, but for anyone to suggest that our "strategy" had backfired missed the point. I was neither thinking in terms of a "strategy," nor was I trying to "win" the case when the letter to the other Attorneys General was sent. My goal was to make sure the other states knew what was happening and what was at stake in *Gideon*, and that they were given an opportunity to become involved if they wished to do so. In my view, "strategy" has no place before the Supreme Court in a case as important as *Gideon*. The job of the lawyer in such a case was not to try to prevail through strategy, but instead to prepare the case honestly and thoroughly and to help the Court reach the best possible result for everyone.

Certiorari was granted on June 4, 1962.<sup>205</sup> Then, on June 25, the Court appointed Abe Fortas to represent Gideon in the case.<sup>206</sup>

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205. *Supra* n. 199.

206. 370 U.S. 932 (1962). When the United States Supreme Court appoints an attorney

Fortas was a partner in Arnold, Fortas & Porter, a prominent Washington, D.C. law firm. He was a Yale Law School graduate who had been editor in chief of the *Yale Law Journal*. After graduation and before going to work for the Government during the New Deal, he served as a faculty member at Yale.<sup>207</sup> As court-appointed counsel for the defendant in *Durham v. United States*,<sup>208</sup> he persuaded the United States Court of Appeals for the District of Columbia to adopt a novel, forward-looking test, based almost entirely on medical evidence of criminal insanity.<sup>209</sup> *Durham* abandoned the venerable *McNaghten* test,<sup>210</sup> followed in most common-law jurisdictions, and adopted the rule for the District of Columbia in which a defendant is considered not responsible if he was suffering, at the time of committing the act, from a mental disease and the act was a product of that disease. Fortas was also the personal attorney for, and a close personal friend of Lyndon B. Johnson.<sup>211</sup>

During June, I was offered a position as an associate with the law firm of Holland, Bevis & Smith in Bartow, Florida.<sup>212</sup> While eager to accept the position, I also wanted to be able to complete the *Gideon* case. Therefore, Chesterfield H. Smith,<sup>213</sup> the head of

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to represent an indigent in a case in which certiorari has been granted, the appointment is considered a great honor. When the Court appointed me to represent federal inmate Harold Kaufman, in *Kaufman v. United States*, 394 U.S. 217 (1969), Justice Fortas was a member of the Court when the case was argued and decided.

207. Lewis, *supra* n. 2, at 50. Fortas had been Thurman Arnold's and Douglas' protégé when he attended Yale Law School, and afterwards. Howard Ball, *Hugo L. Black: Cold Steel Warrior* 152–156 (Oxford U. Press 1996).

208. 214 F.2d 862 (D.C. Cir. 1954). Unfortunately, the *Durham* rule has not been followed by courts of other jurisdictions.

209. *Id.* at 874.

210. *Daniel McNaghten's Case*, 8 Eng. Rep. 718 (1843). Under this much-criticized test, a defendant is considered responsible for his acts if he knew, when he committed them, the difference between right and wrong, and had the capacity to adhere to the right. *Durham*, 214 F.2d at 869–870.

211. See *infra* n. 257 (discussing Fortas' relationship with Johnson).

212. The firm was Holland, Bevis, McRae & Smith. Before I began working there, William McRae was appointed a United States District Judge. The firm was Holland, Bevis & Smith, until Burke Kibler of Lakeland joined the firm during my last year there, and it became Holland, Bevis, Smith & Kibler. In the 1960s, the firm merged with the Peter O. Knight firm in Tampa, and it became known as Holland & Knight, its present name. When I joined the firm, it had one office and fourteen lawyers. Now it has offices in Lakeland, Tampa, Coral Gables, Orlando, Washington, D.C., Chicago, and many other cities throughout the United States and the world, and now employs approximately 1,300 attorneys.

213. Smith, one of America's greatest lawyers, has been the moving force behind the growth of Holland & Knight. See Tom Brokaw, *The Greatest Generation* 307 (Random

the Holland firm, gave me his approval to continue to handle the case. Similarly, both Judge Bowen and Ervin, the Florida Attorney General, readily gave their permission.

When deciding when to begin at the Holland firm, I tried to estimate when the *Gideon* brief would be due. The record, to be printed by the Supreme Court, was expected to be completed by late June. After all, the record in the case was only a few pages long because it consisted only of Gideon's habeas petition to the Florida Supreme Court, the Florida court's brief denial, the petition for certiorari to the Supreme Court, our response, and the order granting certiorari. Counsel for Gideon would have thirty days to prepare the brief for petitioner, and I would have thirty more days following receipt of petitioner's brief to complete the brief for the State of Florida. Thus, our brief was expected to be finished by early September. Based on this assumption, I told the Holland firm that I would begin to work there around the middle of September. My fiancée Ann and I decided to get married on September 8, 1962, because we thought that the brief would be filed before the wedding and the change of jobs. All that would be left for me to do in the case after starting at Holland would be to prepare for oral argument and go to Washington, D.C., to argue the case. However, the best laid plans often go astray.

Days and weeks drifted by, but the printed record did not surface. After his appointment, unbeknownst to me, Fortas decided to ask the Court to include the transcript of the trial in the printed record of the case. However, there was no transcript in existence.<sup>214</sup> On receiving his request or "designation" of the record in late August, a motion to strike the transcript from the record in the case was filed.<sup>215</sup> It was later learned that the trial transcript had already been prepared and provided to the Supreme Court even before I had received Fortas' designation.<sup>216</sup>

The motion to strike was filed because the transcript was not properly a part of the record in the case and did not belong in the

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House 1998) (describing Smith). Unfortunately, Smith died on July 16, 2003. This was a great loss to his friends and to the people of Florida. He was fearless, outspoken, never afraid to say what was on his mind, and one of the most capable and effective lawyers in the history of our profession. I worked with him for a brief time at the Holland firm and was extremely fortunate to have had that experience.

214. Lewis, *supra* n. 2, at 133–134.

215. *Id.*

216. *Id.* at 162.

printed record. It is one of the elementary principles of appellate practice that a reviewing court should review only what is in the record. The record consists only of materials that were before the court whose decision is under review. Florida appellate courts scrupulously followed this rule, and it had been drilled into me by my colleagues at the Attorney General's Office. In the *Gideon* case, all that the Florida Supreme Court had before it was the habeas petition by Gideon, and that plus the Florida court's denial was all that should have been subject to review. However, if the United States Supreme Court believed that the Florida Supreme Court should have considered the trial transcript, then the appropriate action was to remand the case to the Court with instructions to obtain and review the trial transcript and to reconsider its decision in light of the additional information. The Florida Supreme Court should have been given an opportunity to rectify its own mistake.

The Supreme Court denied my motion, and because the Court allowed Fortas to include information in the printed record that had not been before the lower court, I also obtained a letter from the trial judge, Judge McCrary, stating that, in his opinion, "Gideon had both the mental capacity and the experience in the courtroom at previous trials to adequately conduct his defense. . . . In my opinion, he did as well as most lawyers could have done in handling his case."<sup>217</sup> This was sent to the Supreme Court, and it was included in the file of the case.

The Supreme Court did not deny my motion to strike until mid-October.<sup>218</sup> A week or so later, the record was printed.<sup>219</sup> Fortas' printed brief was filed on November 21.<sup>220</sup> I received it approximately three days after that, and thus, my brief was filed just before Christmas.<sup>221</sup>

The brief had to be printed, and all printing for the State, by contract, had to be done by the Rose Printing Company in Tallahassee. Bartow, where the Holland firm was then located, is about 250 miles south of Tallahassee, and this made it impossible for me to oversee the printing. Therefore, A.G. Spicola, an Assis-

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217. *Id.* at 165.

218. *Id.* at 134.

219. *Id.*

220. *Id.* at 139.

221. *Id.* at 164.

tant Attorney General in Tallahassee and a good personal friend, oversaw the proofreading, printing, and mailing of copies of the brief to the Supreme Court and to Arnold, Fortas & Porter.

While all this was happening, Justice Felix Frankfurter retired from the Supreme Court.<sup>222</sup> This was bad news for us because he had been a staunch believer in the concept that due process required a flexible, after-the-fact review process. Justice Frankfurter believed that the process could not be reduced to hard-and-fast rules to be followed before the fact, such as an automatic rule that counsel must be appointed in every case, regardless of the overall fairness or lack of fairness of the proceedings in the particular case under review.<sup>223</sup>

As already indicated, from mid-March until close to Christmas of 1962, almost every spare moment was spent preparing the case. While still working in Tallahassee, a lot of time was spent discussing the case and the contents of the brief with Judge Bowen and other members of the Attorney General's Office, such as George Georgieff and Jim Mahorner. During the entire nine or ten months, I did research and recorded it on four-by-six-inch cards, wrote drafts of sections of the brief, and asked secretaries, while at the Attorney General's office, or my now-wife, after moving to Bartow, to type those sections, eventually edited the drafts and put the final, seventy-four-page brief together.

I also discussed the case from time to time with lawyers at the Holland firm, particularly with Warren E. Hall, Jr. I had told Smith I would not use the firm's time to work on the case, and, though he would have surely allowed me to do so if I had asked, I did not ask.

During the final three months of 1962, I would leave the law office at 5:00 or 5:30 p.m., and go home for supper. After supper, Ann and I would drive to the old county courthouse in the center of Bartow, a block north of our law offices. The librarian gave me keys to the main door of the courthouse and to the county law library on the east side of the third floor of that historic building. I would do research there until 11:00 p.m. or 12:00 a.m., and Ann

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222. *Id.* at 163.

223. *Id.* Justice Frankfurter retired on August 28, 1962. 371 U.S. III-IV, VII-XIII (1963). Another conservative Justice, Charles E. Whittaker, had retired earlier that year. 369 U.S. III, VII-X (1962). He was replaced by Justice Byron White, 369 U.S. at XI-XIII, and Justice Frankfurter was replaced by Justice Arthur Goldberg, 370 U.S. at XV-XVII.



would copy excerpts from appellate cases onto four-by-six-inch cards in longhand whenever we thought them worthy of being preserved for later use. Xerox machines did not exist in those days, so copying excerpts in this way was the best way to preserve the research. On some weekends, we would drive 250 miles to Tallahassee to work in the State Supreme Court Library or seventy miles west to St. Petersburg to the Stetson University College of Law Library. The Stetson library, of course, was open on weekends. However, the library in Tallahassee was closed on weekends. The librarian, Mrs. Agatha Thursby,<sup>224</sup> gave me a key and advised the security guards of my presence there on some weekends. In particular, the historical English law collection, housed in the basement of the Tallahassee library, needed to be consulted. On the weekends in Tallahassee, Ann and I also got to see Judge Bowen and his wife, and I was able to talk over our progress on the brief with him.

We bought a used electric typewriter from Holland, Bevis & Smith. It was electric, but was not a “memory” typewriter—such as the computers we have today. While I was at the office during the week, Ann would type drafts of sections of the brief. In the evenings or on the weekends, these would be edited and she would re-type them the following day. In those days, before computer memory typewriters, each entire page had to be re-typed and re-edited.

## V. PRINCIPAL ARGUMENTS IN THE BRIEFS

### A. Brief for Petitioner

In the brief for petitioner,<sup>225</sup> Fortas argued that a defendant in a criminal case cannot effectively prepare one’s own defense and defend himself or herself at trial. Usually, an indigent is in jail and, therefore, is unable to investigate or question witnesses. Generally not trained in the law, an indigent cannot adequately assess whether to plead guilty or go to trial. Additionally, because

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224. Mrs. Thursby was a very good friend. Her husband, Dr. Vincent Thursby, a political science professor at Florida State University, was my faculty advisor during my undergraduate student days. He had invited those of us who were his advisees to their home, and thus, I had known her for some time and liked both of them very much.

225. Fortas was joined in the brief by Abe Krash and Ralph Temple, fellow lawyers at Arnold, Fortas & Porter.

of a lack of legal training, an indigent is at a loss in conducting a defense at trial.

The underlying assumption of *Betts*, that the trial judge could safeguard the indigent—and hence unrepresented—defendant, was hotly disputed by Fortas. He also argued that the “special circumstances” rule of *Betts* created friction between state and federal courts because so many cases had been reversed and remanded to state courts since 1942 for violations of the *Betts* doctrine. His position was that the *Betts* “special circumstances” test was inherently unworkable and, therefore, should be discarded.

Fortas further claimed that, because the right to the appointment of counsel in felony cases had risen to the level of a fundamental right in the years since 1942, it was only appropriate to extend *Johnson* to state, as well as federal, cases through the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Based on the transcript of the trial, Fortas argued that, had Gideon been trained as a lawyer, he would have realized that the defense of voluntary intoxication was available to him. The crime charged—breaking and entering with intent to commit petit larceny—required specific intent, and Fortas argued specific intent could not be formed in the mind of a person who was intoxicated at the time of the offense.<sup>226</sup>

## B. Brief for the State of Florida

### 1. *Confession of Error?*

In 1963, during my interview for his book, *Gideon's Trumpet*, Lewis asked me whether I had considered the possibility of confessing error in the *Gideon* case. In a previous Supreme Court case in which the Florida Attorney General's Office was involved, the lawyer handling the case confessed error, and the Office had been embarrassed when the Court rejected that confession.<sup>227</sup> Just because a lawyer confesses error does not mean that the Court must accept the confession,<sup>228</sup> and that probably is what would

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226. Br. of Pet. at 7–9, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

227. I do not remember the name of the case or details, but many of us in the Attorney General's Office at the time had heard about this incident, though it was certainly not a criminal case.

228. E.g. *Upshaw v. U.S.*, 335 U.S. 410 (1948); *Rose v. State*, 705 So. 2d 958 (Fla. 2d Dist. App. 1998).

have happened had this been done in *Gideon*. The issues in the case were too important to be decided by default.

Most knowledgeable observers were certain that the Court would require counsel be provided to indigent defendants in all noncapital felonies, but there were additional issues that needed to be dealt with, either in *Gideon* or in subsequent cases. One of the issues was whether the decision should be predicated on the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. Another issue was to what extent the historical concept of due process should be modified. Also to be considered was whether the decision should be extended to misdemeanors and whether the decision should be made retroactive in its application.<sup>229</sup> All these issues needed to be briefed and argued in *Gideon*, and it would have been incorrect, in my view, for the State of Florida to confess error in the case.

One step could have been to concede that, because Gideon was an alcoholic, a special circumstance existed in his case, requiring reversal under the principles of *Betts*. In this way, perhaps, we could have avoided reaching the question of whether *Betts* should be overruled. However, the only evidence of Gideon's alcoholism was the transcript, which indicated he was probably intoxicated at the time of the offense.<sup>230</sup> Without more information, such sparse evidence did not establish that he was an alcoholic. Years later, after talking with people who knew Gideon, I learned he suffered from alcoholism. If I had been certain of this at the time, perhaps, I could have obtained affidavits from people in Panama City to show that Gideon suffered from this disease and filed these affidavits with the Court.<sup>231</sup> Then it could have been argued that, under *Betts*, he was entitled to counsel. Whether the Court would have agreed, of course, is debatable.

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229. *Mapp*, 367 U.S. 643, for example, was applied prospectively rather than retroactively, in *Linkletter v. Walker*, 381 U.S. 618 (1965).

230. However, not all evidence indicated this. For instance, the cab driver testified that Gideon was not intoxicated. Tr. Transcr. at 27, *Gideon v. Wainwright*, 372 U.S. 335 (1963). The owner of the Bay Harbor Hotel also testified that Gideon never got drunk. *Id.* at 40.

231. Such affidavits would not have been part of the record in the case, but as has been indicated earlier, the Supreme Court allowed information that was not a part of the true record in the case (the trial transcript and my letter from Judge McCrary) to be filed and considered. *Supra* nn. 214–218 and accompanying text.

## 2. A Summation of Arguments

In the State's brief, I made essentially nine arguments. These are briefly summarized below, followed by some comments.

1. Under *Betts*, Gideon was competent to handle his own defense because the issues in his trial were not complex and, therefore, he received a fair trial. The case simply involved the factual question of whether Gideon was the person who broke into the poolroom.<sup>232</sup>

2. Historically, there was no basis for requiring the automatic appointment of counsel in all felonies. The English common law and the historical backgrounds of the Sixth Amendment and the Fourteenth Amendment did not support Gideon's position.<sup>233</sup>

3. Under our constitutional framework, the states had the power to determine their own rules of criminal procedure, unless clearly forbidden to do so by the Constitution. In fact, it was important that states were allowed some latitude to try to develop better ways of dealing with criminal cases.<sup>234</sup>

4. The concept of due process is based on fairness and is not susceptible to being reduced to a fixed formula or hard-and-fast rule that is applicable to every case. Instead, due process is a flexible concept, depending upon the circumstances of each case. The *Betts* case-by-case approach was consistent with the common-law method and the concept of due process.

5. The right to automatic appointment of counsel for indigents in noncapital criminal cases had not, as of 1962, been accepted as a fundamental constitutional requirement by the states. Statutes, court rules, caselaw, and practices throughout the United States were inconsistent and not uniform.

6. Because of the wording of the Due Process Clause, to incorporate or absorb the Sixth Amendment, as construed by *Johnson*, into the concept of due process, would require the states to provide free counsel to indigents in misdemeanors and civil cases. This would create immense practical difficulties.

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232. Br. of Respt. at 18–22, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

233. *Id.* at 22–29.

234. *Id.* at 29–35.

7. If the Supreme Court were to use the Equal Protection Clause of the Fourteenth Amendment as the basis for overruling *Betts*, the Court would have to equalize differences between rich and poor and affirmatively require that counsel be provided to indigents in appeals, post-conviction proceedings, and many other types of legal actions. The states could find it difficult to meet such requirements.

8. A rule requiring appointment of counsel for all indigent defendants would just lead to habeas petitions filed by losing defendants, arguing that they did not receive adequate or effective representation from the court-appointed attorneys.

9. If the Court decided to overrule *Betts*, the decision should operate prospectively, rather than retroactively.

### *3. Some Possible Alternatives*

Further comments concerning some of the foregoing arguments may now be made. In 1962, providing effective representation automatically to every state court felony defendant would have been difficult to accomplish. Economically, some states would have encountered difficulties in complying with such a requirement. Perhaps, there were other ways to ensure fairness to indigent defendants.

Suppose a state decided to automatically provide counsel to every indigent defendant wishing to go to trial, but not to those who wished to plead guilty. Instead, the state could then have provided a "lay advocate," a person with experience in the criminal justice system, such as a former probation officer, to counsel each defendant wishing to plead guilty. The lay advocate would advise the indigent defendant on whether such a plea was wise, and the trial judge would inquire of the defendant to ensure that the plea was voluntary. The lay advocate could advise a defendant on whether to plead not guilty and go to trial. In this case, counsel would be appointed.

Or, suppose that a state established a criminal justice school that allowed people with three or more years of college to participate in a one-and-a-half or two-year training course and become certified as "criminal justice advocates." Then these advocates would be allowed to defend indigent persons charged with crimes. Students in this program could be required to take courses on criminology, constitutional law, criminal law, constitutional

criminal procedure, practical criminal procedure, ethics in criminal cases, sentencing, plea bargaining, trial practice, correctional law, appellate practice, and post-conviction remedies. For several months, the students would be clinical interns in a prosecutor's office or a criminal defender's office. These advocates would not be licensed lawyers, but defendants would probably receive better representation from these advocates than from some law school graduates, who usually take only one or two courses relating to criminal practice.

Alternatively, suppose that a state were to adopt a two-tier criminal court system. All criminal cases would begin at the lower level, where no licensed lawyers would be allowed, either on the prosecution side or the defense side. Police officers would prosecute, and defendants would either represent themselves or be represented by a lay person, such as a knowledgeable relative or friend. The defendant could either plead guilty or go to trial. If dissatisfied with the result, he or she could ask that the case, whether felony or misdemeanor, be transferred to the higher trial court where he or she would receive *de novo* consideration, with the benefit of assigned counsel. The prosecutor in that court also would be an attorney. The lower court proceedings would be nullified and the case would begin anew. A previous plea of guilty or evidentiary admissions would not be admissible before the higher court.<sup>235</sup>

The three examples, given above, probably seem strange today, but at the time I was preparing the brief, the provisions of the Bill of Rights relating to criminal procedure had not yet been incorporated into the Due Process Clause of the Fourteenth

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235. From 1971 to 1972, as a staff attorney in the Community Legal Assistance Office in Cambridge, Massachusetts, I helped supervise Harvard law students defend indigents in minor criminal cases in Massachusetts courts and handle more serious cases. The two-tier system in Massachusetts was similar in some ways to the system described in the text. Criminal cases began in the district court, where the prosecutors were police officers, not attorneys. Defendants could, however, be represented by counsel, retained or appointed, at that court. If the defendant was satisfied with the results at that level, such as an acquittal, a plea to a less serious offense, or a very fair sentence, the defendant could accept the results and the case ended. But, if the defendant was not satisfied, the case would then move to the superior court, where pleas of guilty or testimony at the district court could be not used against the defendant. The case began anew at that level, and the prosecutors were lawyers. From my experience, the results from the district court were usually so favorable that a high percentage of defendants accepted those results and gave up the right to take the case to the superior court.

Amendment. The core right to privacy of the Fourth Amendment had been made part of the concept of due process,<sup>236</sup> but the rights of defendants in federal criminal cases in the Fifth, Sixth, or Eighth<sup>237</sup> Amendments had not been “incorporated” into the Fourteenth Amendment. In 1962, the prevailing view was that, when it came to criminal procedure, the states should be allowed greater leeway to develop their own methods of ensuring fairness of the criminal process and should be allowed to experiment,<sup>238</sup> without superimposing the Sixth Amendment right-to-counsel requirement. (This, of course, changed with the Supreme Court’s decision in *Gideon*.) The Due Process Clause of the Fourteenth Amendment placed limits on what the state could fashion in the way of criminal procedures, but due process was a vague, nonspecific concept.<sup>239</sup>

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236. *Wolf*, 338 U.S. 25.

237. *See supra* n. 101 (discussing the Eighth Amendment).

238. *E.g. Cohen v. Hurley*, 366 U.S. 117, 125 (1961) (privilege against self-incrimination); *Cicenia v. LaGay*, 357 U.S. 504, 510–511 (1958) (right to counsel during confession); *Knapp v. Schweitzer*, 357 U.S. 371, 374–377 (1958) (privilege against self-incrimination); *Hoag v. N.J.*, 356 U.S. 464, 468 (1958) (double jeopardy; collateral estoppel); *Stein v. N.Y.*, 346 U.S. 156, 179 (1953) (admissibility of confession); *Bute*, 333 U.S. at 649–650, 656 (right to counsel); *Foster v. Ill.*, 332 U.S. 134, 139 (1947) (right to counsel); *Carter v. Ill.*, 329 U.S. 173, 175 (1946) (right to counsel); *Buchalter v. N.Y.*, 319 U.S. 427, 429–430 (1943) (selection of jury; prosecutorial misconduct); *Palko*, 302 U.S. at 324 (double jeopardy); *Snyder v. Mass.*, 291 U.S. 97, 105 (1934) (presence of defendant at view of the scene of the crime); *Gaines*, 277 U.S. at 85 (public trial); *Jordan v. Mass.*, 225 U.S. 167, 174, 176–177 (1912) (sanity of juror); *Twining v. N.J.*, 211 U.S., 78, 102, 106, 111–112 (1908) (privilege against self-incrimination); *Howard*, 200 U.S. at 173 (substitution of juror by court in absence of defendant); *West*, 194 U.S. at 261, 263 (confrontation of witnesses); *Maxwell v. Dow*, 176 U.S. 581, 590, 598–601, 605 (1900) (jury consisting of eight persons instead of twelve); *Brown v. N.J.*, 175 U.S. 172, 175 (1899) (if either the prosecutor or defendant moved for a “struck” jury, the court would give the lawyers a list of ninety-six names, from which each party would strike twenty-four names—the remaining forty-eight persons would be placed in a jury box, and the jury would be selected from them in the usual way); *Eilenbecker*, 134 U.S. at 38 (trial by jury in contempt cases); *Hayes v. Mo.*, 120 U.S. 68, 70 (1887) (peremptory challenges); *Hurtado v. Cal.*, 110 U.S. 516, 535 (1884) (trial based on information rather than indictment); *Mo. v. Lewis*, 101 U.S. 22, 31–32 (1879) (fixing jurisdiction of courts).

239. As of 1962, if a legal scholar had been asked what protections a state must provide to comply with due process, he or she would have been hard pressed to formulate a specific set of guidelines, but this is probably the type of list that would have developed:

- A. There must be a statute that clearly defines and makes criminal the defendant’s particular conduct, and the statute must have been in existence before the time the defendant committed his act. Also, this statute must have been published and made known to the community-at-large.
- B. The defendant must be charged with violating that statute in a written, public document, that clearly states what he or she is alleged to have done and when. The

#### 4. Was Right to Counsel a Fundamental Right?

I spent many hours researching the constitutions, statutes, court rules, and cases decided in each jurisdiction in the United States, and I included these in a lengthy appendix to our brief.<sup>240</sup> According to my count, there were twelve states—Alabama, Delaware, Florida, Hawaii, Maine, Maryland, Mississippi, New Hampshire, North Carolina, Pennsylvania, South Carolina, and Vermont<sup>241</sup>—that had not made a provision for the automatic appointment of counsel for indigents in all noncapital felony cases. Fortas' brief mentioned the twelve states and added one more, Rhode Island.<sup>242</sup> According to my research, Rhode Island was one of a group of states that had a statute that provided for appointment in cases arising in certain courts, but not in all courts.<sup>243</sup>

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document must be provided to the defendant well before the date of hearing.

- C. A hearing, open to the public, must be held to determine whether the allegations are true. The defendant must be given adequate time to prepare for the hearing.
- D. The defendant has a right to defend himself or herself or to be defended by retained counsel, but if the charges are extremely complex, or if a special circumstance is present that would prevent a fair hearing without the benefit of a licensed attorney, then an attorney should be provided at the state's expense.
- E. The hearing should be presided over by an independent, neutral, unbiased fact finder or fact finders. A jury of one's peers should be provided, if requested, in more serious criminal cases, to make factual determinations and to decide the issue of guilt.
- F. Evidence or testimony must be presented by the state at the hearing to support the charges against the defendant.
- G. The defendant must be given an adequate opportunity to contest the evidence and testimony against him or her.
- H. The defense should be allowed to present its own testimony or evidence to refute the charges, but the defendant should not be compelled to testify.
- I. The defense should be allowed to make arguments, including legal arguments, in opposition to the case presented by the state.
- J. The decision must be made on the basis of the evidence and testimony adduced at the trial, and the decision must rationally and logically follow from that material.
- K. The standard of proof for guilt should be higher than the standard in civil cases. Proof should be beyond a reasonable doubt.

As of 1962, one would have believed that, if these elements had been satisfied, the defendant could be said to have received a "fair" trial, in compliance with due process. And this would have been determined in an after-the-fact appraisal of the totality of facts and circumstances in that case.

240. Br. of Respt. at 63, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

241. *Id.* at 67–68.

242. Br. of Pet. at 30, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

243. Br. of Respt. at 68–69, *Gideon v. Wainwright*, 372 U.S. 335 (1963).



Fortas claimed that, in thirty-seven states, appointment was mandatory in all felony cases if the defendant requested counsel.<sup>244</sup> The balance certainly had shifted since the time of *Betts*, but twelve or thirteen states did not yet automatically appoint counsel. This meant that the absolute right to counsel had not yet risen to the level of a fundamental right. In my view, it could not be so until the states were nearly unanimous.

*5. Closing the Lid on Pandora's Box: Retroactively  
versus Prospectively*

Significantly, the due process provisions of the Fifth and Fourteenth Amendments, protecting “life, liberty, and property,” do not differentiate between felonies and misdemeanors. Therefore, a decision to include the Sixth Amendment right-to-counsel provision within the concept of due process under the Fourteenth Amendment logically had to extend to misdemeanors, which are punishable by loss of liberty or loss of property (fines). Similarly, because due process protects against deprivation of property as well as liberty and life, the incorporation of the right to counsel into the Fourteenth Amendment would have to apply to indigents in both civil and criminal cases.<sup>245</sup> I called this my “chamber of horror” or “Pandora’s Box” argument. If the Supreme Court ruled against us, it would be forced by logic to extend the right to counsel to many other types of legal proceedings in the future. It would be expensive and, as a practical matter, difficult for the states to comply.

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244. Br. of Pet. at 30, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

245. Consider the case of an elderly widow, living on her social security benefits. The widow is approached by a person who agrees to repair the roof of her home, to replace rotten wood, and paint the home, for a total of \$3,500. He obtains a mortgage in that amount from her and immediately sells the mortgage to a third party. He fails to do the work, or does very shoddy work, spending only \$500 in materials and labor. Then, the third party sues to foreclose on the mortgage. The woman stands to lose her home. Or, suppose that an electrician’s license is being taken away through a civil administrative proceeding on the basis of false information, which results in the loss of his way of making a livelihood for his family.

I do not believe that it can reasonably be argued that the woman in the first example or the electrician in the second example is less in need of counsel than a person charged with shoplifting, who will probably receive a small fine or probation as a sentence. The distinction between criminal and civil cases, in many situations, is illusory. Often, the consequences in a civil case are every bit as serious to those involved as the consequences in a criminal case.

Before 1962, the Supreme Court held that a state need not provide a particular judicial remedy, such as a direct appeal from a criminal conviction. However, if it did so, the Equal Protection Clause prohibited the state from discriminating between rich and poor, by making it possible for a rich person to utilize that remedy, but not a poor person. For example, Illinois made it possible to appeal a criminal conviction, but required that a trial transcript be prepared in order to obtain an appeal. If the state refused to pay for transcripts for indigent, convicted defendants, thereby depriving them of direct appeals from their convictions, it would be violative of the Equal Protection Clause. That case was *Griffin v. Illinois*,<sup>246</sup> decided just a few years before *Gideon*. Illinois could have refused to allow appeals altogether, but if it did allow appeals, the appellate process had to be open to all, regardless of financial status.<sup>247</sup> *Griffin* did not, however, require that states take affirmative action to equalize all economic conditions existing between its citizens.<sup>248</sup> Justice Black, in his majority opinion, said as follows:

We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants.<sup>249</sup>

Our position was that, if a state could be required by the Equal Protection Clause to provide counsel, automatically and affirmatively, it could be required to provide bail for indigent defendants. Also, the state could be required to provide investigators and psychiatrists to the defendant to enable him or her to receive the same quality of representation as the rich defendant in a criminal case, and this would create practical financial problems for the states. Additionally, we were concerned about the prospect of turning a large number of inmates loose at one time. Florida could theoretically retry them, with counsel provided, but often witnesses are dead or unavailable, evidence has been misplaced, and retrials are not possible. We knew that the chances of

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246. 351 U.S. 12.

247. *Id.* at 18–20.

248. *Id.* at 20.

249. *Id.*

winning the *Gideon* case were slim. Our main hopes were that the decision, if adverse to us, would not require appointment in misdemeanors, and that it would not be applied retroactively.

## VI. THE ORAL ARGUMENT BEFORE THE UNITED STATES SUPREME COURT

### A. Journey to Washington and My Initial Impressions

In late December 1962, the Clerk of the Supreme Court set oral argument in our case for January 14, 1963. The arguments would not actually take place on that day. Cases were generally scheduled a day or so in advance. A lawyer was expected to be there ahead of time, waiting for his or her case to be called. Our case was actually heard on January 15, 1963. We were given an hour and a half for the argument. I asked Mentz, the Alabama Assistant Attorney General who had written the amicus brief on our behalf,<sup>250</sup> to take a half hour, and I kept one hour for my argument.

To prepare for the oral argument, I needed to take some prior appellate opinions to Washington, D.C. In those days we had no photocopy machines capable of copying pages from books. The only way one could take opinions was to take the entire book. So I took about thirty-five books along with me in suitcases. In those days, there were jet airplanes, but my wife Ann and I flew in a propeller plane. We flew through a storm, which made me airsick during the flight. We arrived in Washington, D.C., at National Airport early on Sunday before the arguments began and met Mentz at the hotel.

The next morning, Ann, Mentz, and I went together to the Supreme Court. My impressions of the Supreme Court on that first visit are still vivid in my mind. Noticeably, each Justice had a different-sized chair. Justice White, for example, a former professional football player, had a huge chair, while Justice Black had a diminutive chair that seemed about half the size of Justice White's chair. The Justices came in and swore in new members.

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250. *Supra* n. 203 and accompanying text. Incidentally, in response to a query earlier as to what to wear during the argument, the clerk's office had advised me that a dark blue or brown suit would be appropriate. My parents had bought a blue suit for me in January 1957, for twenty-five dollars, the evening before I entered law school, thinking it would be needed while at the law school. I wore this suit at the argument.

Mentz moved my admission, and Chief Justice Earl Warren welcomed me as a member of the Bar of the Supreme Court. At that time, I was twenty-seven years old and had been licensed as a lawyer for only three years, which was the minimum required for admission to practice before the Supreme Court.

For the rest of the day, we listened to the reading of opinions. During these readings, the Justices would send notes to court pages, and the pages would come in and out of the court delivering messages or carrying books to the Justices. Sometimes, a Justice would get up from his chair and leave. At one point, Justice White whirled around and faced away from the audience. Justice Douglas wrote feverishly for some time and, when he finished, he began licking envelopes and pounding the envelopes shut with his fist. Later, Lewis told me that Justice Douglas occasionally wrote letters to friends during court sessions. Justice Potter Stewart looked out into the audience and began combing his hair with his fingers, looking straight ahead as if looking into a mirror.

The atmosphere was relaxed and informal, and it was obvious that the Justices were not concerned about ceremony or formality. This was quite a contrast to the formal atmosphere that prevailed in the state courts in Florida. Of course, all of this changed the next day when the oral arguments began. The atmosphere became intense; informality disappeared, and it was all business from then on.

The reading of the opinions took all day Monday, which meant that our case would not be heard that day. The opinions were read verbatim by the Justices who wrote them. One of the decisions announced was *Wong Sun v. United States*.<sup>251</sup> On Tuesday, there was one case before ours called *White Motor Company v. United States*.<sup>252</sup> The government's lawyer in the case was Archibald Cox, the Solicitor General of the United States at the time. Dressed in a coat and tails, he looked like a basketball player because he was tall with a crewcut. Cox's argument was the best that I had ever heard, never before hearing anyone speak so easily, effortlessly, and beautifully.<sup>253</sup>

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251. 371 U.S. 471 (1963).

252. 372 U.S. 253 (1963).

253. Several years later, as a graduate student at the Harvard Law School, I audited Cox's course on Constitutional Law.

In the Supreme Court, there is a backup table, and I was sitting there behind the attorney in the *White Motor Company* case, Gerhard A. Gesell. This was before he was appointed to the federal bench. He also was wearing a formal coat and tails. Gesell turned to me several times during the argument and spoke with me. He leaned back to make comments while Cox was arguing. He had a wonderful sense of humor. At one time, he whispered to me, "Watch me. I am going to have to make a jury argument." This is what lawyers sometimes say when they know they do not have much law on their side, and they have to make a stirring emotional argument to win their case.<sup>254</sup> Later, of course, Cox was the Special Prosecutor in the Watergate case who was fired by President Richard M. Nixon because Cox had begun to investigate Nixon's participation in the Watergate break-in and cover-up. Gesell became a federal judge who tried Oliver North.

There was no lawyer seated at the ready table to my right, the table behind Cox. Fortas must have made arrangements with the Office of the Clerk to telephone him during the *White Motor Company* arguments, to let him know approximately when the *Gideon* case would be called.

#### B. Fortas' Argument: Some Reminiscences

When *White Motor Company* ended and our case was called, Fortas suddenly appeared, seemingly out of nowhere. This was my first glimpse of our opponent. He approached the podium and began to speak. He was wearing a brown suit, rather than the coat and tails worn by lawyers who often appear in the Supreme Court. My first impression was that he was in his early 50s, small and dapper-looking, with a deep voice. Lewis described him in the following words:

Fortas is a smallish man with a manner that can be grave or, especially with women, charming . . . . His speech has a slow, deliberate quality, with tangible intellectual force—the word may be tension—behind it. It is hard to imagine him being entirely spontaneous. Not that he lacks humor, but he always seems controlled. A lawyer who has worked with him says: "Of all the men I have met he most knows why he is do-

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254. The *White Motor Company* opinion indicates that he won, so I now am puzzled by why he would have made such a comment.

ing what he does. I don't like the s.o.b., but if I were in trouble I'd want him on my side. He's the most resourceful, the boldest, the most thorough lawyer I know."<sup>255</sup>

In the middle of Fortas' argument, the Court recessed for lunch. Earlier that morning, a representative of the Court explained that, at noon, the lawyers in the midst of argument would be taken downstairs to a special room where lunch would be served. I was given some choices and was asked what I wanted to eat. At noon, Fortas and I were led downstairs to a room with tables and chairs. We introduced ourselves and sat together at a small table in the middle of the room, facing each other. We were the only people in the room, other than the waiter who served us our food.

Fortas was very friendly and kind to me. He began with an apology. *Gideon* was one of four companion cases that had been set together for argument, one after the other, beginning with *Gideon*.<sup>256</sup> Fortas explained to me that he had sent invitations to the lawyers in these four cases for a dinner party at his home the Sunday evening before the cases were set for argument. The invitation had been sent only a few days before the event. Evidently, mine had gone to Tallahassee and was not received in time to attend the party.

During the lunch, Fortas talked about Justice Black and how much he thought of him. He mentioned the case from Texas in which he had represented Johnson regarding election results<sup>257</sup>

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255. Lewis, *supra* n. 2, at 54.

256. The other three cases were *Draper v. Washington*, 372 U.S. 487 (1963) (right to transcript for appeal where the trial judge could deny a request on the ground that issues were frivolous, and where review of the judge's decision was limited), *Lane v. Brown*, 372 U.S. 477 (1963) (right to transcript for appeal of denial of petition for writ of error *coram nobis* where, under state law, only the public defender could procure a free transcript, and where the public defender had refused on the ground that appeal would be unsuccessful), and *Douglas*, 372 U.S. 353 (right to counsel for the first appeal of right from a criminal conviction).

257. A good discussion of that case can be found in Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 90-96 (William Morrow & Co. 1988). The Democratic run-off for a vacant United States Senate seat in Texas, in August 1948, was between Johnson and former Governor Coke Stevenson. Johnson won by eighty-seven votes, but the outcome was suspect. A single ballot box in Duval County contained 202 votes for Johnson in the same handwriting and in the same ink. Then, when election commissioners later opened the box, it was empty. Nevertheless, the Democratic party executive committee certified Johnson as the victor. From this incident, Johnson earned the nickname "Landslide Lyndon." Stevenson alleged fraud. He could have gone to state court,

and had received an order from Justice Black in favor of Johnson. Fortas described to me what had taken place in that case, and he had high praise for Justice Black's decision and for the way he had handled the matter.

After lunch, we returned to the courtroom. There were very few spectators in that large room. During the arguments, I turned to look at the audience, and there was only one spectator in the entire courtroom—my wife. I remember thinking how strange it was to have a completely empty courtroom for a case that would probably become a landmark decision.<sup>258</sup>

### C. My Oral Argument

When it was my turn to argue, I stepped before the podium. The Justices before me, from left to right, were Justices White, Brennan, Clark, Black, Warren, Douglas, Harlan, Stewart, and Goldberg. My first impression was that I was in a pit. The Justices were very close to the speaker's podium, and they were seated high above me and were spread out far to my left and to my right. This was different from the configurations in the state

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but instead elected to go to an old friend of his, United States District Court Judge T. Whitfield "Tiddy Winks" Davidson, alleging fraud, and Davidson promptly invalidated the election results. Johnson now was off the ballot for the general election, which in Texas, in those days, was always won by the Democratic candidate. *Id.* at 91–92.

Fortas entered the case at this point. Time was of the essence. Fortas presented his argument on Johnson's behalf to Judge J.C. Hutcheson of the United States Court of Appeals for the Fifth Circuit, but Hutcheson wanted to wait until later in the fall, when the entire court could hear the case. Fortas then directly presented the case to the Supreme Court, for, he said, "[Justice Hugo] Black will handle it expeditiously," in his capacity as presiding Supreme Court Justice for the Fifth Circuit. *Id.* at 93. Fortas argued that a federal judge should not enjoin a state-run election. *Id.* at 94. Arguments took place in Justice Black's office, in the Supreme Court building, for four hours. Stevenson's lawyers argued vote fraud, while Fortas argued that state law controlled and that the federal district court had no jurisdiction in the matter. *Id.* at 94–95. "Obviously, the very [astute] Fortas knew [that such an argument] would strike a chord with [Justice Black], who was forever defending 'Our Federalism,' especially states' rights in the federal system." Ball, *supra* n. 207, at 152. He also argued that delay in obtaining judicial relief would effectively bar Johnson from running in the general election. Justice Black ruled with Fortas on September 28, 1948, in Johnson's favor and quickly set aside the challenged order on the ground that the district court had lacked jurisdiction to enjoin the state election. "Johnson was rapidly certified as [the] Democratic candidate and won election to the Senate in November 1948." *Id.* at 153. Twenty years later, Johnson repaid the enormous debt he owed to Fortas by appointing him to a seat on the Supreme Court vacated by Justice Goldberg. *Id.*

258. There was one other person in the courtroom that afternoon who was not a member of the Court, a staff member, or an attorney participating in arguments, and that was Lewis, a reporter for *The New York Times*. He was not in the audience section; the Court allowed him to sit within the bar, with the lawyers, at a table to my left.

courts where I had previously argued. The podium had lights on it. There was a green light, a yellow light, and a red light to indicate when the speaker was supposed to stop.

The Justices did not ask many questions in the *White Motor Company* case, but they seemed more interested in the *Gideon* case. I began to make my prepared argument, but there were questions almost immediately. I was used to the Florida Supreme Court and the Florida appellate courts, where the judges asked very few questions. These Justices inquired about everything. There was no reverence for established rules, and they were willing to reexamine every rule and concept down to its very foundation.

A total of ninety-two questions, comments, or interruptions took place<sup>259</sup> during my argument, and most of these came during the first half hour or so. In a letter to the editor of the *Harvard Law Record*, on April 24, 1969, I described the questioning in the following way:

It became obvious, during the argument, how deeply the Court was committed to the overthrow of *Betts v. Brady* and its progeny. Never in the eighteen cases which I had previously argued in the Florida Supreme Court and other appellate courts had I encountered anything like the zeal and emotion that emerged in the questioning. Anger seemed to characterize my most relentless questioner.<sup>[260]</sup> A constant rain of hostile questions came from most of the justices. Concessions made in a spirit of candor that I thought to be the State's duty seemed only to excite fresh attack. Florida's position was obviously hopeless; my ten months of work devoted to the case were of little avail.<sup>261</sup>

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259. This number was obtained by counting the questions in the transcript of the oral arguments. *Landmark Briefs*, *supra* n. 178, at 640–660.

260. Justice Black was the Justice to whom I was referring. Justice Black, by the way, had a tie or connection to the Stetson University College of Law. From about 1932 until about 1950, the Florida Military Academy was located in the former Rolyat Hotel building in Gulfport, Florida, and Justice Black's sons were students there. In 1954, the Stetson University College of Law moved from DeLand, Florida, into the former Rolyat property, and it has been at that site since then.

261. *Letters to the Editor*, 48 Harv. L. Rec. 9, 11 (Apr. 24, 1969). This letter followed an exchange of letters by Krishna Mohan Sharma, a fellow graduate student at Harvard Law School, and Professor Yale Kamisar of the University of Michigan. Kamisar had written a book review of *Gideon's Trumpet*, and was critical of me and my role in the *Gideon* case. Yale Kamisar, *Book Review*, 78 Harv. L. Rev. 478, 480 (1964) (reviewing *Gideon's Trumpet*). Sharma read the book review, thought it inaccurate, and proposed to write an article



At times, a Justice would ask a question to which he knew the answer, but he used me as a kind of a foil in an effort to persuade another Justice to agree with his position. The interrogator would ask me the question, then look down the row at another Justice as if to say, "This is an idea of mine and I want you to understand my position and to agree that my position is correct." The questioning was absolutely brutal, and every Justice, except Justice Douglas, asked at least one question of me during the argument. I felt like I was caught in a crossfire. It was difficult to know which question to take next and difficult to respond with so many questions coming from so many different directions. At times, two Justices would ask questions at virtually the same time, while there still was a previous question from another Justice that had not yet been answered completely. In these situations, it became difficult to remember which Justice had asked the next question and what the question was, at the same time that I was formulating my answer to the previous, not-yet-fully-answered question. Not aware that one would have had to remember several rapid-fire questions at a time, I neglected to bring a pad and pencil to the podium that could have, perhaps, helped in answering. I would have written the name of the Justice and a couple of words to remind me of his question, so that I could have more readily answered in the order presented, as the questions came at me so relentlessly.

There were several exchanges that are still particularly vivid in my memory. For instance, in answer to a question about *Johnson*, I said that decision was at least in part based upon the supervisory powers of the United States Supreme Court over the lower federal courts. The point, trying to be made, was that the Court's supervisory power over the lower federal courts gave it additional ammunition, making it easier for it to render such a

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in the *Harvard Law Record* criticizing Kamisar's review. I asked him not to submit it because I did not want a controversy created over my involvement in the case in a year when I was searching for a law teaching position. Sharma, however, insisted on submitting the article to correct the historical record, and it was published as *Gideon's Trumpet Reviewed Anew: Several New Facts Now Disclosed*, 48 Harv. L. Rec. 6, 7, 14 (Feb. 28, 1969). Kamisar responded, *Letters to the Editor*, 48 Harv. L. Rec. 12, 14, 15 (Apr. 10, 1969). Lewis, author of *Gideon's Trumpet*, joined in. *Letters to the Editor*, 48 Harv. L. Rec. 12, 15 (Apr. 10, 1969). I wrote the letter to the Editor, cited above, on April 24, 1969. Then Sharma concluded the exchange in *Letters to the Editor*, 48 Harv. L. Rec. 9, 10 (May 1, 1969).

decision, rather than relying solely on the Sixth Amendment. My comments, unfortunately, made Justice Black very angry, and he became red in the face.

At another point, while talking about the principle that states should be free to experiment with regard to criminal procedure and thinking in terms of minor criminal cases, I suggested that perhaps a state could do away with a need for a prosecutor—perhaps, a judge could handle the matter without the benefit of counsel on either side. On hearing this, Justice Harlan, whose views were most favorable to our position, tried to help me out by saying, “Careful now, don’t go too far.”<sup>262</sup>

The fact that twenty-two states had filed an amicus brief against us certainly did not enhance our position. However, Justice Harlan, at one point during the arguments,<sup>263</sup> wondered whether the right to counsel could be considered a fundamental right, essential to due process, if only twenty-two states had joined in the amicus brief.

The low point in my argument began when Justice Stewart asked whether a lay person, such as Gideon, could be permitted to defend another person. Obviously, no judge would allow Gideon, with a prior felony record, to defend anyone. However, the issue of whether a lay person could be allowed to represent a criminal defendant under at least some circumstances seemed to be a reasonable one. Suppose a judge had rejected an indigent’s request for the appointment of a lawyer, on the ground that there was no special circumstance entitling him or her to free counsel under the *Betts* rule, and as a consequence, the defendant wanted the help of a friend who was a more knowledgeable, more educated, and more experienced lay person, to assist in the defense. It seemed reasonable to me that the defendant should be allowed to receive help from the more experienced friend. Therefore, responding that if a defendant wanted the lay person to defend him or her and asked the trial court to allow this, I believed that a court would not object. But Justice Black then asked, “Wouldn’t Gideon maybe get in trouble for practicing without a license?” The

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262. *Landmark Briefs*, *supra* n. 178, at 655. For some reason, Justice Harlan’s remark is left out of the transcript, but this is the page at which that remark was made.

263. I cannot remember whether he made this comment during my argument or during the argument of one of the other three attorneys arguing in the case—Fortas, Rankin, or Mentz.

belated realization, that the organized bar would probably never allow a lay person to represent a defendant under any circumstances, prompted me to say, “I’m sorry, Your Honor; that was a stupid answer.”<sup>264</sup>

At the time, though unhappy with the answer to Justice Stewart’s question, a few years later it dawned upon me that my answer had not been “stupid” after all. In 1965, after being hired as an Assistant Professor at the Emory University School of Law, in Atlanta, I went downtown to the United States District Court and volunteered to accept appointments in criminal cases. Though not licensed to practice law in Georgia—at the time, a prerequisite for admission to practice before the United States District Court for the Northern District—Judge Frank Hooper said, “I should be able to decide who practices in my own courtroom.” He, then, promptly appointed me to a case and admitted me to practice in the Northern District.

The judges of that court appointed me to represent inmates of the Atlanta Penitentiary in several cases. In one, I represented four inmates who wished to have the help of Robert Joyner White, a knowledgeable, very capable “jailhouse lawyer,” in preparing their petitions for post-conviction relief. White was never a licensed attorney, but he had studied law for many years while confined and probably knew as much about federal criminal law and procedure as any licensed lawyer. My clients wanted his assistance, but the Atlanta Penitentiary had a rule prohibiting one inmate from providing legal help to another. For violation of the rule, my clients and White risked being placed in solitary confinement and losing accumulated “gain time” for good behavior, which would reduce the length of time served. Also, they risked having their trial transcripts and other legal papers confiscated and destroyed by prison officials. Some of these papers, such as affidavits, were irreplaceable. After a three-day trial, in *White v. Blackwell*,<sup>265</sup> Judge Hooper ruled in our favor; thus, the rules of the Atlanta Penitentiary, prohibiting jailhouse lawyer activity, could not be enforced against my clients or against White. He was free to provide legal help to them, and they were free to receive

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264. *Landmark Briefs*, *supra* n. 178, at 656.

265. 277 F. Supp. 211 (N.D. Ga. 1967).

his help. And, whether or not the members of the bar approved was irrelevant, as far as Judge Hooper was concerned.

In a similar case, the United States Court of Appeals for the Sixth Circuit had ruled in favor of Tennessee prison officials and against the inmates wishing the assistance of a jailhouse lawyer.<sup>266</sup> While the appointed lawyers in that case were in the process of seeking review in the United States Supreme Court, White and I sent all of the papers, pleadings, memos, and briefs from our case to those lawyers and offered our assistance. They won their case in the Supreme Court, and that case is known as *Johnson v. Avery*.<sup>267</sup> The Court agreed that the inmates would be denied access to the courts unless able to receive help from more knowledgeable inmates. The Court held that, in the absence of an alternative, such as a comprehensive public defender program or assigned-counsel system for inmate petitions, the State could not be allowed to enforce a regulation prohibiting knowledgeable lay persons from providing assistance and inmates needing assistance from seeking such help.

After the *White* case, with the help of John Cleary, Deputy Director of the National Defender Project of the National Legal Aid and Defender Association, a project funded by the Ford Foundation, we were able to hire White and Benjamin Rayburn, another extremely capable jailhouse lawyer at the Atlanta Penitentiary, for our Emory program for the purpose of assisting in the supervision of law students.<sup>268</sup> Cleary later became the Director of

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266. *Johnson v. Avery*, 252 F. Supp. 783 (M.D. Tenn. 1996), *rev'd*, 382 F.2d 353 (6th Cir. 1967).

267. 393 U.S. 483 (1969).

268. In a 1970 law review article, my co-author and I made the following comments regarding White and Rayburn:

Since November, 1968, the Emory Law School Legal Assistance for Inmates Program has employed a former jailhouse lawyer who was released on parole for the purpose of working with the program, [Robert Joyner White], and in December, 1969, a second former jailhouse lawyer [Benjamin Rayburn] was added to the staff. Their utilization in the program has been a joint experiment by Emory and the National Defender Project, and their salaries have been paid in the form of fellowship grants by the National Defender Project. One carries the title of "administrative assistant" and the other is a "research associate." They do a variety of work, including answering letters from prisoners, doing legal research and writing, and supervising law students. These two men are unusually qualified and competent and the experiment to date has been successful. It is hoped by the school and by staff members and officials of the National Defender Project that the Emory experience will be duplicated elsewhere, and that this unusual source of manpower will be utilized by other prison legal assistance programs.

the Federal Defender program in San Diego, and one of his first acts was to hire Rayburn as a paralegal. For many years, Rayburn wrote post-conviction petitions and appellate briefs for the program, and he became so highly respected that the judges of the United States Court of Appeals for the Ninth Circuit allowed him to orally argue before them, even though he had never been a licensed attorney.

Getting back to Justice Stewart's question about a layperson representing a defendant, and Justice Black's comment about the bar association, if, in 1963, an indigent defendant, in a case without any special circumstances, were to ask that a knowledgeable, experienced lay person represent him or her, the trial judge would have had to either appoint counsel for that defendant or allow the defendant to be represented by the knowledgeable lay person. It is unlikely that the bar association would have been in any position to object. If the bar wished to create an assigned counsel system and provide an alternative, then, perhaps, the judge could have denied the request by the defendant to allow the lay person to represent him or her. But, if the defendant was indigent and did not qualify for appointed counsel under *Betts*, and if there were no alternative means of obtaining representation, the defendant should have been allowed to have the knowledgeable lay person represent him or her. This is so, because my experiences with many nonlawyers over the years have demonstrated that a person does not have to be a licensed attorney to be competent at providing legal services. Furthermore, judges have control over their courtrooms, and if they wish to allow nonlicensed people, in appropriate circumstances, to practice before them, that should be their prerogative.

#### D. Mentz's Argument

After my argument, Mentz made his presentation. Near the end of his argument, one of the Justices said, "You don't really expect to win this case, do you?" Mentz answered, "Your Honors, hope springs eternal." This, of course, drew laughs from the members of the Court.

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Bruce R. Jacob & K.M. Sharma, *Justice after Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 U. Kan. L. Rev. 493, 593-594 (1970) (footnotes omitted).

After Mentz concluded his argument, I felt that I had not done a good job, in part, because the questioning had been so relentless. Fortas approached Ann and me in the outside corridor, and we shook hands. He apologized to Ann for not getting the invitation to us in time to attend the dinner party at his home for the lawyers in the four companion cases. He probably could sense my moroseness regarding the oral argument and, to make me feel better, he said, “You know, you have a wonderful way<sup>269</sup> before the Court.” Of course, this made me feel much better.

Several years later, Fortas was appointed to the Supreme Court. At the time, the Dean of the Emory University School of Law invited him to be the Law Day speaker, telling him in the letter that I was on the faculty. Justice Fortas accepted, and I will never forget his visit to our school. He entered the main lobby with the Dean. The members of the faculty were there, and there seemed to be hundreds of students crowded around us. Justice Fortas and I shook hands, and he turned to the Dean and said in a very loud voice so all could hear, “Dean, you have a good man here in Bruce Jacob.”<sup>270</sup>

Following the argument, Ann and I headed for the Dulles Airport for the flight back to Florida. Dulles had just opened, and the roads leading there were not paved the entire way. In those days, not many people traveled by air. Also, because Dulles was so new, the airport was empty except for those working behind the counters. We were the only two travelers in the entire main terminal. In those days, luggage had to be weighed. The suitcases, full of books, were about fifty pounds overweight and incurred a

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269. I assume that he was using the word “way” to mean “manner.”

270. In 1993, at a program at American University regarding the *Gideon* case, featuring several speakers—including Lewis and Krash, Fortas’ former law partner who had assisted him in writing the *Gideon* brief, *supra* n. 225—I told the audience about my favorable experiences with Fortas; the audience had, amongst others, Justice William Brennan and Smith, former President of the American Bar Association and head of the Holland & Knight law firm. Krash told me afterwards that it was unusual for Fortas to be so good to me, for he was not known for being kind to young lawyers. This unflattering point is also made by Murphy, *supra* n. 257, at 80 (footnote omitted):

Since Fortas was the most organized of three name partners, the job of managing the firm fell to him. This did not make the younger lawyers working for the firm very happy. . . . “You should hear what the junior lawyers who come back here say about Fortas,” reported an administrator at Yale Law School. “They say he’s cold, arrogant, a real son of a bitch, and worse.”

This may very well be true, but he certainly was most gracious and exceptionally good to me, and I have always had the very highest regard for him.

fifty-dollar excess-baggage charge. A fifty-dollar payment in those days was like several hundred dollars today. For example, salaries for associates in those days, in Florida, were between \$4,800 to \$9,000 per year.

There was a newspaper strike early in 1963, and *The New York Times* was shut down. Lewis phoned me and explained that, since the newspaper was on strike and he was temporarily unoccupied, he wanted to fill the time by writing a book. He thought the *Gideon* case would be a good subject. He asked if he could interview me. On my saying yes, he flew to Tampa to meet me. Ann and I drove to the motel where he was staying, and he interviewed us in his room. He had a small portable typewriter. He typed as he asked questions and made comments.

Before the release of the Court's decision, H.G. Cochran stepped down as Director of the State Department of Corrections, and Louis Wainwright became the new Director. I informed the Supreme Court of this change, but never received an answer. However, when the opinion was released, the name of the case had been changed from *Gideon v. Cochran* to *Gideon v. Wainwright*.<sup>271</sup>

#### VII. THE SUPREME COURT DECISION AND ITS IMPLICATIONS

The unanimous decision in the case was announced on March 18, 1963, a little over two months after the oral arguments. *Gideon* overruled *Betts*, making the Sixth Amendment's right-to-counsel provision applicable in the state courts. The holding applied to noncapital felonies and *a fortiori* also to capital cases. In other words, *Gideon* imposed an automatic right-to-counsel constitutional requirement for all felony cases.<sup>272</sup>

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271. 372 U.S. 335. I never met Gideon, but we invited Wainwright to the Stetson University College of Law in the early 1980s as a guest speaker at one of our "Inns of Court" banquets. I sat next to him and introduced him. He gave a good speech and was very likeable.

272. *Id.* at 344–345. The decision in *Powell*, 372 U.S. 45, was based on its facts and special circumstances and did not impose a flat requirement in capital cases. Some would argue that in *Hamilton*, 368 U.S. 52, two years before *Gideon*, the Court had determined that counsel must be provided automatically in every capital case if the defendant was indigent and desired counsel. There is some language in the opinion that can be so interpreted: "When one pleads [guilty] to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." *Id.* at 55. However, the holding of the case was based on the fact that the defendant, charged with a capital offense and entitled to

In *Gideon*, Justice Black said that, in *Betts*, the Court had “made an abrupt break with its own well-considered precedents,” and that he was not breaking new ground, but simply returning to constitutional principles established earlier.<sup>273</sup> He, of course, was referring primarily to *Powell*, but perhaps also to *Johnson*. In his concurring opinion, Justice Harlan, however, accurately pointed out that *Betts* had in reality been an extension of *Powell*.<sup>274</sup>

Why did Justice Black assert that *Betts* had not followed earlier precedents when this was not true? One answer is that he may have been convinced that it was so, even though Justice Harlan’s statement was clearly the correct view. Another reason was that, in doing so, he was effectively foreclosing any possible attempt to make *Gideon* prospective only in its application. By saying, in effect, that *Betts* had been inconsistent with cases such as *Powell* and *Johnson*,<sup>275</sup> he was saying that *Betts* not only was voidable through the overruling process, but it was also void, a nullity, as if it had never existed as precedent. And this being the case, the states had no business ever relying on it as precedent. *Gideon*, therefore, did not really change past precedent, according to Justice Black.<sup>276</sup> The real, valid precedent that the states should have followed were *Powell* and *Johnson*, not *Betts*. Because the states were not entitled to rely on *Betts*, they could not argue that *Gideon* should apply prospectively only.

It was surprising that the opinion in *Gideon* was issued so soon and was also conspicuous for its brevity and simplicity. Considering how complex the case was, a lengthier, more comprehensive opinion would have been more appropriate. However, the brevity of the opinion is understandable because Justice Black

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counsel under state law, was denied counsel at arraignment, which was a critical stage in an Alabama criminal proceeding. *Id.* at 53–54. The Court pointed out that, “[w]hat happens there may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted . . .” *Id.* at 54. Thus, the seriousness of the charge and the complexity of the procedure at that stage in the case required counsel. This is consistent with the “special circumstances” test developed in *Powell* and *Betts*. The complexity of the case was one of the special circumstances requiring appointment of counsel in order to assure a fair trial, in the *Powell* and *Betts* line of cases. *See supra* n. 37.

273. *Gideon*, 372 U.S. at 343–344.

274. *Id.* at 350 (Harlan, J., concurring); *Betts*, 316 U.S. 455; *see supra* n. 59 (discussing Justice Harlan’s concurring opinion).

275. *Gideon*, 372 U.S. at 343–345.

276. *Id.*



took the simple position that *Betts* was wrongly decided and that earlier cases, such as *Powell*—as he interpreted—and *Johnson*, were the correct precedents that ought to have been followed by all the state courts since the 1930s.<sup>277</sup> Therefore, all anyone wishing to understand *Gideon* needed to do was to read the *Powell* and *Johnson* opinions. Those cases, plus Justice Black's brief opinion in *Gideon*, answered all questions. As far as he was concerned, there was little need for explanation. In his mind, those cases had always stood for the true state of the law.

That Justice Black did not distinguish between the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment seemed equally strange. In making the Sixth Amendment's right-to-counsel provision applicable to the states, it was not clear whether it had been incorporated into the concept of due process, or whether the Equal Protection Clause required that economic distinctions between rich and poor, when it came to representation by counsel, must be equalized. The opinion was notable for some other omissions and unanswered questions as well, which have since spawned a proliferation of scholarly writings.<sup>278</sup> For instance, the opinion did not discuss whether the holding applied to misdemeanors as well as felonies. The Sixth Amendment expression, "in all criminal prosecutions," of course, embraces misdemeanors.<sup>279</sup> This issue was later dealt with in *Argersinger v. Hamlin*<sup>280</sup> and *Scott v. Illinois*.<sup>281</sup>

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277. *Id.*

278. See generally e.g. John R. Brown, *The Trumpet Sounds: Gideon—A First Call to the Law School*, 43 Tex. L. Rev. 312 (1964); John F. Decker & Thomas J. Lorigan, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 Creighton L. Rev. 103 (1970); Yale Kamisar, *Gideon v. Wainwright A Quarter-Century Later*, 10 Pace L. Rev. 343 (1990); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L.Q. 625 (1986); James P. Levine, *The Impact of "Gideon": The Performance of Public & Private Criminal Defense Lawyers*, 8 Polity 215 (1975); Henry P. Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U. L. Rev. 445, 446 (1965); Victoria Nourse, *Gideon's Muted Trumpet*, 58 Md. L. Rev. 1417 (1999); Ronald J. Tabak, *Gideon v. Wainwright in Death Penalty Cases*, 10 Pace L. Rev. 407 (1990); Steven Zeidman, *Sacrificial Lambs or the Chosen Few? The Impact of Student Defenders on the Rights of the Accused*, 62 Brook. L. Rev. 853 (1996).

279. See *Evans*, 126 F.2d 633 (holding that the phrase "all criminal prosecutions" in the Sixth Amendment was not limited to felonies).

280. 407 U.S. 25 (1972). In that case, the Court held that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel." *Id.* at 37 (emphasis added).

281. 440 U.S. 367 (1979).

Also not found in the opinion was the issue of retroactivity, left for later. *Burget v. Texas*,<sup>282</sup> which was decided four years later, in 1967, applied *Gideon* retroactively.<sup>283</sup> This meant that 4,300 or so inmates in Florida were sent back to the trial court for new trial or were released from custody. Other states that had not automatically provided counsel to indigents also had to retry or release the inmates who had not received the benefit of counsel.

The Court did not deal with the decision's impact on the line of cases that held that the states were to be allowed as much latitude as possible to experiment in the area of criminal procedure.<sup>284</sup> Presumably, there now was little vitality left in those cases. Also, there was little discussion about the changes that had taken place with respect to the meaning of due process as a result of *Gideon*.

What did the Court do in *Gideon*? Did it merely extend the holdings of *Powell* and *Betts* and find that being tried for a felony is a special circumstance that automatically entitles a defendant to counsel in the same way that illiteracy or mental illness entitled one to counsel under *Betts*? In view of the fact that *Gideon* overruled *Betts* and also incorporated the Sixth Amendment into the Fourteenth Amendment, this certainly was not the theory underlying the decision, although such a rationale would be fairly easy to explain and understand under previous cases defining the concept of due process.

Was the Court in *Gideon* saying that the Due Process Clause of the Fourteenth Amendment was just a shorthand expression for the first eight amendments? The Court had come close to adopting this total incorporation theory in 1947,<sup>285</sup> which would have meant that federal procedures and the caselaw developed by federal courts in the area of criminal procedure, pursuant to the Bill of Rights, are binding on the states.<sup>286</sup> This would have circumscribed the capacity of states to experiment and to formulate their own guidelines for criminal cases. In *Gideon*, although Justice Black wrote the principal opinion, the Court again did not go

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282. 389 U.S. 109 (1967).

283. *Id.* at 114–115.

284. *Gideon*, 372 U.S. at 339–345.

285. *Adamson*, 332 U.S. 46.

286. *Id.* at 84–86 (Black, J., dissenting).

so far as to adopt the total incorporation theory of due process, but did decide to employ the selective incorporation approach.<sup>287</sup>

In *Adamson*, Justices Wiley Rutledge and Murphy took the position, in their separate dissents, that the concept of due process should include the first eight amendments,<sup>288</sup> but unlike Justices Black and Douglas, who would have stopped at that point,<sup>289</sup> they believed that due process was a broad enough concept to include not only the first eight amendments, but more.<sup>290</sup> In other words, if a circle represents due process, the first eight amendments would fit within the circle, but with room to spare. And the extra space within the concept of due process would include due process as a flexible concept of fairness, which courts can employ when reviewing a criminal case, after the fact and after the trial has taken place, to determine whether basic principles of fairness have been observed.

In *Gideon*, Justice Black did not discuss the changes to the concept of due process that were being effected by the decision. However, it is clear, as a result of *Gideon*, that fairness was no longer the primary issue. Rather, the main issue now was whether the new rule requiring counsel had been followed. If not, the conviction was invalid, whether fair or not. Now a before-the-fact requirement had been imposed. After-the-fact review to determine fairness, based on all the facts and circumstances of the case, was no longer the method to be used.<sup>291</sup>

As a result of *Gideon*, the states were also no longer free to experiment as in the past and thereby deviate from the federal model for criminal prosecutions, as set out in the Fourth, Fifth,

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287. *Gideon*, 372 U.S. at 340–343. For additional information on incorporation, review *supra* note 88 and accompanying text. The word “incorporation” troubled some. Justice Goldberg, in a light-hearted moment, wondered aloud during the arguments in *Gideon* whether “absorption” would be a more palatable word to describe the process.

288. 332 U.S. at 124–125.

289. *Id.* at 68–92, app., 92–123.

290. *Id.* at 124–125. Consult Justice Harlan’s dissent in *Poe v. Ullman*, 367 U.S. 497, 539–545 (1961), to contrast his expansive due process view to Justice Black’s narrow, restrictive view as to the scope and meaning of the due process concept. See e.g. *Goldberg v. Kelly*, 397 U.S. 254, 271–279 (1970) (Black, J., dissenting); *Griswold*, 381 U.S. at 507–527 (Black, J., dissenting).

291. Perhaps, what the Court was saying was that it was impossible to ever receive a fair hearing or trial if counsel had been denied—that lack of counsel rendered a trial per se unfair. I do not think the fact that a defendant is not provided counsel necessarily means he or she will receive an unfair trial, but nevertheless this may be what the Court was saying in *Gideon*.

Sixth, and Eighth Amendments. Whether one agrees or not that this federalization of criminal procedure is good for the Country, it is incontestable that the federal model has become the national model for the states in criminal prosecutions, and that federal caselaw, as well as the Fourth, Fifth, Sixth, and Eighth Amendments, have become the prescribed criminal procedure for the states. The states can, of course, impose stricter standards than those set forth in the Bill of Rights, providing greater protection to defendants than is accorded by the first eight amendments.<sup>292</sup> However, they cannot diminish the procedures mandated by the federal Bill of Rights; there is little room now for experimentation by the states.

When the *Gideon* decision was issued, the Florida Legislature was in session, and much to its credit, the Legislature immediately established a statewide public defender system.<sup>293</sup> In each judicial circuit, the office of public defender for the circuit was created and provisions were made for hiring assistant public defenders, providing office space and investigative and secretarial help. One provision of the new law allowed any lawyer in good standing to volunteer to become an unpaid "Special Assistant Public Defender." As soon as the bill became law, I volunteered and became a Special Assistant Public Defender for the Tenth Judicial Circuit of Florida and handled some cases for indigents.

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292. *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 80 (1980). States can provide greater protection to individuals than is provided by the first eight amendments, but some state legislatures, including Florida, have adopted "lockstep" provisions in their constitutions that prohibit the courts of the state from affording more protection than is allowed under the Bill of Rights by the United States Supreme Court. The Florida Supreme Court was more liberal, and more defense oriented than the United States Supreme Court in the areas of the Fourth and Eighth Amendments, in construing parallel state constitutional provisions. The Florida Legislature then successfully introduced a "lockstep approach" in search-and-seizure cases, requiring that the State guarantee "be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Fla. Const. art. 1, § 12; see generally Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. Fla. L. Rev. 653 (1987) (discussing state adoption of federal laws). For a fuller discussion of the distinctive features of state constitutionalism, including a "lockstep approach," see generally Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses* 13–17 (2d ed., Michie Co. 1996); G. Alan Tarr, *Understanding State Constitutions* 2–3, 180–183, 188 (Princeton U. Press 1998).

293. The public defender legislation can be found at Florida Statutes Sections 27.50–27.605 (2002).

### VIII. RETRIAL OF GIDEON

#### A. Appointment of the Trial Lawyer

When the Court remanded the case to Panama City for retrial, the American Civil Liberties Union volunteered to represent Gideon. However, he declined, preferring instead a local lawyer to represent him.<sup>294</sup> Judge McCrary, who was to preside over the retrial, gave Gideon a choice of lawyers, and he chose Turner, a local lawyer. Judge McCrary appointed Turner to represent Gideon.<sup>295</sup>

The first time I saw Turner, on September 14, 2000, at a restaurant on Panama City Beach,<sup>296</sup> he reminded me of the movie star and dancer Fred Astaire.<sup>297</sup> At my table during the dinner, the lawyer sitting next to me, when told how much Turner reminded me of Astaire, said, “It’s strange that you say that, because he’s a dancer.” He explained that, in court, when trying a case before a jury, Turner literally “danced,” moving around like a dancer. Once the local newspaper published a photo of him, taken while trying a case before a jury, showing him whirling around, with his coattails flapping behind him. Turner was an outstanding criminal defense attorney in the Panama City area for many years, and he then became a circuit judge. Retired, and now about eighty years old, he lives near Panama City.

Turner understandably takes pride in having won the acquittal for Gideon, but the part of his life of which he undoubtedly is most proud is the period he spent in the United States Air Corps during the Second World War. As a young staff officer, with the legendary “Flying Tigers,” he flew in planes from India over the Himalayan Mountains into China to provide supplies, ammunition, and equipment to the Chinese who had retreated to the western part of China and were fighting the Japanese.<sup>298</sup> It was an extremely dangerous assignment. If his plane had been

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294. Lewis, *supra* n. 2, at 224–226.

295. *Id.* at 226. Mayo, who was the first Public Defender in that circuit, under the 1963 defender legislation, says that Turner had the reputation of being the best criminal defense lawyer in Bay County. Telephone Interview, *supra* n. 116.

296. *Supra* n. 115 (providing additional information about Turner).

297. Not long afterward, I reread *Gideon’s Trumpet* and found that Lewis also described Turner as a Fred Astaire look-alike. Lewis, *supra* n. 2, at 229.

298. Interview with W. Fred Turner, Sr. Cir. J. (Retired), St. Petersburg, Fla. (Apr. 20, 2001).

downed and the Japanese had captured him, he probably would have been executed.

Turner grew up in Millville, just west of Bay Harbor, and was very familiar with that entire area. He strongly believed that a criminal case was won or lost the moment the jury was chosen.<sup>299</sup> Therefore, selecting the jurors was extremely important. He has said that he “often selected jurors by looking at their shoes.”<sup>300</sup> Presumably shoes that are “spit shined” indicate a person who is meticulous almost to a fault and who might not be entirely sympathetic to a “down and out” defendant who has made mistakes in his life. When trying cases, he wanted to know as much as possible about each prospective juror. He told me the story of a time he traveled to Blountstown to try a case. Blountstown is in another county, about forty miles northeast of Panama City. He took a friend with him who had been raised there. His friend stood in the rear of the courtroom and, by a prearranged signal consisting of pulling on his ear, signaled to Turner whether each potential juror was a kind-hearted, generous person who might be sympathetic to the defendant or a “law and order” type of person who was likely to vote in favor of the prosecution.<sup>301</sup>

Before Turner was assigned to represent Gideon, Gideon’s wife had asked Turner to represent her to obtain money from Gideon for the support of their children. Turner disclosed this fact to his client and asked Gideon whether this bothered him and if he still wanted him as his lawyer. Gideon said that this disclosure did not bother him. Then, Turner told Gideon that if they won and Gideon became free and able to work, he fully expected Gideon to support his family.<sup>302</sup>

Turner also disclosed to Gideon that he had once represented Cook, the key prosecution witness against him in the criminal case two years earlier, and asked whether this bothered him. Again, Gideon said no.<sup>303</sup> And, as we shall learn, Turner’s prior representation of Cook and his knowledge regarding Cook’s juve-

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299. *Id.*

300. Ltr. from W. Fred Turner, Sr. Cir. J. (Retired), to Bruce R. Jacob, Dean Emeritus & Prof. of L. at Stetson U. College of L., *Gideon Trial* (Apr. 27, 2001) (copy on file with Author).

301. Interview, *supra* n. 298.

302. Interview, *supra* n. 130.

303. *Id.*

nile record later proved to be extremely helpful in Gideon's defense. The adult criminal case in which Turner had defended Cook involved the beating and robbery of a person for \$1.98 following an evening of drinking. Cook and another young person were charged with the crime. However, the victim subsequently was arrested and jailed as a defendant in an unrelated case, and the criminal charge against Cook was nol prossed.<sup>304</sup>

When interviewing Gideon in the Bay County Jail, Turner learned that his client was extremely upset that he had to stand trial again, erroneously assuming that, if he won in the Supreme Court, the case against him would end.<sup>305</sup>

At the first interview, Gideon had a "valise" full of motions that he wanted Turner to file in the case.<sup>306</sup> One was a motion for change of venue to Tallahassee. When Turner heard this, he said, "Look, I know everybody in this county. If we go to Tallahassee, no one knows me. Do you want me to argue your case before a jury none of whom know me or before a jury here in Panama City where two out of three jurors know me?"<sup>307</sup> Gideon then understood the advantage of trying the case in Panama City and agreed that asking for a change of venue was not a good idea.<sup>308</sup> Turner, at this point, admonished Gideon, "I'll only represent you if you will stop trying to be the lawyer and will let me handle the case."<sup>309</sup> Gideon relented.

Gideon desperately wanted an acquittal and told Turner that he "just couldn't do any more time" in prison.<sup>310</sup> At his age and after spending so many years in confinement, understandably, he could no longer endure prison life.

#### B. Jury Selection and Testimony of Prosecution Witnesses

When the six prospective jurors were placed in the jury box, Turner knew four of them. He struck two of them from the panel because one was a "teetotaler" who had no sympathy for drinkers, and the other "would convict his own grandmother."<sup>311</sup> These two

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304. Interview, *supra* n. 298; Lewis, *supra* n. 2, at 238.

305. Interview, *supra* n. 130.

306. Interview, *supra* n. 298.

307. *Id.*; Interview, *supra* n. 130.

308. *Id.*

309. *Id.*

310. Interview, *supra* n. 130.

311. Interview, *supra* n. 298.

were replaced by two more jurors, both of whom Turner knew.<sup>312</sup> Turner was very satisfied with the final six jurors. Of the six jurors, three were gamblers. This was particularly good because Gideon's explanation for having so much change in his pockets, at the time of his arrest, was that he had won it while gambling.<sup>313</sup>

Cook was once again the key witness against Gideon. He testified that he stayed out all night at a dance in Apalachicola, about sixty miles southeast of Panama City.<sup>314</sup> His friends dropped him off at Bay Harbor, about two blocks from his home.<sup>315</sup> He did not want to go directly home because he was afraid his parents would, as he put it, "get on me' about coming in [after] drinking."<sup>316</sup>

It was about 5:00 or 5:30 a.m.<sup>317</sup> when Cook stepped up to the front window of the Bay Harbor Poolroom and saw that the poolroom had been broken into.<sup>318</sup> Canvas money bags were on the pool table.<sup>319</sup> The front of the cigarette machine was removed.<sup>320</sup> Gideon was inside the poolroom, standing by the cigarette machine.<sup>321</sup> At the time, Cook had known Gideon for about six months.<sup>322</sup> Cook was looking at Gideon through the window from a distance of six or seven feet.<sup>323</sup> He got a full view of Gideon's face<sup>324</sup> and was sure that the person he saw in the poolroom was Gideon.<sup>325</sup> Cook also said there were empty beer cans on the counter.<sup>326</sup>

After observing Gideon in the poolroom, Cook watched as Gideon left the poolroom by the back door.<sup>327</sup> Cook walked north

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312. *Id.*

313. *Id.*

314. Tr. Transcr. at 10, *Gideon v. Wainwright*, 153 So. 2d 299 (Fla. 1963). I wish to thank Turner for providing me with a transcript of the second trial and copies of other documents in the case.

315. *Id.* at 13.

316. *Id.*

317. *Id.* at 3.

318. *Id.* at 3-4.

319. *Id.* at 4, 27.

320. *Id.* at 27.

321. *Id.* at 3.

322. *Id.*

323. *Id.* at 18.

324. *Id.*

325. *Id.* at 32.

326. *Id.* at 35. Strickland, the proprietor, also testified that there were empty beer cans on the counter. *Id.* at 79.

327. *Id.* at 5, 8.



along the front of the Bay Harbor Poolroom and the next establishment to the north, the Bay Harbor Bar.<sup>328</sup> There was a gap of about fifteen feet wide between the two buildings.<sup>329</sup> Cook looked through the opening and observed Gideon walking north along the alley behind the buildings.<sup>330</sup> Gideon kept walking toward Henderson's Grocery Store near the corner.<sup>331</sup> He was carrying a pint of wine.<sup>332</sup> He "acted kinder drunk," according to Cook, and his pockets bulged "like he was 'toting' something in them."<sup>333</sup> Gideon was wearing pants and a shirt, with no jacket, so Cook was able to see his pockets.<sup>334</sup> Cook saw Gideon get into the telephone booth near Henderson's Grocery Store.<sup>335</sup> Gideon set the wine bottle down by the booth and made a telephone call.<sup>336</sup> Then, a cab came and picked him up<sup>337</sup> three or four minutes later.<sup>338</sup>

Shortly thereafter, Cook saw Rhodes sitting on her porch, across the street from the telephone booth.<sup>339</sup> After the cab picked up Gideon, Cook talked with Rhodes, telling her that he had seen Gideon inside the poolroom and asking her to verify that it was Gideon.<sup>340</sup> She also recognized and identified Gideon as the person who had come out of the alley and had gotten into the telephone booth.<sup>341</sup>

Figure 2 shows the path taken by Gideon, according to Cook's testimony. It also shows the location of Rhodes.

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328. *Id.* at 8.

329. *Id.*

330. *Id.*

331. *Id.* at 5.

332. *Id.* at 6.

333. *Id.* at 25–26, 35, 45.

334. *Id.* at 25–26.

335. *Id.* at 6.

336. *Id.* at 6, 56.

337. *Id.*

338. *Id.* at 26.

339. *Id.* at 6.

340. *Id.* at 6–7, 11, 31.

341. *Id.* at 31.

INSERT FIGURE 2 HERE

After Rhodes spoke with Cook, she went to the telephone booth and got the bottle of wine that Gideon had left on the ground beside the booth.<sup>342</sup> It was half full.<sup>343</sup> She drank what was left.<sup>344</sup>

Cook returned to the vicinity of the poolroom and spoke with Officer Berryhill and Officer Duell Pitts about the break-in.<sup>345</sup> They found that a large trash can had been placed against the side of the building, at the northwest corner, next to a window.<sup>346</sup> The window had been broken. The glass was broken from the outside because the pieces of glass were inside the poolroom.<sup>347</sup> This permitted the burglar to enter the poolroom. The back door was also open.<sup>348</sup> Money bags and a coin box were on the pool table.<sup>349</sup> The canvas sacks had contained coins from the juke box and the coin box had contained cash from the cigarette machine.<sup>350</sup>

Strickland, the proprietor of the poolroom, said the door had not been open the night before, and the window had been intact.<sup>351</sup> Strickland said cash had been taken, but he did not know how much.<sup>352</sup> Also, some beer and wine had been taken, but he did not know how much was missing.<sup>353</sup> When pressed for an estimate, he said his best guess was that about twelve cans of beer and four bottles of wine had been taken.<sup>354</sup> In neither trial did Strickland say that anything other than cash, beer, and wine had been taken. However, Officer Pitts testified only in the second trial that twelve bottles of Coca-Cola had been taken.<sup>355</sup> This obviously was incorrect, but was a mistake that had consequences, as we shall see later. Also, Strickland testified that Gideon sometimes

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342. *Id.* at 46.

343. *Id.*

344. *Id.*

345. *Id.* at 11.

346. *Id.* at 12, 22, 85.

347. *Id.*

348. *Id.* at 12.

349. *Id.* at 86.

350. *Id.* at 64, 66.

351. *Id.* at 69.

352. *Id.* at 67.

353. *Id.* at 68, 74–75.

354. *Id.* at 76–77.

355. *Id.* at 88.

helped out at the poolroom and was paid.<sup>356</sup> However, he was never on the payroll.<sup>357</sup>

Gideon was arrested around 10:30 a.m., on the morning of the break-in at the Bayshore Bar in Panama City.<sup>358</sup> He had bought a half pint of vodka and about four or five beers.<sup>359</sup> When he was arrested, he had \$25.28, all in quarters, dimes, nickels, and pennies.<sup>360</sup>

At the second trial, Gideon testified and denied guilt.<sup>361</sup> He said that he had played poker on the Sunday before the break-in, five or six days earlier, during which he had obtained the small change.<sup>362</sup> He lived at the Bay Harbor Hotel, across the street and a few doors north of the poolroom.<sup>363</sup> Gideon testified that he crossed the street to telephone the cab company to go to the Bayshore Bar in downtown Panama City.<sup>364</sup> Instead of going the shortest and most direct way to get to the telephone booth, he walked across the street, between two buildings, to the alley behind them, and then north along the alley to the telephone booth.<sup>365</sup> He explained that he avoided the more direct route because there was a “drop-off” on the sidewalk if he went that way.<sup>366</sup> He also said that he had no beer or wine with him,<sup>367</sup> and that he saw Rhodes on her porch.<sup>368</sup>

It is clear that Gideon emerged from the alley when he approached the telephone booth, not only because Cook so testified, but also because Gideon had admitted this in his questioning of

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356. *Id.* at 62.

357. *Id.*

358. *Id.* at 89, 91

359. *Id.* at 116.

360. *Id.* at 89, 91.

361. *Id.* at 116.

362. *Id.* at 114, 122.

363. *Id.* at 113.

364. *Id.*

365. *Id.* at 113, 126–127.

366. *Id.* at 126–127.

367. *Id.* at 115. Turner asked Gideon on direct examination, “Did you have any beer, wine or whiskey about your person?” Gideon’s response was, “No sir, I don’t drink wine, if I had a bottle of wine I threw it away.” *Id.* On March 18, 2003, Turner told me that he had been surprised by Gideon’s answer, which was untrue. Turner said that he was not sure at the time whether the reply required him to disclose its untruth to the court. He did not, and, arguably, he was not required to do so, because that statement probably was not material enough to have changed the outcome of the trial. Interview with W. Fred Turner, Sr. Cir. J. (Retired), Miami, Fla. (Mar. 18, 2003).

368. Tr. Transcr. at 115, *Gideon v. Wainwright*, 153 So. 2d 299 (Fla. 1963).

Rhodes at the first trial.<sup>369</sup> Either Gideon was telling the truth that he went a little out of his way to walk between the buildings across the street and up the alley to the telephone booth, or he was so testifying that he went by way of the alley because he knew that not only Cook, but also Rhodes, could contradict him if he testified otherwise. Further, the transcript from the first trial could be used to contradict him if he changed his testimony. Rhodes, by the way, did not testify at the second trial. She was alive and available.<sup>370</sup> Why did the prosecution not use her as a witness? This is not known.

### C. Gideon's Testimony and Defense Counsel's Impeachment of the Prosecution's Key Witness

Turner's theory was that Cook and his friends were responsible for the poolroom break-in.<sup>371</sup> They had been partying and then broke into the poolroom and took the beer, wine, and Cokes that Officer Pitts said were taken. It seemed unlikely that Gideon, who obviously preferred alcoholic beverages, would have wanted the Cokes. However, young boys looking for beverages for a party were far more likely to take Cokes. According to Turner, Cook was acting as the lookout for the boys.<sup>372</sup> The fact that Gideon did not have beer or Cokes with him when he entered the telephone booth, according to Turner, made it unlikely that he had committed the crime. Of course, there were empty beer cans on the counter in the poolroom, and Gideon was carrying a wine bottle when he reached the telephone booth.

As mentioned earlier, Turner had previously represented Cook and was familiar with his police record.<sup>373</sup> This previous record became a major issue at the second trial, when Turner asked the following question:

Q: Have you ever been convicted of a felony?<sup>374</sup>

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369. *Supra* nn. 158–161.

370. Interview, *supra* n. 298.

371. Lewis, *supra* n. 2, at 248–249.

372. *Id.* at 248.

373. For an additional discussion of Turner's previous representation of Gideon, consult *supra* notes 303–304 and accompanying text and *infra* notes 386–387 and accompanying text.

374. Tr. Transcr. at 35–36, *Gideon v. Wainwright*, 153 So. 2d 299 (Fla. 1963).

Cook responded:

A: I 'stoled' a car one time and got put on probation for it.<sup>375</sup>

Turner then said, "The last time you testified in this case, you denied that, didn't you?"<sup>376</sup> The prosecutor objected, and the jury was removed from the courtroom so that the judge and lawyers could discuss the matter.<sup>377</sup>

Prosecutor Harris objected because Cook had pled guilty and, therefore, was not "convicted."<sup>378</sup> In other words, if Turner's question had merely asked whether Cook had pled guilty to a felony, the question would have been proper. J. Frank Adams, the State Attorney for the circuit, also chimed in, saying a defendant has not been "convicted" if he has pled guilty.<sup>379</sup> Turner pointed out that at the first trial the following exchange had taken place when Gideon had cross-examined Cook:

Q: Have you ever been convicted of a felony?

A: No sir, never have.<sup>380</sup>

After much argument, Judge McCrary called back the jury and allowed the following colloquy:

Q: [by Turner] Mr. Cook, have you ever denied, under oath, that you had been convicted of a felony? Prior to today, I'm speaking of.

A: Yes, I did.<sup>381</sup>

The prosecution objected to this, but Turner was allowed to continue as follows:

Q: When and where did you deny your criminal record, Mr. Cook?

A: Right here, the last time [Gideon] was tried, two years ago.<sup>382</sup>

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375. *Id.* at 36.

376. *Id.*

377. *Id.* at 36–37.

378. *Id.* at 40, 53–54. This objection did not make sense, because whether a defendant pleads guilty or not guilty and is found guilty after a trial, he or she is adjudged guilty and is "convicted." In both instances the result is a "conviction."

379. *Id.* at 40, 53–54.

380. *Id.* at 38, 51.

381. *Id.* at 43.

Therefore, Turner successfully impeached Cook. Prosecutor Harris then tried to rehabilitate Cook, by asking:

Q: What did you mean when you said you had not been convicted of a felony and yet, you say you pled guilty to stealing an automobile?<sup>383</sup>

Cook gave this answer:

A: Well, I didn't quite understand what a felony was then.<sup>384</sup>

Later, when the jury was out of the courtroom, Turner said that he intended to ask the court to instruct the jury "that stealing an auto is a felony under Florida Law."<sup>385</sup> When the jury came back into the courtroom, Harris proceeded to ask more questions of Cook. During this questioning, Cook happened to mention that his "felony" case had been before a judge, known by those in the courtroom to be a juvenile judge.<sup>386</sup> It is important to recall that Turner had represented Cook in a felony case, but that case was not pressed. The only other judicial case in which Cook had been a defendant had been a juvenile delinquency proceeding for "joy riding." In that case, Cook pled guilty and had been given probation. Harris then asked:

Q: Don't you know, Mr. Cook, that you can't be convicted, or plead guilty, to a felony in Juvenile Court?<sup>387</sup>

Turner objected, and Judge McCrary sustained the objection. This was the end of the discussion regarding Cook's past record.

This was probably the most critical point in the trial. The prosecution had not bothered to determine ahead of time whether their key witness had a criminal or juvenile record and, therefore, was totally unprepared for Turner's impeachment of their witness. Turner knew that Cook did not have a felony record and has said that he was surprised that the prosecutor offered such poor resistance when he asked Cook whether he had been convicted of a felony and whether he previously had lied about being convicted

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382. *Id.*

383. *Id.* at 48.

384. *Id.* at 49.

385. *Id.*

386. *Id.* at 58–59.

387. *Id.* at 60.

of a felony.<sup>388</sup> Cook had never been convicted of a felony. Moreover, he had never even been convicted of a crime, since juvenile delinquency is a civil, not a criminal, offense.<sup>389</sup> When Harris finally realized that Cook had been convicted of juvenile delinquency, not a felony, it became clear that Cook should not have been impeached. Further, when Harris pointed out that a juvenile court case is not a felony, Judge McCrary should have straightened out the mess that had been created by telling the jurors that Cook had not lied. However, Judge McCrary seemed to sidestep the entire issue by granting Turner's objection.

At the conclusion of the trial, the jury found Gideon not guilty. He was immediately released from custody.

### IX. LEGACY OF GIDEON: SOME FREQUENTLY ASKED QUESTIONS

#### A. Was Gideon Innocent?

Whenever I speak on the subject of *Gideon*, it is invariably asked whether Gideon was the person who broke into the Bay Harbor Poolroom in the early morning hours of June 3, 1961. My first response is that, in our system of justice, it does not matter whether he was innocent or not. All that really matters is whether he was guilty or not guilty of the crime. In his case, he was found not guilty by the jury at the 1963 trial. However, often this does not satisfy the questioners. They want to know whether he was the person who broke into the poolroom.

There are only two people who will ever know for certain the truth—Gideon and Cook. At the second trial, Gideon asserted that he did not break into the poolroom. As far as I know, through the remainder of his life,<sup>390</sup> he never deviated from that position.<sup>391</sup>

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388. Interview, *supra* n. 298.

389. *In re Gault*, 387 U.S. 1, 23 (1967); *In re Poff*, 135 F. Supp. 224 (D.C. Cir. 1955); *In re Anthony R.*, 201 Cal. Rptr. 299 (Cal. App. 5th Dist. 1984); *Ex parte Jones*, 93 P.2d 185 (Cal. App. 1st Dist. 1939); *State in Interest of Cook*, 145 So. 2d 627 (La. App. 4th Cir. 1962); *Ex parte Brown*, 233 P. 1098 (Okla. Crim. App. 1925); *Cmmw. v. Lash*, 30 A.2d 609 (Pa. Super. 1943); *State ex rel. Hinkle v. Skeen*, 75 S.E.2d 223 (W. Va. 1953); *Ogden v. State*, 156 N.W. 476 (Wis. 1916).

390. Gideon died in 1972.

391. In the "Pre-Sentence Investigation" report prepared by the Florida Parole Commission, Parole and Probation System, in August 1961, to aid Judge McCrary in imposing the sentence, it was reported that "the Defendant admits taking the items from the poolroom after finding the back door open, which he claims the operator, Mr. Strickland, does



Cook, of course, was equally sure that Gideon had broken into the poolroom. Turner remains convinced that Gideon did not commit the crime. Instead, he believes that Cook and his friends were the perpetrators.<sup>392</sup> However, Turner has also commented that Gideon's propensity for stealing was so overpowering that "he would steal a hot stove with his bare hands."<sup>393</sup>

Turner did a masterful job of defending Gideon at the 1963 trial, thereby proving the truth of one of the underlying assumptions of the Supreme Court's decision—that being represented by counsel in a criminal case makes a tremendous difference. There were several components to his defense strategy, including the selection of a jury that would be favorable to Gideon. And, as has been shown, through his skill of selecting jurors, he got the jury he wanted for this case.

The proprietor of the poolroom, Strickland, had testified at both trials that, in addition to coins from the cigarette machine and juke box, some beer and some wine had been taken. He was unsure of the number of cans of beer and bottles of wine that had been taken. There were some empty beer cans on the counter of the poolroom, which could have been drunk by the intruder. Also, there was testimony that Gideon had a half-full bottle of wine with him when he stepped into the telephone booth. In neither trial did Strickland say that Cokes had been taken. However, although Officer Pitts had not mentioned Cokes at the first trial, he did say at the 1963 trial that some Cokes had been missing. Undoubtedly, this was incorrect, but Turner exploited this testimony to great advantage. He emphasized to the jury that no Cokes were seen in Gideon's possession. Also, Gideon obviously preferred alcoholic beverages, not Cokes, but young men needing beverages for a party would have wanted Cokes. Turner used all of this to point the finger of blame at Cook and his friends, and away from Gideon. Also, Turner was able to explain why Gideon had so

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quite frequently [sic] after becoming intoxicated himself. The Defendant claims that he has been framed with the breaking and entering charge with a penalty of five years when actually he is only guilty of a misdemeanor, that being petit larceny." He also admitted "being under the influence of intoxicants at the time of the offense . . ." A copy of this report is on file with the Author.

392. Interview, *supra* n. 298.

393. *Id.*

much change with him that morning by Gideon's testimony that he had won it gambling five or six days earlier.

I realize that my objectivity may be on trial, but after a study of the transcripts of the two trials, I am convinced that Gideon, not Cook and his friends, was the person who broke into the poolroom. If Gideon had won fifty dollars or so in change while gambling, it is doubtful, with his drinking proclivities, that he still would have had any of that change available five or six days later for the cab ride to downtown for a drinking spree at Panama City's Bayshore Bar. It is much more likely that those coins came from the cigarette machine and juke box of the Bay Harbor Poolroom in the early morning hours of June 3, 1961.

Furthermore, if Cook committed the crime, why did he walk to the porch where Rhodes was sitting to tell her that he had seen Gideon inside the Bay Harbor Poolroom? And, then, why did he go back to the poolroom, speak with police, and inform them about what had taken place? If he were guilty, would he not have disappeared rather than calling attention to himself? Of course, if he had left the scene after seeing Gideon in the poolroom, he might have been charged with the crime. One can only speculate, but it is quite possible that Cook stayed at the scene and reported the crime to police because he could have been seen on the street in front of the poolroom and could have been charged himself had he not remained there and cooperated with the police. He had been placed on probation for a juvenile offense, and it was in his best interest to cooperate.

Rhodes should have been called as a witness for the prosecution at the second trial. She would have confirmed that it was Gideon who walked out of the alley that ran behind the poolroom that morning, carrying a bottle of wine, and that he made the telephone call and was picked up shortly thereafter by a taxicab. She also would have confirmed that Cook then came to her porch to tell her about the break-in and that he was going to call the police. Rhodes would have bolstered much of Cook's testimony.<sup>394</sup> Instead, the prosecution relied solely on Cook, and when he was

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394. Rhodes had been a witness for the defense at the original 1961 trial, but her testimony was harmful to the defendant. Turner interviewed her and considered using her as a witness at the second trial to establish that Gideon was not carrying beer or Cokes when he approached the telephone booth, but he decided not to use her as a witness. However, she was available and could have been called by the prosecution. *Id.*

“impeached” as a liar, the jury disregarded his testimony. Without the benefit of Cook’s testimony, it is easy to understand why the jury acquitted Gideon. Of course, as discussed earlier, the so-called “impeachment” was a travesty. Cook had not lied at the first trial and should not have been impeached.

Reading the two transcripts in tandem and talking with Turner years later, I cannot help but feel that the case against Gideon probably involved more of a medical than a legal problem. The crime seems relatively petty, and if Gideon committed it, it was caused by the urge for alcohol by a person with an alcohol problem. Perhaps, people like Gideon, who commit fairly insignificant offenses, belong in therapeutic treatment institutions rather than in punitive and nonrehabilitative penitentiaries. I now sometimes even wonder why he was prosecuted at all. It probably would have been better had the police given him a choice—either face prosecution or undergo treatment for the apparent alcohol problem.

B. Did the Book and the Movie, *Gideon’s Trumpet*, Accurately Describe the *Gideon* Case?

There were several inaccuracies in the movie. For example, after Gideon was acquitted in the 1963 trial and was leaving the courtroom a free man, the prosecuting attorney, Harris, and the defense attorney, Turner, were with him. Gideon said that, more than anything, he wished he could have a McDonald’s hamburger. Turner and Harris each gave him a twenty-dollar bill so that he could go to McDonald’s. However, in the movie, Lewis, not Turner or Harris, hands a twenty-dollar bill to Gideon.<sup>395</sup>

Another inaccuracy is how I was portrayed in the movie. I was born in Chicago and was raised in Hinsdale, a western suburb of Chicago. My family did not move to Sarasota, Florida, until

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395. *Id.* Lest there be any misunderstanding, Lewis “had nothing to do with [the movie],” except that he “watch[ed] it being shot,” presumably only a small portion, as an invitee. Anthony Lewis, Keynote Address, *Conference on the Thirtieth Anniversary of the United States Supreme Court’s Decision in Gideon v. Wainwright: Gideon and the Public Service Role of Lawyers in Advancing Equal Justice* (Am. U., Wash., D.C., Mar. 18, 1993), 43 Am. U. L. Rev. 1, 17 (1993). In his remarks, in *Gideon*, Professor John Hart Ely, who had worked on Fortas’ brief while a student law clerk, speaks of inaccuracies concerning “two sickening scenes.” *Id.* at 29. Notwithstanding the influx of many inaccuracies, the movie can be used as a good pedagogical tool. *E.g.* Robert J. Aalbert, *From the Classroom: Gideon’s Trumpet*, 12 J. Leg. Stud. Educ. 321 (1994).

I was a junior in high school. By that time, it was too late for me to acquire a southern accent. My speech is that of a Midwesterner. However, in the movie, the actor who plays my part has a southern accent. Also, in the movie scene in the Supreme Court, the courtroom is crowded. In actual fact, the courtroom was almost empty during the arguments in the *Gideon* case. As said earlier,<sup>396</sup> at one point in the arguments, there was only one person in the spectator section, my wife Ann.

When Lewis interviewed me for *Gideon's Trumpet* and listened to me describe the preparation of the brief for the State of Florida, he suddenly blurted out the words, "Oh, good, now I have my theme." The theme for the book, he explained, would be that at the first trial, Gideon was all alone, confronted by the State with its enormous resources. However, at the Supreme Court, the opposite was true. Gideon was represented by one of the best lawyers in the country, supported by an outstanding law firm with all of its resources. The State, on the other hand, was represented by a lone, young, inexperienced lawyer, working only on nights and weekends, having to travel long distances to obtain library resources, and with no support except for the secretarial help of his wife. In response, I said to Lewis, "I thought this was to be a non-fiction book. How can it be nonfiction if you have to have a theme?" He replied, "The book would never sell if it didn't have a theme."

By reporting this conversation, it is in no way intended to imply that Lewis was avaricious, for the profits from sales of *Gideon's Trumpet*, or a good portion of them, go into a trust fund for the benefit of Gideon's children.<sup>397</sup> Furthermore, the book is an extremely valuable contribution. In my view, every high school student in America should be required to read it as an assignment in civics or government classes. Better than any other source, it describes how our Supreme Court works, and it tells how even the lowliest person, if unfairly treated in our criminal justice system, can hope for relief by taking the case to the very highest level of our judicial system.

However, the theme, as far as I am concerned, is inaccurate. Most of the research and most of my thinking about the case was

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396. *Supra* n. 258 and accompanying text.

397. Interview, *supra* n. 298.

done during the six months I spent in Tallahassee, where I had Judge Bowen and other excellent criminal and constitutional lawyers to consult with, and all of the resources of the Attorney General's Office to support me. It is true that I worked only during nights and weekends on the case during the final three months after the move to Bartow, but that was my choice, not the firm's requirement. At any time, I could have asked to work on the case during office hours or asked for secretarial help from the firm, and I am certain that the partners would have readily acceded to my request. As it was, I consulted with some members of the firm about the case. Furthermore, having my wife Ann as my secretary was no handicap; she had been the personal secretary to the Secretary of the State of Florida and was an outstanding help to me throughout the process. My main objection to the use of a "theme" in a nonfiction work is that there is bound to be a tendency on the part of the author to include information that fits or advances the theme and to exclude or minimize information that collides with the theme.

Another example of inaccuracy concerns the depiction of our law firm. Lewis devoted many pages to praising the Arnold, Fortas & Porter law firm.<sup>398</sup> However, he barely mentioned that I worked at Holland, Bevis & Smith, a law firm in Bartow, Florida.<sup>399</sup> There is no further description of the firm, except that the "Holland" in the firm's name, Spessard L. Holland, was a United States Senator. The reader gets the impression that it was an obscure, small-town firm. This was hardly the case.

The Holland firm was then and still is considered by many to be the most outstanding law firm in Florida. At that time, it happened to be located in Bartow, in what probably was the most industrialized area of the State, but it carried on "a big city practice in a small town."<sup>400</sup> Our clients included citrus canneries, packing houses, and large phosphate mining companies, such as American Cyanamid and International Minerals and Chemicals.

The firm was founded by Holland, former Governor of Florida and a United States Senator for many years. He probably was the person most responsible for the adoption of the constitutional

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398. Lewis, *supra* n. 2, at 51–58, 64–67, 122–145.

399. *Id.* at 162.

400. These words are taken from a comment by Hall, one of the partners in the firm, mentioned earlier in the text between *supra* notes 223 and 224.

amendment<sup>401</sup> abolishing the poll tax that had prevented African Americans from voting. William McRae, another member of the firm, was eventually appointed a United States District Judge. William O.E. Henry, an excellent corporate and tax lawyer and one of my mentors in the firm, later became President of The Florida Bar. Hall, with whom I worked on some legal matters, had been a partner in a firm in Atlanta,<sup>402</sup> where he represented labor unions, including the Teamsters. He had worked closely with Jimmy Hoffa in labor disputes. He suffered a heart attack, and his doctors told him to move to a small town where he would be under less pressure. He joined the Holland firm because it handled sophisticated legal matters and, yet, was located in a small town. Another lawyer who supervised me was Stephen H. Grimes, who later became a judge of Florida's Second District Court of Appeal. Subsequently, he was elevated to the Florida Supreme Court, where he served as Justice and as Chief Justice. While in the firm, he and I were appointed to represent a defendant in a capital rape case.<sup>403</sup>

The most outstanding lawyer I had the privilege of working with at the Holland firm was Smith, one of the finest American lawyers during the last half century. He became President of The Florida Bar, then President of the American Bar Association (ABA), and was its president during the Watergate scandal. As President of the ABA, he courageously spoke out against President Nixon's firing of Cox, the Watergate Prosecutor, when it had become apparent during Cox's investigation that President Nixon had been involved in criminal wrongdoing.

Holland & Knight is now the eighth largest law firm in the Country, with offices in many major American cities and many cities abroad. It has approximately 1,300 lawyers. Until recently, Bill McBride, Democratic candidate for the office of Governor of Florida in 2002, was a member. I was not the equal of Fortas, but

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401. U.S. Const. amend. XXIV, § 1.

402. Poole, Pearce & Hall.

403. The defendant was charged with rape, kidnapping, car theft, and forgery, among other things, all arising out of the same incident. The case went to trial, but on the first day of trial, the prosecution offered a plea bargain with a recommendation of a light sentence, which our client accepted.

In addition to Grimes, another outstanding lawyer in the firm who supervised my work on a couple of matters was Henry M. Kittleson.

without question, the Holland firm was the equal of the Arnold, Fortas & Porter firm.

Overall, it is difficult for me to be critical of *Gideon's Trumpet*, because, in the scheme of things, my personal complaints are outweighed by the value of the book. It is an excellent book, painstakingly written, that, as said earlier, should be a required reading for one's education regarding our system of government. Lewis has been a good friend to me and to Stetson University College of Law.<sup>404</sup> However, the use of a theme, unfortunately, did cause some distortion.<sup>405</sup>

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404. Several years ago, Lewis graciously accepted our invitation to be a speaker/panelist at our annual Conference on Law and Higher Education. All of us greatly appreciated his participation.

405. Another part of the book that bothered me was the following statement:

Jacob was born . . . in Chicago, and his family moved to Sarasota, Florida, when he was a junior in high school. They sent him back to Principia College, a Christian Science institution in Elmhurst, Illinois, but he quit after a year. He finished college at Florida State University.

Lewis, *supra* n. 2, at 147. To say that my parents "sent" me back to Principia College was to portray me as a person who was easily manipulated, the kind who could be pushed into taking a case that no one else wanted. However, my parents had nothing to do with my decision to enter Principia. I had been offered a grant-in-aid to be on the cross-country, indoor track, and track teams at the University of Michigan, but instead I decided on my own to go to Principia. I went there for religious reasons—it is a Christian Science School and I had been raised in that religion—and because I received what was then a substantial academic scholarship based on my high school grades. That scholarship essentially covered all of my tuition but not room and board.

The word "quit," as used in the above excerpt, connotes failure, when failure certainly was not my reason for leaving Principia. While there for my first year of college, I realized that Principia was costing my parents money, even though I worked at four part-time jobs—the soda fountain, the college's bookstore, on the college landscaping crew, and baby-sitting for the faculty. My parents never suggested that I leave Principia, but they did not have much income or resources. My twin sisters, three years younger than I, would be entering college in a couple of years and would need their financial support. Also, beginning to have doubts about my religion, I decided to transfer to Florida State University, which was less expensive than Principia, and I received a partial track scholarship and a partial violin scholarship to play in the first violin section of the university symphony orchestra.

Able to pay for my education entirely by myself, with part-time jobs as a waiter in sorority houses and at university banquets, and with income from a summer job, I transferred for financial reasons and because of my change of mind concerning religion. I did not leave Principia because of any failure there. The use of the word "quit" does not accurately describe the situation, even though its use may have advanced the theme of the book. Academically, I ranked fourth in my class of approximately seventy freshmen males at the end of that year at Principia, even though I devoted many hours to part-time jobs and participated in varsity track and basketball—I being the starting left forward on the varsity basketball team.

C. How Could You in Good Conscience Take the Position  
You Took in *Gideon*?

Fortas' appointment to represent Gideon was probably the greatest "plum" ever handed out by any court to a lawyer. If I could have been the recipient of that honor, I gladly would have traded places with him and represented Gideon, rather than the State of Florida. Such a statement may surprise some. They may think that a lawyer should handle only causes that he or she believes in. How, they wonder, could I ethically represent the State if I would have preferred being the lawyer for Gideon?

When I was the Director of Clinical Programs and a professor at the Ohio State University College of Law, one day, a nonlawyer friend of mine walked into my office screaming at me. Why, he asked, were we researching the case of a convicted serial rapist to determine whether a post-conviction petition should be filed on his behalf? I tried to explain to my friend that, no matter what the inmate did, he still was a human being and that we should help him if we could. The explanation that lawyers do not handle only those cases and causes that are popular did not persuade my friend. After researching, we determined, however, that the inmate was not entitled to relief and we did not file a petition on his behalf, but the fact that he was a convicted serial rapist would not have been a valid reason for turning him away.

It may not be hard to understand why a nonlawyer would feel the way my friend felt, but it bothers me when lawyers and law students fail to understand the role of a lawyer. A lawyer does not always get the preferred side of a case. The lawyer takes the case entrusted to him or her and should do the best, legally and ethically, to help the client and the court reach the best result for everyone concerned.<sup>406</sup> Obviously, a lawyer should not take a case if it

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406. In England, for example, barristers are bound by the Barristers Code of Conduct. Part VI of the Code provides, in part, as follows:

**PART VI ACCEPTANCE AND RETURN OF INSTRUCTIONS**  
**Acceptance of instructions and the "Cab-rank rule"**

- 601 A barrister who supplies advocacy services must not withhold those services:
- (a) on the ground that the nature of the case is objectionable to him or to any section of the public;
  - (b) on the ground that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of



means promoting an illegal, immoral, or unethical position. Also, if the case of a particular client has no merit whatsoever and is frivolous, the lawyer must not accept it or must withdraw if already involved. But there are few cases that are completely frivolous and without merit, where no legitimate arguments can be made on one side.

Is it unethical to represent a client or a cause that the lawyer does not believe in? Perhaps, it is, for doing so could jeopardize that client's chances of success. But, even if the lawyer would prefer to be on the other side of a case, he or she can ethically accept the cause. Even if the cause or the client is unpopular, even despicable, a lawyer should not turn down the client who needs assistance, anymore than a medical doctor should not turn away a patient suffering from leprosy or AIDS.

In *Gideon*, my personal belief was that counsel should be provided to all indigent defendants in criminal cases. But there were legitimate issues that needed to be argued and decided by the Supreme Court. For instance, states would encounter practical, financial problems in attempting to provide counsel in all criminal cases. Thus, Florida had a legitimate request in asking that if *Betts* were overruled, the new decision should be made to operate prospectively only. Furthermore, there was no provision in the Constitution, at that time, that required counsel to be automatically provided in state courts. Deciding how to modify the Constitution was an issue that required debate. In particular, it was desirable that state legislatures should be allowed some freedom

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the public;

602 A barrister in independent practice must comply with the "Cab-rank rule" and accordingly . . . he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is publicly funded:

- (a) accept any brief to appear before a Court in which he professes to practise;
- (b) accept any instructions;
- (c) act for any person on whose behalf he is instructed; and do so irrespective of (i) the party on whose behalf he is instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person.

Gen. Council of the B., *Code of Conduct for the Bar of England and Wales Part VI, 7th ed.* (2000) (available at <http://www.barcouncil.org.uk>).

to experiment, toward determining whether there were other ways of ensuring fairness in criminal proceedings. It was hoped that legislatures would meet the challenge and find the resources necessary for providing counsel to all indigent defendants, if they were not able to find another way of ensuring fairness. No longer possessed of that confidence in legislatures, I now realize that if *Gideon* had not been decided in Gideon's favor, some states still would not be providing counsel in felony cases.

It is gratifying that *Gideon* was decided the way it was, and that other provisions of the Bill of Rights have been made applicable against the states, as being incorporated into the concept of due process. While personally endorsing the process of the gradual federalization of criminal procedure, it was not inappropriate for me to represent the State, even though I would have chosen the other side if presented with that choice.

#### D. How Could *Gideon's* Zealous Appellate Prosecutor Switch Sides and Represent Criminal Defendants?

In England, a barrister may be called upon to be a prosecutor one day and a criminal defense attorney the next.<sup>407</sup> Thus, by working on both sides, hopefully, a sense of balance is maintained that can be lost if one becomes a full-time career prosecutor or a career defense attorney. During my years at the Ohio State University College of Law, students in the clinical program were invariably exhorted that there was nothing worse than being an overzealous prosecutor, for a fair-minded prosecutor can do much more good than a defense lawyer, because of the power available to drop or dismiss cases that should not have been pursued or filed in the first place.

When giving talks about the *Gideon* case, I have had members of the audience refer to me not only as a "zealous" prosecutor, but on at least one occasion a "rabid" prosecutor. Those characterizations hurt because they are completely untrue. I was never a rabid, or even a zealous, prosecutor. To me, each case was a search for truth and sometimes the resulting search favored the State and sometimes it favored the defendant. When at the Attorney General's Office, I often answered legal questions forwarded to me by the officials of the Division of Corrections. In

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407. *Id.*

several instances, the officials had calculated a release date for a particular inmate, but the inmate claimed he was entitled to an earlier release. I would recalculate the date, carefully following the statutes, and one or two times found that the inmate was correct and was entitled to an earlier release. Notifying the officials that the inmate was right and they were wrong gave me every bit as much gratification as winning an appeal for the State.

My work in the Attorney General's Office infused in me a strong interest in prison reform and in the rights of prison inmates, later evidenced by several articles published on these subjects<sup>408</sup> and by cases worked on.<sup>409</sup> Also, I helped establish legal assistance programs for inmates at the Atlanta Penitentiary and for Massachusetts inmates. The Emory program resulted in a victory in the Supreme Court, in *Kaufman v. United States*.<sup>410</sup>

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408. E.g. Bruce R. Jacob & K.M. Sharma, *Disciplinary and Punitive Transfer Decisions and Due Process Values in the American Correctional System*, 12 Stetson L. Rev. 1 (1982); Bruce R. Jacob, *Determining the Length of Confinement: A Study of Correctional Decision-making* (unpublished S.J.D. thesis, Harv. U. 1980) (on file with Author and at Harvard Law School); Jacob & Sharma, *supra* n. 268; Bruce R. Jacob, *Prison Discipline and Inmate Rights*, 5 Harv. Civ. Rights-Civ. Libs. L. Rev. 227 (1970).

409. E.g. *Lawrence v. Blackwell*, 298 F. Supp. 708 (N.D. Ga. 1969); *White*, 277 F. Supp. 211. In addition, I assisted United States District Judge Raymond Pettine in preparing the opinion in *Palmigiano v. Travisono*, 317 F. Supp. 776 (D.R.I. 1970), regarding mail censorship in prisons.

410. 394 U.S. 217. As a result of this case, Harold Kaufman, who had been an inmate at the Atlanta Penitentiary, pled guilty and received a lesser sentence and has since estimated that his total prison term was shortened by about twelve years. Also, he was allowed to serve much of his sentence at an honor farm. When he was released, he infiltrated an organized crime organization in New Jersey for the FBI. He surreptitiously recorded conversations with organized crime figures and was responsible for sending many of them to prison. His experiences have been made into a movie entitled *A Deadly Business*, with Alan Arkin playing the role of Kaufman. He is now in the Federal Witness Protection Program.

On March 24, 1969, *The New York Times* reported that the Supreme Court had just decided to accept a case on the issue of whether *Gideon* should be extended to indigent defendants in preliminary hearings. The case was *Coleman v. Alabama*, 399 U.S. 1 (1970). In the news article, it stated as follows:

By coincidence, in a separate case, the lawyer who argued for the state of Florida and was on the losing side in *Gideon v. Wainwright* won a significant ruling today in the Supreme Court—this time as the appointed counsel for a Federal prisoner.

Bruce R. Jacob, now a graduate student at the Harvard Law School, argued for Harold Kaufman, a convicted bank robber, who contended that evidence obtained in an illegal search had been used by the Government in his trial.

The Supreme Court ruled, in an opinion by Justice William J. Brennan, Jr., that Kaufman should be permitted to challenge his 20-year sentence in habeas corpus proceedings on this ground, even though it was not raised or ruled upon at his trial.

*High Court Will Decide on Lawyers at Hearings*, 118 N.Y. Times 26 (Mar. 24, 1969).

In the years since *Gideon*, I have been a defense lawyer at the trial level as well as at the appellate and post-conviction levels. For a year, I supervised Harvard law students and handled criminal cases in the Community Legal Assistance Office in Cambridge, Massachusetts. Then, for seven years at Ohio State University, I taught the Criminal Defense Practicum and the Criminal Appeals and Post-Conviction Remedies Practicum. In those clinical courses, a staff attorney assisted me with students on hundreds of criminal cases, at all levels.

When I became Dean of Mercer University School of Law, I taught the Criminal Defense Practicum, and while at Stetson University College of Law, I have taught courses on criminal appeals and post-conviction remedies. When all of my criminal practice is added up, it is a fair estimate that only one-and-a-half years was spent in prosecutorial work, at the appellate and post-conviction levels, and the equivalent of about thirteen years of full-time criminal defense work at all levels. The bulk of my experience in practice, therefore, has been on the defense side, not the prosecution side. Being a prosecutor was a small part of my life.

If I could describe myself as either prosecution-minded or defense-minded, I do not think either description fits. I am more of a defense lawyer than a prosecutor, but law practice is always a search for truth, and the truth is not always on one side or the other. I particularly enjoy working on unpopular causes, and have been involved in many of those. Representing the State in *Gideon* was one of those unpopular causes.

#### E. Have the Courts Implemented *Gideon* as You Expected?

In *Gideon*, the Supreme Court held that indigent, felony defendants were entitled to state-appointed counsel, and *Douglas v. California*<sup>411</sup> required such an appointment of counsel for an indigent, convicted defendant who took the first appeal of right from that conviction. These two decisions answered some questions but raised many others. For example, how early in the criminal proceedings should the right to counsel attach? This question, of course, has been answered through a series of cases, the most no-

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411. 372 U.S. 353. *Douglas* was decided the same day as the *Gideon* decision.

table of these being *Miranda v. Arizona*,<sup>412</sup> despite its continuing erosion in some related aspects—not of immediate relevance to us in the realm of the right to counsel. Another question was how far into the criminal trial court proceedings did the right to counsel exist? This question was answered by decisions such as *Gagnon v. Scarpelli*,<sup>413</sup> which indicated that the right to counsel may extend to probation revocation proceedings, depending upon the facts and circumstances involved.<sup>414</sup>

*Douglas* also raised additional questions. Should the right to counsel extend to the second discretionary review of the criminal case by the state supreme court, or to the certiorari proceeding before the United States Supreme Court? Here is an expanded list of some of the legal proceedings in which a right to appointed counsel arguably could have applied that confronted courts in 1963, following *Gideon*:

- felony pretrial interrogations, lineups, etc.;
- sentencing proceedings;
- probation revocation proceedings;
- parole revocation proceedings;
- misdemeanor cases;
- juvenile delinquency cases;
- the second direct appeal of right or discretionary review proceedings in the state supreme court;
- certiorari to the United States Supreme Court, including preparation of the petition;
- habeas corpus and statutory post-conviction motions or petitions or post-conviction motions or petitions author-

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412. 384 U.S. 436 (1966). Other cases include *United States v. Gouveia*, 467 U.S. 180 (1984) (declining right to counsel during administrative detention), *United States v. Ash*, 413 U.S. 300 (1973) (refusing right to counsel at photo identification), *Kirby v. Illinois*, 406 U.S. 682 (1972) (denying right to counsel at showup), *Coleman*, 399 U.S. 1 (approving right to counsel at preliminary hearing), *United States v. Wade*, 388 U.S. 218 (1967) (supporting right to counsel at police lineup), *Escobedo v. Illinois*, 378 U.S. 478 (1964) (endorsing right to counsel at police interrogation), and *Hamilton*, 368 U.S. 52 (backing right to counsel at arraignment). In regards to *Escobedo*, consult *Kirby*, 406 U.S. at 689, and *United States v. Muzychka*, 725 F.2d 1061, 1066–1068 (3d Cir. 1984), both of which explain that the *Escobedo* case was limited to its facts and actually based on the privilege against self-incrimination, instead of the right to counsel.

413. 411 U.S. 778 (1973).

414. *Id.* at 790–791.

ized by court rule which provide relief similar to that obtained by habeas;

- appeals from denials of habeas petitions or other motions or petitions for post-conviction relief;
- second appeals or certiorari proceedings from the denial of habeas corpus or other post-conviction motions or petitions;
- certiorari proceedings before the Supreme Court in such cases, including the drafting of the certiorari petition;
- extradition proceedings;
- prison disciplinary proceedings;
- prison punitive transfer proceedings;
- prison classification proceedings;
- civil proceedings; and
- administrative proceedings.

After *Gideon*, as one would have expected, the issue of effectiveness of counsel has become a common complaint of convicted defendants. In fact, courts have been called upon to deal with this problem with great frequency. Another issue that would confront the courts was whether a person without a license to practice law would be allowed to act as “counsel” for indigents in some situations.

Although forty years have passed since *Gideon*, the record of the courts in fulfilling the hopes represented by *Gideon* has not been a promising one. May one ask, what has been accomplished during these forty years, for example, to require counsel during the critical stages following arrest—such as the interrogation and the police lineup—at sentencing, and in the first appeal of right?

In *Argersinger*<sup>415</sup> and *Scott*,<sup>416</sup> the Supreme Court held that an indigent, misdemeanor defendant may not be sentenced to imprisonment unless the state has afforded him or her the right to

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415. For a broader discussion of *Argersinger*, consult Paul Froyd et al., *Right to Counsel in Nonfelony Cases: The Argersinger Decision* (Ballinger Pub. Co. 1975), and Sheldon Krantz et al., *The Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin* (Executive Summary) (Nat'l. Instn. L. Enforcement & Crim. J. et al. eds., U.S. Govt. Printing Off. 1976).

416. For a critical analysis of this case, consult Lawrence Herman & Charles A. Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?* 17 *Am. Crim. L. Rev.* 71 (1979).

appointed counsel.<sup>417</sup> A colleague of mine at Stetson, Professor Jerome C. Latimer, has told me about two incidents that occurred during the early or mid-1990s in the courts of Pinellas County that made a mockery of *Argersinger* and *Scott*. Defendants in misdemeanor cases that carried the possible sentence of imprisonment were represented by the public defender. In each instance, the public defender prepared the case thoroughly and went to court on the day set for trial to try the case. However, the trial judge obviously had anticipated that the defendant would plead guilty and that a trial would not be necessary. When the trial judge learned that there was a public defender involved and that the defendant wanted a trial, the judge announced that he would not impose a sentence of imprisonment in the case and that, therefore, the defendant was no longer eligible for the services of the public defender. Without counsel, the defendant in each case pled guilty and the case ended.<sup>418</sup>

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417. In *Argersinger*, Justice Douglas, writing for the majority, rejected the argument that counsel was not necessary in petty offenses: “We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.” 407 U.S. at 33. Justice Powell, concurring, also pointed out that many petty offenses involve complex factual and legal issues, and that “[t]he consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label ‘petty.’” *Id.* at 47–48.

418. In *State v. Ull*, the Florida Supreme Court decided that a trial judge may discharge the public defender who is representing an indigent defendant in a misdemeanor case as long as the judge first certifies in writing that he or she will not impose a sentence of confinement if the indigent defendant should be convicted. 642 So. 2d 721, 723–724 (Fla. 1994). The trial judge may do this even though the public defender was previously appointed by the court to represent the defendant, and even though the public defender has already investigated the case, engaged in discovery, and arranged for witnesses in the defendant’s behalf. *Id.* The Court did say, however, that the defendant “can successfully block discharge by showing that he or she will be substantially disadvantaged by loss of counsel.” *Id.* at 724. In such a case, the “court should either (1) not discharge the public defender, or (2) allow the defendant a reasonable time to obtain private counsel or, . . . time to prepare his or her own defense.” *Id.*

In 2000, Florida’s Third District Court of Appeal, in *Hardy v. State*, 776 So. 2d 962, 962 (Fla. 3d Dist. App. 2000), held that, if an indigent, misdemeanor defendant is incarcerated before trial because of inability to post bond, that defendant is entitled to the appointment of counsel regardless of whether the trial judge certifies that no jail time will be served if the defendant is convicted. The fact that the defendant has been incarcerated makes him or her eligible for the appointment of counsel under *Argersinger*. For additional reading on Florida’s rule for appointment of counsel, consult *Amendments to the Florida Rules of Criminal Procedure*, 794 So. 2d 457 (Fla. 2000), and *Amendments to the Florida Rules of Criminal Procedure*, 837 So. 2d 924 (Fla. 2000).

Enough time has passed since *Gideon* and *Argersinger* for the Supreme Court to have put an end to incidents such as those described by my colleague and to have decided that counsel should be provided in all misdemeanor cases, including those punishable by fines. The stigma of any criminal conviction, including a misdemeanor conviction that results in a fine, is significant. Any misdemeanor conviction in a person's past, except for a minor traffic offense,<sup>419</sup> makes it difficult for that person to gain entry into medical school or law school, to obtain certain jobs, or to enter the military service. Imposing a fine is a taking of property under the Due Process Clause of the Fourteenth Amendment. Logically, now that the right to counsel has been incorporated into the Fourteenth Amendment, an indigent defendant in a misdemeanor case, facing a possible fine as punishment, should be entitled to the appointment of counsel.

Since *Gideon*, the Supreme Court has extended the absolute right to counsel to juvenile delinquency proceedings, in the landmark case of *In re Gault*.<sup>420</sup> This was done even though a juvenile delinquency court is not a criminal court, the juvenile delinquent is not considered a criminal, and the juvenile's act is not classified as a crime. Thus, the holding of *Gideon* was extended in that case to what is essentially a civil proceeding. The Court has also said, in *Johnson v. Avery*, that knowledgeable fellow inmates, or "jailhouse lawyers," should be allowed to provide legal help to their fellow inmates if the state has not provided an adequate alternative to enable inmates needing assistance to have access to the courts.<sup>421</sup>

The Supreme Court has also dealt with the question of how to determine, after the fact, whether counsel has provided effective representation. The Court developed a two-pronged test for determining effectiveness in *Strickland v. Washington*.<sup>422</sup> Under this test, the convicted person seeking a new trial must show that (1) counsel's performance was defective and (2) the performance prejudiced him or her. The Court also stated that there is a strong presumption in these cases that counsel "rendered adequate as-

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419. I do not consider leaving the scene of an accident or driving while intoxicated to be minor offenses.

420. 387 U.S. 1; *supra* n. 389 (providing additional caselaw).

421. 393 U.S. at 490.

422. 466 U.S. 668 (1984).



sistance and made all significant decisions in the exercise of reasonable professional judgement,<sup>423</sup> because “there are countless ways to provide effective assistance in any given case.”<sup>424</sup>

Further, the Supreme Court decided, in *Wolff v. McConnell*,<sup>425</sup> that in prison disciplinary proceedings there is no right to the appointment of counsel.<sup>426</sup> It would be difficult, as a practical matter, to provide counsel in all such proceedings. However, a great deal is at stake in some prison disciplinary and punitive transfer cases. The inmate may lose “good time,” which can result in months or even years being added to his time for release. A balancing test, such as that provided by *Mathews v. Eldridge*,<sup>427</sup> or a *Betts*-type of test based on the facts and circumstances of the case should be utilized to determine whether counsel should be appointed in these situations.

The Supreme Court has refused to extend *Douglas* to the second appeal, including discretionary appeals or certiorari proceedings from a criminal conviction, in cases such as *Ross v. Moffitt*,<sup>428</sup> and *Pennsylvania v. Finley*.<sup>429</sup> And, of course, there is no right to have counsel appointed by the Supreme Court to prepare and present a certiorari petition to that Court.<sup>430</sup> The inmate is on his or

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423. *Id.* at 690.

424. *Id.* at 689. For a critical examination of the inadequacy of the *Strickland* standard, particularly as it applies in capital cases, consult Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 Iowa L. Rev. 433, 499–504 (1993), and James W. Hitzeman, *Effective Assistance of Counsel: Strickland and the Illinois Death Penalty Statute*, 1987 U. Ill. L. Rev. 131.

425. 418 U.S. 539 (1974).

426. *Id.* at 556.

427. 424 U.S. 319, 334–335 (1976). In this case, the Supreme Court developed a balancing test for determining how much process is due in a case before an administrative agency. The agency must consider the following: (1) “the private interest that will be affected by the [action of the agency]”; (2) the risk of an erroneous deprivation of that interest that will be affected by the action of the agency; (3) “the risk of an erroneous deprivation of [that] interest through the procedure used, and the probable value” of additional or substitute safeguards (presumably including the need for counsel); and (4) “the Government’s interest, including the function involved and the fiscal and administrative burdens” the additional safeguards would entail. *Id.* at 335.

428. 417 U.S. 600 (1974).

429. 481 U.S. 551 (1987).

430. It seems strange that the Supreme Court, which has not hesitated to require other courts to provide counsel to indigents, has not yet devised a system for providing counsel to indigents who wish to prepare certiorari petitions for filing with that Court. If an indigent, having valid grounds for certiorari relief, has a lawyer or legally trained person to draft the petition, it would have a reasonable chance of being granted by the Court, and the Court will then appoint counsel and provide for the printing of the brief at government expense. However, if he or she has valid grounds, but no lawyer to put them into the form

her own in doing this, and only if the court considers the filed petition meritorious will counsel be appointed.

The most glaring need for counsel by indigents is to prepare and present habeas petitions. A habeas proceeding is a civil proceeding but, in terms of what is at stake, it often involves issues just as significant as those in a felony trial. The right to habeas was considered to be so important by our founding fathers that it was included in the body of the Constitution<sup>431</sup> before the Bill of Rights was added. Unfortunately, however, the courts have not seen fit to require counsel in habeas proceedings or in appeals from denials of habeas and statutory and other post-conviction motions or petitions. The ground often used for denying counsel, as pointed out in *Coleman v. Thompson*,<sup>432</sup> is that these proceedings are civil, not criminal, in nature.

At the time of *Gideon*, I believed that the decision would lead to a requirement that counsel be provided to indigents in civil as well as criminal proceedings, for the Due Process and Equal Protection Clauses do not differentiate between criminal and civil cases. Since the 1870s, France and Germany have provided counsel for indigent defendants in civil cases.<sup>433</sup> Switzerland has been doing this since about 1950.<sup>434</sup> In Austria, Spain, and Greece, civil defendants have a statutory right to counsel.<sup>435</sup> In 1979, the European Court of Human Rights required member countries to provide counsel for indigents in civil cases.<sup>436</sup>

In this Country, there is no automatic right to counsel in such situations. However, in *Lassiter v. Department of Social Services*,<sup>437</sup> a case involving the termination of parental rights, the Court used a *Betts* approach to determine whether a noncriminal litigant is entitled to counsel, and asked whether counsel is needed and whether counsel would make a difference in the out-

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of an effective petition for certiorari, he or she will have no chance of success, no matter how valid the grounds are. Counsel should be provided for the preparation of such petitions.

431. U.S. Const. art. 1, § 9.

432. 501 U.S. 722, 756–757 (1991).

433. Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Policy Rev. 503, 504 (1998).

434. *Id.*

435. *Id.*

436. *Id.*

437. 452 U.S. 18 (1981).

come of the proceedings.<sup>438</sup> The decision is to be made on a case-by-case basis, in the same way decisions such as this were made under the *Betts* rule and are now made under the decision in *Mathews*. The rule of *Betts* was considered unworkable by the Court. That was one of the main reasons for the decision in *Gideon*, but now, ironically, the Court is using the same principles of *Betts* in other right-to-counsel types of situations. Can it not be argued that the Court is being inconsistent? If *Betts* was not workable in 1963, why is it workable now? A better approach would be a flat *Gideon*-type rule requiring counsel in every indigency situation.

The problem of providing counsel for indigent defendants in civil matters was almost solved when the federally funded legal services programs were established during the 1960s. However, political efforts were made to abolish the legal services corporation, to cut its funding, and to gut the legal services program by imposing limitations on the kinds of matters that can be handled by legal services lawyers.<sup>439</sup> As long as Congress keeps undermining the legal services program, the ideal of “justice for all” in civil matters will not be realized.<sup>440</sup>

Certainly any person hauled into court or brought before any tribunal, whether criminal, civil, or administrative, as a defendant, should, if indigent, be afforded counsel at public expense. Whether a plaintiff or a moving party should be provided with counsel is a more difficult question. In some civil cases, an indigent plaintiff is able to obtain counsel under a contingent-fee arrangement. In other cases involving moving parties, to avoid the cost that would be involved in automatically providing counsel at public expense in every such case, there probably should be a determination made whether the matter is meritorious or not before counsel is provided. However, such a determination must be made independently of the court or tribunal and independent of any lawyer who stands to be adversely affected if it is determined that the case has merit. For instance, a public defender who is understaffed and who already has a large caseload should not make this determination because there would be too great an incentive

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438. *Id.* at 32–33.

439. Bill Maxwell, *St. Petersburg Times*, *GOP Has Hard Heart in Legal Aid for the Poor*, <http://pqasb.pgarchiver.com/sptimes/doc/59003946> (Aug. 27, 2000).

440. *Id.*

to turn down the applicant even if his or her case has merit. Perhaps, these decisions could be made by an independent committee of lawyers and law professors in each region of the Country.

Would such a dramatic expansion of the right to publicly funded counsel for indigents be feasible, as a practical matter? Are there enough lawyers to fulfill such a requirement? In 1961, at about the time of the *Gideon* decision, there were 257,403 lawyers in the United States.<sup>441</sup> The population of the United States, in 1960, was 179,323,175.<sup>442</sup> This meant there was one lawyer for every 697 persons. In 2000, there were 681,000 lawyers who held jobs in this Country.<sup>443</sup> The population figures for 2000 show a total population of 281,421,906.<sup>444</sup> This means that in the year 2000, there was at least one lawyer for every 413 persons. The number of lawyers is increasing faster than the population, and this means that with each year, there is more legal manpower available to take indigency cases. Whether or not the public funds will be available to pay them is, of course, another matter. The answer to this question will depend on the desire or lack of desire of those in our legislative bodies to ensure equal justice for all.

## X. CONCLUDING OBSERVATIONS

### A. The *Gideon* Decision's Impact

Many pre- and post-*Gideon* developments have helped to define the meaning and scope of the Sixth Amendment as a right of a criminal defendant to have the assistance of counsel. The Supreme Court's evolving decisional law, at least since 1932, has recognized that "the guiding hand of counsel,"<sup>445</sup> particularly for unsophisticated defendants, is necessary for their defense and "that lawyers in criminal courts are necessities, not luxuries."<sup>446</sup> This recognition is consistent with the expectations of fundamental fairness of the adversarial criminal justice system that exists

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441. ABA, *Ann. Rept. of the ABA, Proceedings of the Eighty-Fifth Ann. Meeting* vol. 87, 266 (ABA 1962).

442. 27 *Encyclopedia Americana* 531 (Am. Int. ed., Grolier 1971).

443. Bureau of Lab. Statistics, U.S. Dept. of Lab., *Occupational Outlook Handbook, Lawyers*, <http://stats.bls.gov/oco/oco5053.stm> (accessed June 16, 2003).

444. U.S. Census Bureau, *Census 2000 Data Releases, Resident Population*, <http://www.census.gov/main/www/cen2000.html> (last updated May 7, 2003).

445. *Powell*, 287 U.S. at 69.

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

in this Country and also in most of the jurisdictions of common-law heritage.<sup>447</sup> Thus, even though the right to state-funded counsel was not originally encompassed by the United States Constitution, the Supreme Court, over the years, through a process of judicial reasoning and interpretation of the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, has gradually evolved such a constitutional right. It has been a gradual process because of the practical concerns, administrative and/or financial, that states would encounter in implementing the mandate of their decisions.<sup>448</sup> The right, initially recognized in capital cases,<sup>449</sup> has been extended to both federal and state cases involving possible loss of liberty in felony prosecutions,<sup>450</sup> misdemeanors where a sentence of imprisonment is imposed,<sup>451</sup> juvenile prosecutions,<sup>452</sup> and appeals from convictions.<sup>453</sup> And, for purposes of the Sixth Amendment, a “criminal prosecution” begins with the initiation of a formal adversary proceeding.<sup>454</sup>

The underlying rationale of these developments has been that an accused has a right to be tried fairly, and that an unrepresented defendant on a serious charge risks an unfair trial. The presence of effective counsel at each important stage of criminal

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447. However, since British judges, given to a less expansive style of judicial interpretation, defer to Parliament for any such ameliorative initiatives, a decision like *Gideon* would have been completely unthinkable in England “because that is not the way we do things.” R.M. Jackson, *The Machinery of Justice in England* 440 (5th ed., Cambridge U. Press 1967).

448. Understandably, practical considerations concerning the need for increased governmental funding allocations and the attendant administrative infrastructure led the Court to procrastinate, for twenty-five years, from extending *Johnson*, 304 U.S. 458, to indigent, felony defendants in state court proceedings, until *Gideon*, 372 U.S. 335. Instead, the Court held that the Due Process Clause required appointed counsel for indigent, non-capital defendants only when, on a case-by-case basis, compelling them to proceed uncounselled would be fundamentally unfair. For example, see the cases cited in *supra* notes 79–86. The practical concerns were further revived in respect of *Gideon*’s extension to misdemeanor defendants. See *Argersinger*, 407 U.S. at 60–62 (Powell, J., concurring).

449. *Powell*, 287 U.S. 45.

450. *Gideon*, 372 U.S. 335 (overruling *Betts*, which had adopted a case-by-case approach, popularly known as “special circumstances”).

451. *Argersinger*, 407 U.S. 25; *Scott*, 440 U.S. 367.

452. *In re Gault*, 387 U.S. 1.

453. *Douglas*, 372 U.S. at 355 (citing *Griffin*, 351 U.S. 12). Appointed counsel is not required for discretionary appeals or petitions for certiorari. *Ross*, 417 U.S. at 610.

454. *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Kirby*, 406 U.S. at 688. Unfortunately, this does not include the investigatory stages that precede the filing of criminal charges. *Kirby*, 406 U.S. at 690.

proceedings, from detention through trial to appeal, does help deter and prevent any abuses against the person prosecuted and ensure that due process will be observed. This assumption concerning the indispensability of counsel is now so fundamental that it is pervasively guaranteed both in several international instruments and in a large number of national constitutions, at least with respect to criminal proceedings—either through the actual trial or at detention, trial, and other critical stages.<sup>455</sup> Some instruments and constitutions have gone further and specifically extended the guarantee to include the right to counsel of one's choice.<sup>456</sup>

The growing global recognition of the right to counsel in a variety of situations is indeed a welcome step in the right direction. But, perhaps, it is not an exaggeration to suggest that *Gideon* was probably the first major decision of a national court to pioneer a trend of state-appointed counsel for indigent defendants who could be vulnerable to a sentence of imprisonment upon conviction.<sup>457</sup> Thus, despite an ongoing struggle in the United States between the constitutional ideal of assigned counsel for indigents and its actual implementation in practice, the “significant progress”<sup>458</sup>—however disappointing—is nevertheless far better than operates in many civil-law jurisdictions.<sup>459</sup> *Gideon* was certainly an innovative decision, breaking new ground in the realm of assigned counsel for indigent, criminal defendants during a golden era of constitutional, criminal jurisprudence by the Warren Court,<sup>460</sup> notwithstanding its architect Justice Black's

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455. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 *Duke J. Comp. & Intl. L.* 235, 280–281 nn. 219–224, 284–285 nn. 237–244 (1993).

456. *Id.* at 281–282 nn. 225–230.

457. However, this is not to suggest that the judicially envisioned promise of *Gideon* has been adequately delivered over the last forty years. Much remains to be done by Congress and state legislatures.

458. Rudolf B. Schlesinger, Hans W. Baade, Peter E. Herzog & Edward M. Wise, *Comparative Law* 399 (6th ed., Found. Press 1998).

459. *Id.* at 399–400.

Court,<sup>460</sup> notwithstanding its architect Justice Black's thinking to the contrary.<sup>461</sup>

*Gideon's* clarion call has reverberated its echo in some of the notable common-law jurisdictions of Australia,<sup>462</sup> Canada,<sup>463</sup> In-

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460. For a general discussion of the Warren Court, consult Lucas A. Powe, Jr., *The Warren Court and American Politics* 379–391 (Harv. U. Press 2000), and A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 Mich. L. Rev. 249 (1968). The Warren Court's approach, of course, suffered considerable change subsequently. See generally e.g. John F. Decker, *Revolution to the Right: Criminal Procedure Jurisprudence during the Burger-Rehnquist Court Era* (Garland Publ. 1992).

461. Justice Black, who had always regarded *Betts* as an aberration—and departure—from the clear holdings of *Powell* and *Johnson*, often dissented in the post-*Betts* cases—including *Betts* itself—decided by the Supreme Court, based on *Betts'* totality of circumstances test. These cases are discussed in Kamisar, *supra* note 55. Thus, Justice Black's opinion for the Court, in a matter-of-fact style, simply read, “In returning to these old precedents [that is, *Powell*, 287 U.S. at 69, and *Johnson*, 304 U.S. at 467–469], sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.” *Gideon*, 372 U.S. at 344. And, agreeing with the thrust of the amicus brief, filed by twenty-two states, that *Betts* was “an anachronism when handed down,” Justice Black simply concluded, “We agree.” *Id.* at 345.

462. Significantly, the Australian Constitution contains no express guarantees similar to the Sixth Amendment's right to counsel or the Fourteenth Amendment's Due Process and Equal Protection Clauses. Nevertheless, Justice Deane, in *Dietrich v. The Queen*, (1992) 177 C.L.R. 292, looked to the “due process” provisions of various imperial statutes that are incorporated into Australian law, such as 28 Edw. III c. 3 (1354) and 42 Edw. III c. 3 (1368), and found “The reasoning [of the] United States judgments [in *Argersinger*, 407 U.S. at 32, and *Betts*, 316 U.S. at 476, which was overruled by *Gideon*, 372 U.S. at 345, in relation to the ‘special circumstances’ test] compelling in its analysis of the significance of lack of legal representation by reason of poverty to the law's fundamental requirement that a criminal trial be fair.” *Dietrich*, 177 C.L.R. at 334. And, because “Similar reasoning ha[d] prevailed in [several] common law jurisdictions,” according to Justice Deane, “It should now be accepted and applied in this Court [High Court]” as well. *Id.* The American decisions could not be dismissed outright as turning on constitutional provisions alone, because, in essence, they were concerned with the concept of a fair trial. *Id.* Thus, examining the various categories of cases in which legal representation was a must, Justice Deane observed as follows:

[I]n the absence of exceptional circumstances, the inability of an indigent accused to obtain legal representation from any source will have the consequence that such a trial is unfair. At least in relation to such a trial, I would echo the conclusion of the United States Supreme Court in *Gideon v. Wainwright*: “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.”

*Id.* at 336 (footnote omitted). Twenty-four years ago, in *McInnis v. The Queen*, (1979) 143 C.L.R. 575, one of the most retrograde decisions on the right to counsel in Western Australia, one progressive judge, the late Justice Lionel Murphy, in a blistering dissent, drew support from many international conventions and American decisions like *Powell*, *Johnson*, *Betts*, and, in particular, *Gideon*, toward requiring a right to appointed counsel for indigent, criminal defendants in Australia. *Id.* at 586–588 (Murphy, J., dissenting). For a discussion of *Dietrich* and the right to a fair trial, consult Simon Bronitt and Maree Ayers, *Criminal Law and Human Rights*, in *Human Rights in Australian Law* 120, 121–124 (David Kinley ed., Fedn. Press 1998), The Hon. Sir Anthony Mason AC KBE, *The Role of*

dia,<sup>464</sup> and Ireland.<sup>465</sup> These countries have often looked avidly to

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*the Judiciary in Developing Human Rights in Australian Law*, in *Human Rights in Australian Law* 26, 45–46 (David Kinley ed., Fedn. Press 1998), and George Zdenkowski, *Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel?* 18 *Crim. L.J.* 135 (1994).

463. The Canadian Charter of Rights and Freedoms, entrenched in 1982, is the constitutional heir to the Canadian Bill of Rights, which was passed in 1960, as a statute of the federal government, and contains many guarantees, similar to those judicially established under the United States Bill of Rights, toward the protection of the accused's rights. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, which is Chapter 11 of the United Kingdom Statutes of 1982. Does Section 10(b) of the Charter, dealing with the right to counsel, require state-funded counsel for indigent, criminal defendants? In *Re Ewing*, (1974) 49 D.L.R. 3d 619, the British Columbia Court of Appeal held that Section 2(c) of the Canadian Bill of Rights, concerning "the right to retain and instruct counsel without delay," does not require state-appointed counsel for indigents. *Id.* at 628. However, according to Peter W. Hogg, a leading Canadian constitutional writer, "such a narrow definition of the right [to counsel] is unlikely to be followed under the Charter of Rights." Peter W. Hogg, *Constitutional Law of Canada* 1086 (3d ed., Carswell 1992). For, in addition to Canada being a party to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), which "provides [in part III, article 14(3)(d), at 54] a right to legal assistance 'without payment' by the person charged 'if he does not have sufficient means to pay for it,'" the American position is also the exact opposite:

In the United States, the famous case of *Gideon v. Wainwright* (1963) decided that an accused's [S]ixth [A]mendment right "to have the assistance of counsel for his defence" includes the right to have counsel provided at public expense, at least where the defendant is unable to afford counsel and the offence charged carries the penalty of imprisonment. Section 10(b) of the Charter should probably receive a similar interpretation to the [S]ixth [A]mendment.

Hogg, *supra*, at 1086 (footnotes omitted).

464. In a series of landmark decisions, liberally interpreting Articles 21 ("procedure established by law," treated as an equivalent to "due process"), 22(1) ("right to counsel"), and 39(b) ("legal aid"), appearing in the Constitution's chapter on Fundamental Rights, which is analogous to the United States Bill of Rights, and related provisions in the non-justiciable Directive Principles of State Policy and Fundamental Duties, the Supreme Court of India has admirably advanced the rights of the accused in the realm of counsel for indigents, speedy trial, first appeal as of right, and privilege against self-incrimination. *See generally Sheela Barse v. Maharashtra*, (1987) 4 S.C.C. 373; *Suk Das v. Arunachal Pradesh*, A.I.R. 1986 S.C. 991, 993–994; *Ranjan Dwivedi v. India*, A.I.R. 1983 S.C. 624, 627–628; *Francis Coralie Mullin v. Delhi*, A.I.R. 1981 S.C. 746, 750–751; *Hussainara Khatoon v. Bihar*, A.I.R. 1979 S.C. 1377, 1381; *Hussainara Khatoon v. Bihar*, A.I.R. 1979 S.C. 1369, 1370–1371, 1373–1376; *Nandini Satpathy v. P.L. Dani*, A.I.R. 1978 S.C. 1025, 1047, 1050. In *Madhav Hayawadanrao Hoskot v. Maharashtra*, A.I.R. 1978 S.C. 1548, 1549, 1553–1557, interestingly, notwithstanding Article 22(1), which specifically deals with the right to counsel, the Supreme Court has looked to Article 21—the so-called equivalent to "due process"—in requiring that any procedure of a fair trial necessarily encompasses the state-funded right to counsel for indigent, criminal defendants. In so doing, the Indian Supreme Court placed heavy reliance on American precedents like *Powell*, *Johnson*, *Betts*, *Miranda*, *Argersinger*, and, of course, the paradigm case, *Gideon*, which led one constitutional pundit to observe the following:

The Indian law has . . . been brought at par with the American view in *Gideon's case*, viz., that where the [c]ourt finds that the accused is unable to pay for a lawyer owing to economic disability, it would be the *duty* of the [c]ourt to inform him of his



American precedents when interpreting their national constitutions,<sup>466</sup> including the provisions relating to a right to state-funded counsel for indigent, criminal defendants. Obviously, the relevance of cases, like *Gideon* and its progeny, in these jurisdictions owes much to a shared common-law heritage, the basic likeness of the adversarial proceedings, and the same character of the proneness to handicaps encountered by uncounselled representa-

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right to have a lawyer engaged by the State, and that in the absence of legal representation owing to poverty the trial would be vitiated and the conviction should be *set aside*.

Acharya Dr. Durga Das Basu, *Human Rights in Constitutional Law* 434 (Prentice-Hall 1994) (emphasis in original) (footnotes omitted). For a relatively early writing on *Gideon*'s relevance for India, see A. Kenneth Pye, *Recent Developments in Legal Aid in America: Lessons for India*, 9 J. Ind. L. Inst. 153, 156–158, 168–170 (1967).

465. Irish courts have subsumed some of the accused's rights, including the right to assigned counsel for indigents, under the "due course of law" provision contained in Article 38, Section 1 of the Ireland Constitution, which is "an echo of [the 'due process of law'] provisions in the Constitution of the United States of America which, through Coke's interpretation, come from Magna Carta." *The State (Healy) v. Donoghue*, [1976] I.R. 325, 364 (Kenny, J.); see also James Casey, *Constitutional Law in Ireland* 411–412 (Sweet & Maxwell 1987) (discussing *Donoghue* and the right to legal aid). *Donoghue*'s language is reminiscent of many of the right-to-counsel cases in the United States, from *Powell to Gideon* and beyond, referred to by one of the counsels. *Donoghue*, [1976] I.R. at 343. Justice Kenny appropriately drew support from Justice Sutherland's "guiding hand passage" in *Powell*, when he said that "[l]egal assistance is often a requisite to the very existence of a fair trial on a serious criminal charge." *Id.* at 363 (relying on *Powell*, 287 U.S. at 68–69). And, Chief Justice O'Higgins pointedly observed as follows:

In *Gideon v. Wainwright* the Supreme Court of the United States held that, in a criminal trial for a serious offence, the right of an indigent defendant to have the assistance of counsel is a fundamental right which is essential to a fair trial, and that a trial and conviction without such assistance violated the [Fourteenth] Amendment.

*Id.* at 351.

466. No extensive literature need be cited, except to refer to a random and more generalized sampling. Thus, for Australia, consult Tony Blackshield & George Williams, *Australian Constitutional Law and Theory* 1095, 1099–1157 (3d ed., Fedn. Press 2002); James A. Thomson, *American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law*, 30 John Marshall L. Rev. 627 (1997); James A. Thomson, *An Australian Bill of Rights: Glorious Promises, Concealed Dangers*, 19 Melb. U. L. Rev. 1020, 1021–1048 (1994); for Canada, consult *Canadian Charter of Rights Annotated* (John B. Laskin et al. eds., Canada L. Bk. 1982); D.A. Alderson, *The Constitutionalization of Defamation: American and Canadian Approaches to the Constitutional Regulation of Speech*, 15 Advocates' Q. 385 (1993); Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (U. Okla. Press 1993); for India, consult P.K. Tripathi, *Perspectives on the American Constitutional Influence on the Constitution of India*, in *Constitutionalism in Asia: Asian Views of the American Influence* 59, 90 (Lawrence Ward Beer ed., U. Cal. Press 1979); K.M. Sharma, "Law and Order" and Protection of the Rights of the Accused in the United States and in India: A General Framework for Comparison, 21 Buff. L. Rev. 361 (1972); and, for Ireland, consult Francis X. Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective* 78–79 (Round Hall Sweet & Maxwell 1997); Casey, *supra* n. 465.

tion. *Gideon's* impact in these countries has been, no doubt, quite significant.

### B. A Memorable Legacy: Vivant Gideon!

In the experience of humankind, many criminal defendants happen to be unreformably unsavory characters, undeserving of any sympathy whatsoever. Gideon was certainly not one of them, of the type of a Dickensian Bill Sikes; he was cast more in the mold of an unfortunate Oliver Twist who was driven to a life of criminality!<sup>467</sup> Perhaps he was a victim of some unwholesome circumstances—disturbed childhood, alleged ill-treatment by a step-father, scant education, virtual absence of any steady occupation, largely a directionless idling life of dissipation in the company of similar delinquents, and, later on, addiction to the bottle, etc.—which led him to pursue a life of thieveries and break-ins.<sup>468</sup> According to his mother, “If he’d gone to school as he ought to and behaved himself, Clarence [Gideon] could have been most anything.”<sup>469</sup> “But,” surely, “he was something,”<sup>470</sup> the catalyst toward a significant milestone in the development of the law regarding the right to counsel.<sup>471</sup> And, but for the quirks of fate, the mantle of establishing such a right for misdemeanors and petty offenses resulting in incarceration would not have fallen upon Jon Argersinger, but on Gideon himself, long before 1972, when he was once perilously close to casting himself in that oracular role!<sup>472</sup> That would have been quite a tour de force in the annals of

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467. See generally William H. Rehnquist, “Isaac Parker, Bill Sikes and the Rule of Law,” 6 UALR L.J. 485, 485–499 (1983).

468. Gideon’s marital life was also in shambles and required his children to be placed in foster homes. Interview, *supra* n. 130.

On August 5, 2003, a historical marker commemorating the 40th anniversary of the *Gideon* decision was unveiled at the Bay County Courthouse, in Panama City, Florida. David Angier, *Landmark Gideon Case Honored*, News Herald (Panama City, Fla.) 1A (Aug. 6, 2003). Turner took part in the dedication and met two of Gideon’s sons—Ronald and David Gideon—who had the following to say of their father: “We hardly knew our father, he was at our time known as ‘Uncle Earl’ and we were raised in foster homes.” Ltr. from W. Fred Turner, Sr. Cir. J. (Retired), to Bruce R. Jacob, Dean Emeritus & Prof. of L. at Stetson U. College of L., *Gideon Commemoration* (Aug. 9, 2003) (copy on file with Author). The State kept Ronald and David together, but separated them from their sister, two half brothers, and two half sisters. Angier, *supra*, at 3A.

469. Lewis, *supra* n. 395, at 21.

470. *Id.*

471. See *Gideon*, 372 U.S. 335 (establishing the right to appointed counsel for indigent defendants).

472. In this respect, Lewis’ telling answer to an often-asked question—if, following

American constitutional jurisprudence. Thus, even if Gideon did not belong to a broadly sympathetic stock of criminal defendants, it is important not to overlook, as Justice Frankfurter has reminded us, that “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”<sup>473</sup>

For a great teacher of law like Professor (later Justice) Frankfurter, a case was not simply illustrative of some principle or point of view. Such an analysis focusing only upon its principles would have been a sacrilege to him. In one of his seminars, a case was explored in all its vitality as a process, through the record, the briefs, the biographies of the counsel and the judges, the statutes involved and their legislative history, and indeed the particularities of the locale in which the case arose, preferably to be reported on by a student who came from that area.<sup>474</sup>

Would it not be a fascinating exercise to learn of the variegated facets of the right to counsel and its ongoing related problems, such as perennially inadequate government funding, by

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acquittal at the retrial, Gideon ever reverted “to a life of crime [or] got in trouble again”—is most revealing and instructive:

The answer is that, so far as I know, and I think I do know, he only ever got in trouble one more time. He went to the Kentucky Derby, and he didn’t win. He was across the river in one of those Ohio River towns, and he was arrested for vagrancy. He was called before the judge or the magistrate.

“How do you plead Mr. Gideon?”

“Well, before we have this case, Your Honor, I wonder if you’d have a look at this?” And he hands him a copy of my book [*Gideon’s Trumpet*].

“Now,” the judge said, “it is very interesting. I don’t have time to read it right now, but you spend the night in the lockup and I’ll see you tomorrow, Mr. Gideon.”

The next day he comes into court. The judge says, “Well, Mr. Gideon, I’ve read the book, and I must say I’m delighted and honored to have met you. It is wonderful to know you are right here in my courtroom. Actually, I was just going to let you go. But if I understand the case correctly, it only holds that people charged with ‘serious’ crimes are entitled to free counsel if they’re poor. But if you would like to see whether the Supreme Court would extend that to petty crimes like this one—instead of letting you go, I will sentence you to six months in jail and you can take it on up.”

“Well, if it’s all the same to you, Judge. . . .”

Lewis, *supra* n. 395, at 20. Gideon, by the way, died in 1972, the year *Argersinger* was decided.

473. *U.S. v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting); see *Olmstead v. U.S.*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (“We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.”).

474. Paul A. Freund, *Mr. Justice Frankfurter*, 26 U. Chi. L. Rev. 205, 206 (1959).

concentrating on a single watershed case like *Gideon*?<sup>475</sup> Any exposition of the developmental process of constitutional law—including the issues for the courts and counsel, the challenges for the advocate in brief writing and oral argument—would be immensely revealing, if appropriate enlightenment could be obtained from material not ordinarily—and easily—accessible, such as the respective attorney’s subjective experiences of the proceedings, excerpts from unreported court orders, correspondence, memoranda, and briefs.

Such an approach would undoubtedly open up new vistas toward appreciating the labors of those who devote great effort to establish a principle without experiencing the ultimate triumph of obtaining a constitutional decision from the highest court.<sup>476</sup> This, in fact, happens with most of the lawyers; the experiences of Fortas and Thurgood Marshall are the exception rather than the rule.<sup>477</sup> The interesting irony is that *Gideon* was, until late in the litigation, handled pro se by Gideon himself. In fact, as mentioned

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475. See generally e.g. Aalbert, *supra* n. 395, at 323–327 (describing some of the issues that can be discussed in a classroom setting with the help of *Gideon* and *Gideon’s Trumpet*—both the book and the movie).

476. Professor Daniel John Meador, a law clerk to Justice Black in 1954—reference to his “energy, intelligence, and ability, combined with complete integrity” can be found in Hugo L. Black, *Reminiscences*, 18 Ala. L. Rev. 3, 11 (1965)—was involved in a number of significant right-to-counsel cases, including as court-appointed counsel for the petitioning prisoner in *Chewning*, 368 U.S. 443. He recounts that one of his chief frustrations was that while, as a legal theoretician, he was primarily interested in the establishment of the new principle—that is, discarding the “special circumstances” rule and going to an absolute guarantee of counsel in noncapital felonies—as a pragmatic lawyer, consistent with his ethical obligations, he had to concern himself with protecting the needs of his particular client. Thus, in *Holly v. Smyth*, 280 F.2d 536 (4th Cir. 1960), he presented the argument of special circumstances primarily because it seemed to present his client with a good chance of winning and, as a result, like *Chewning*, *Holly* became just another in the *Betts* line of decisions, rather than fulfilling the initial promise of becoming a guiding constitutional star. Meador, *supra* n. 87, at 27–55.

477. Following his appointment to represent Gideon, Fortas lamented before his associates that, if the facts did not lend themselves into creating a new rule of law, then, what would he do other than be stoically resigned to represent Gideon with only zeal and vigor? Fortunately, upon receiving Gideon’s long biographical response, Fortas was relieved—or gladdened—to learn that Gideon was not African American, too young, illiterate, or mentally infirm, and was treated fairly by the trial judge. The special circumstances test was thus plainly inapplicable, leaving Fortas to argue, among other grounds, that no person, however intelligent and smart, could be expected to represent himself effectively and that even Clarence Darrow felt that he needed a lawyer when he had criminal problems. Aalbert, *supra* n. 395, at 326. Fortuitously, Fortas was fortunate enough, unlike Meador, to have been presented with an ideal, tailor-made fact-situation, paving the way toward a formal obituary for *Betts*. *Supra* n. 476.

earlier, Gideon tried to persevere in that role even at the retrial until Turner reproached him mildly to desist from doing so or risk not being represented by him.<sup>478</sup>

By way of concluding these recollections concerning *Gideon* and my modest role thereof, in 1962–1963, it was quite a nostalgic experience when, in September 2000, Turner drove my wife Ann and me to the site of the Bay Harbor Poolroom, just east of Millville, the small community where he himself had been raised, regaling us with anecdotes about his experiences as a defense lawyer, particularly his representation of Gideon. The poolroom and all the other buildings in the vicinity have been demolished; all that survives are the relatively deserted dusty streets and the foundations of the pulverized buildings. We stopped and walked around. He showed us where the Bay Harbor Hotel (Gideon had roomed there), the front porch where Rhodes sat, the telephone booth, and the alley behind the poolroom had been located. During that memorable tour, Turner made the case spring to life again, after a lapse of so many years.

Forty years have passed since *Gideon*. Many of those who were involved in the case are now deceased, including Gideon, Fortas, Judge McCrary, and prosecutor Harris. Also dead are the Justices of the Supreme Court who participated in the unanimous outcome of the momentous decision: Chief Justice Earl Warren, Justices Black (who wrote for the Court), Douglas, Clark, Harlan (who wrote a separate concurrence), Brennan, Stewart, White, and Goldberg. And, of course, the time will come when none of us who participated in *Gideon* will be left. But the decision will live on for years and will be studied by many generations to come. It is my hope that the reminiscences recounted here—at times with considerable difficulty<sup>479</sup>—will be of

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478. *Supra* nn. 306–309 and accompanying text. That “Fred Turner did make a difference—the difference between a verdict of guilty and a verdict of not guilty,” led one commentator to call him, “the real hero of *Gideon*.” Gerald F. Uelman, 2001: *A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel*, 58 L. & Contemp. Probs. 13, 23 (1995).

479. In 1981, a large number of storage boxes—containing valuable personal papers, including all the papers and documents relating to the *Gideon* case—were inadvertently destroyed during my family’s move to St. Petersburg, Florida. Fortunately, Lewis had been given requested photocopied materials concerning *Gideon*, in 1963, for his book. *See supra* n. 202. Thus, Lewis’ book, *Gideon’s Trumpet*, has proved a valuable aid toward the recapitulation of some of these reminiscences.

On a final recollection, I felt greatly honored, six years after *Gideon*, as a court-

some help to future chroniclers, legal scholars, and others, as they attempt to learn more about this case and to analyze its impact in American history.<sup>480</sup>

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appointed counsel for the prisoner, to appear in *Kaufman*, 394 U.S. 217, before Justice Fortas. Fortas continues to inspire me as a conscientious lawyer and a decent man. *Supra* n. 410 (discussing *Kaufman*).

480. *Supra* n. 180.