

March 2003

Gideon—Then and Now
by **Tod Aronovitz**

Page 6

"The poor man charged with crime has no lobby. Ensuring fairness and equal treatment in criminal trials is the responsibility of us all."

Attorney General Robert Kennedy

In Panama City in 1961—for the burglary of 12 bottles of Coca Cola, 12 cans of beer, four fifths of whiskey, and about \$65 in change from the cigarette machine and jukebox of the Bay Harbor Poolroom—Clarence Earl Gideon, a penniless drifter too poor to hire a lawyer, asked that the state appoint counsel for him. His request was denied. On March 18, 1963, the U.S. Supreme Court agreed to hear Gideon's case and ruled that a state must provide legal counsel to anyone charged with a felony who cannot afford a lawyer.

Gideon's trial in Florida began on August 4, 1961.

The Court (Judge Robert L. McCrary, Jr.): The next case on the docket is the case of State of Florida, Plaintiff, versus Clarence Earl Gideon, Defendant. What says the State, are you ready to go to trial in this case?

Mr. Harris (William E. Harris, Assistant State Attorney): 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: Did you plead not guilty to this charge by reason of insanity?

The Defendant: No, Sir.

The Court: Why aren't you ready?

The Defendant: I have no counsel.

The Court: Why do you not have counsel? Did you not know that 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?

The Defendant answered the Court's question, but spoke in such low tones that it was not audible.

The Court: Come closer up, Mr. Gideon, I can't understand you. I don't know what you said, and the Reporter didn't understand you either.

At this point the Defendant arose from his chair where he was seated at the Counsel Table and walked up and stood directly in front of the Bench, facing his Honor Judge McCrary.

The Court: Now tell us what you said again, so we can understand you, please.

The Defendant: Your Honor, I said: 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. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.

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 in this trial and the court denied the request and informed the defendant that the only time the court could appoint counsel to represent a defendant was in cases where the defendant was charged with a capital offense. The defendant stated to the court that the United States Supreme Court said he was entitled to it.¹

If the landmark case of *Gideon v. Wainwright* stands for anything, it stands for the right of an accused criminal to a *vigorous* defense. *Powell vs. Alabama*, the famous "Scottsboro Boys" case, was well known to attorney Hugo Black. He was representing the State of Alabama in the U.S. Senate throughout the infamous trial. In *Powell*, a very conservative Supreme Court reversed the death judgments of nine young black men convicted of raping two white girls. Although the trial court had appointed counsel for the defendants, the Supreme Court concluded they "did not have the aid of counsel in any real sense," because the court appointed "all the members of the bar" to represent them at their arraignment. None of these lawyers took any responsibility to investigate the case and the defense at trial was perfunctory at best. Closing arguments were waived.

Years later, the principal architects of the Supreme Court's landmark decision in *Gideon v. Wainwright* were Abe Fortas, a brilliant advocate, and Hugo Black, a great jurist. Fortas, who was then a lawyer in private practice in Washington, D.C., was appointed by the Supreme Court to represent Clarence Earl Gideon in connection with his appeal. He wrote the brief and presented the oral argument on Gideon's behalf.

Justice Black was the author of the court's opinion upholding the constitutional right to counsel of indigent persons in all state court felony prosecutions. Fortas and Black were each remarkable men and the decision bears the imprimatur of both.

In his biography of Justice Black, Roger Newman describes the atmosphere at the Court

on the morning of March 18, 1963, as the decision in *Gideon* was announced: “When [Chief Justice] Warren called on him on the bench, he [Black] leaned forward and spoke, in an almost folksy way, reading sections of his opinion. Happiness, contentment, gratification filled his voice.”

The impact of that decision on the criminal justice system cannot be overstated. We all know that the right to counsel has forever changed the landscape of criminal law in America. 1963 will always be a watershed for indigent defense.

Steven B. Bright, director of the Southern Center for Human Rights in Atlanta, Georgia, has stated: “No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.”

Mr. Bright argues that a sober assessment of *Gideon* today reveals “a candid recognition of the tremendous resistance to *Gideon* by some prosecutors, judges, legislators, governors, lawyers, and laypeople, the indifference of many others, and the enormous difficulty of protecting the rights of people without a constituency in an era when public policy is driven by campaign contributions and courts are unwilling to protect individual rights.”

While some states have implemented the right to counsel recognized in *Gideon*, others have resisted. For example, Georgia’s legislature rejected a proposal for statewide funding for indigent defense in 1976 after being told by the state’s prosecutors that it was “the greatest threat to the proper enforcement of the criminal laws of this state ever presented.” The opposition of Georgia’s judges and prosecutors delayed any state funding for years and has prevented to this day the creation of an independent, adequately funded system for providing indigent defense in Georgia.

How can trial judges preside over cases in which the lawyer for a person facing the death penalty sleeps? A Houston judge who presided over the case of George McFarland answered, “The Constitution doesn’t say the lawyer has to be awake.” The Texas Court of Criminal Appeals upheld the death sentence imposed on McFarland, rejecting his claim that he was denied his right to counsel over the dissent of two judges who pointed out that “a sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense.”

The right to counsel is the most fundamental constitutional right because an attorney is needed to protect the client’s rights and marshal the evidence necessary for a fair and reliable determination of guilt or innocence and, if guilty, a proper sentence.

Our Florida judicial system has led the way since the days of the *Gideon* trial in assuring Gideon’s request of equal justice.

However, today it is important to recognize that pervasive deficiencies are reported in the indigent defense system of many states: impossibly high case loads; underpaid attorneys mired in law school debt; indigent defense contracts awarded to the lowest bidder, regardless of ability; and a lack of independence on the part of defender organizations.

When defendants are denied the assistance of counsel or elect to represent themselves, the government’s evidence and legal arguments do not receive meaningful adversarial testing, and the danger of an unjust conviction increases dramatically. Gideon’s 1961 request of the court to appoint counsel “to represent me in this trial” was answered by the Supreme Court when it found that the Sixth Amendment’s guarantee of counsel is a

fundamental right, essential to a fair trial.