CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
Professor Stephen B. Bright

Class Seven: Part One:
The Sixth Amendment Right to a Lawyer

Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.

- *United States v. Cronic*, 466 U.S. 648, 654 (1984)

The law is a system that protects everybody who can afford to hire a good lawyer.

- Mark Twain

I can confirm from my own experience as a judge that criminal defendants are generally poorly represented, but if we are to be hardheaded we must recognize that this may be not an entirely bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system of indigent criminal defense may be optimal.

- Richard A. Posner, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 163-64 (Harvard U. Press 1999)

The next time you say the Pledge of Allegiance – I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one nation, under God, indivisible, with liberty and justice for all – remember: it's a lie. A whopper of a lie. We coax it from the mouths of babes for the same reason that politicians wear those flag pins in their labels – it makes the hypocrisy go down a little easier.

- Bill Moyers, *The Hypocrisy of "Justice for All"*
http://billmoyers.com/segment/bill-moyers-essay-the-hypocrisy-of-justice-for-all

Due process, equal protection and the right to counsel for indigent defendants

Powell v. Alabama, 287 U.S. 32 (1932), the Scottsboro case in which the convictions were set aside because of the denial of counsel, was based upon the due process clause of the Fourteenth Amendment, not the Sixth Amendment right to counsel. In the case that follows, the Court also considered whether the Fourteenth Amendment required that transcripts be provided for an appeal of a non-capital case.

JUDSON GRIFFIN and
JAMES CRENSHAW
v.
ILLINOIS.

United States Supreme Court
351 U.S. 12, 76 S.Ct. 585 (1956)

Black, J., announced the judgment of the Court and filed an opinion in which Warren, C.J., Douglas and Clark, JJ., joined. Frankfurter, J., concurred in the judgment. Burton, J., filed a dissenting opinion in which and Minton, Reed and Harlan, JJ., joined. Harlan, J., filed a dissenting opinion.

Mr. Justice BLACK announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, Mr. Justice DOUGLAS, and Mr. Justice CLARK, join.

Illinois law provides that "Writs of error in all criminal cases are writs of right and shall be issued of course." The question presented here is whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others.

The petitioners Griffin and Crenshaw were tried together and convicted of armed robbery in the Criminal Court of Cook County, Illinois, Immediately after their conviction they filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost. They alleged that they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal * * *." These allegations were not denied. Under Illinois law in order to get full direct appellate review of alleged errors by a writ of error it is necessary for the defendant to furnish the appellate court with a bill of exceptions or report of proceedings at the trial certified by the trial judge. As Illinois concedes, it is sometimes impossible to prepare such bills of exceptions or reports without a stenographic transcript of the trial proceedings. * * * The petitioners contended in their motion before the trial court that failure to provide them with the needed transcript would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial court denied the motion without a hearing.

* * *

Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors. * * * We must therefore assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript. * * * The sole question for us to decide, therefore, is whether due process or equal protection has been violated.

Providing equal justice for poor and rich, weak and powerful alike is an age-old problem..[10] People have never ceased to hope and strive to move closer to that goal. * * * [O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations

10. . "Ye shall do no unrighteousness in judgment: thou shalt not respect person of the poor, nor honour the person of the mighty: but in righteousness should thou judge thy neighbor. Leviticus, c. 19, v. 15.

between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."

Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. * * *

There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. * * * But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.

* * *

Mr. Justice FRANKFURTER, concurring in the judgment. * * *

* * *

This Court would have to be willfully blind not to know that there have in the past been prejudicial trial errors which called for reversal of convictions of indigent defendants, and that the number of those who have not had the means for paying for the cost of a bill of exceptions is not so negligible as to invoke whatever truth there may be in the maxim de minimis.

Law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth

erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

* * *

Mr. Justice BURTON and **Mr. Justice MINTON**, whom Mr. Justice REED and Mr. Justice HARLAN join, dissenting.

While we do not disagree with the desirability of the policy of supplying an indigent defendant with a free transcript of testimony in a case like this, we do not agree that the Constitution of the United States compels each State to do so with the consequence that, regardless of the State's legislation and practice to the contrary, this Court must hold invalid state appellate proceedings wherever a required transcript has not been provided without cost to an indigent litigant who has requested that it be so provided. It is one thing for Congress and this Court to prescribe such procedure for the federal courts. It is quite another for this Court to hold that the Constitution of the United States has prescribed it for all state courts.

In the administration of local law the Constitution has been interpreted as permitting the several States generally to follow their own familiar procedure and practice. * * *

* * *

Mr. Justice HARLAN, dissenting.

Much as I would prefer to see free transcripts furnished to indigent defendants in all felony cases, I find myself unable to join in the Court's holding that the Fourteenth Amendment requires a State to do so or to furnish indigents with equivalent means of exercising a right to appeal. * * *

* * *

* * * *Equal Protection.* – In finding an answer to that question in the Equal Protection Clause, the Court has painted with a broad brush. It is said that a State cannot discriminate between the "rich" and the "poor" in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. Illinois has not imposed any arbitrary conditions upon the exercise of the right of appeal nor any requirements unnecessary to the effective working of its appellate system. Trial errors cannot be reviewed without an appropriate record of the proceedings below; if a transcript is used, it is surely not unreasonable to require the appellant to bear its cost; and Illinois has not foreclosed any other feasible means of preparing such a record. Nor is this a case where the State's own action has prevented a defendant from appealing. All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.

The Court thus holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances. That holding produces the anomalous result that a constitutional admonition to the States to treat all persons equally means in this instance that Illinois must give to some what it requires others to pay for. Granting that such a classification would be reasonable, it does not follow that a State's failure to make it can be regarded as discrimination. It may as accurately be said that the real issue in this case is not whether Illinois has discriminated but whether it has a duty to discriminate.

I do not understand the Court to dispute either

the necessity for a bill of exceptions or the reasonableness of the general requirement that the trial transcript, if used in its preparation, be paid for by the appealing party. The Court finds in the operation of these requirements, however, an invidious classification between the "rich" and the "poor." But no economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against "indigents" by name would be unconstitutional. Thus, while the exclusion of "indigents" from a free state university would deny them equal protection, requiring the payment of tuition fees surely would not, despite the resulting exclusion of those who could not afford to pay the fees. And if imposing a condition of payment is not the equivalent of a classification by the State in one case, I fail to see why it should be so regarded in another. Thus if requiring defendants in felony cases to pay for a transcript constitutes a discriminatory denial to indigents of the right of appeal available to others, why is it not a similar denial in misdemeanor cases or, for that matter, civil cases?

* * *

* * * *Due Process*. – Has there been a violation of the Due Process Clause? The majority of the Court concedes that the Fourteenth Amendment does not require the States to provide for any kind of appellate review. Nevertheless, Illinois, in the forefront among the States, established writs of error in criminal cases as early as 1827. * * * Illinois has steadily expanded the protection afforded defendants in criminal cases, and in recent years has made substantial strides towards alleviating the natural disadvantages of indigents. Can it be that, while it was not unconstitutional for Illinois to afford no appeals, its steady progress in increasing the safeguards against erroneous convictions has resulted in a constitutional decline?

Of course the fact that appeals are not constitutionally required does not mean that a State is free of constitutional restraints in establishing the terms upon which appeals will be allowed. It does mean, however, that there is no "right" to an appeal in the same sense that there is a right to a trial. Rather the constitutional right under the Due Process Clause is simply the right not to be denied an appeal for arbitrary or capricious reasons. Nothing of that kind, however, can be found in any of the steps by which Illinois has established its appellate system.

* * *

It is argued finally that, even if it cannot be said to be "arbitrary," the failure of Illinois to provide petitioners with the means of exercising the right of appeal that others are able to exercise is simply so "unfair" as to be a denial of due process. * * * [T]he question is whether some method of assuring that an indigent is able to exercise his right of appeal is "implicit in the concept of ordered liberty," so that the failure of a State so to provide constitutes a "denial of fundamental fairness, shocking to the universal sense of justice," Such an equivalence between persons in the means with which to exercise a right of appeal has not, however, traditionally been regarded as an essential of "fundamental fairness," and the reforms extending such aid to indigents have only recently gained widespread acceptance. * * * I am unable to bring myself to say that Illinois' failure to furnish free transcripts to indigents in all criminal cases is "shocking to the universal sense of justice."

As I view this case, it contains none of the elements hitherto regarded as essential to justify action by this Court under the Fourteenth Amendment. In truth what we have here is but the failure of Illinois to adopt as promptly as other States a desirable reform in its criminal procedure. Whatever might be said were this a question of procedure in the federal courts, regard for our system of federalism requires that matters such as this be left to the States. However strong may be one's inclination to hasten the day when in forma pauperis criminal procedures will be universal among the States, I think it is beyond the province of this Court to tell Illinois that it must provide such procedures.

Note

For Justice Clarence Thomas' view that *Griffin* and the later case of *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963), (holding that the Constitution requires counsel be provided for a defendant's first appeal), were wrongly decided and should be overruled, see *M.L.B. v. S.L.J.*, 519 U.S. 102, 129 (1996) (Thomas, J., dissenting); *Lewis v. Casey*, 518 U.S. 343, 373-378 (1996) (Thomas, J., concurring).

THE SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.
>
> - Sixth Amend. U.S. Const.

JOHNSON
v.
ZERBST, Warden, United States Penitentiary, Atlanta, Ga.

Supreme Court of the United States
304 U.S. 458, 58 S.Ct. 1019 (1938).

Mr. Justice BLACK delivered the opinion of the Court.

* * *

The record discloses that:

Petitioner and one Bridwell were arrested in Charleston, S.C., November 21, 1934, charged with feloniously uttering and passing four counterfeit twenty-dollar Federal Reserve notes and possessing twenty-one such notes. Both were then enlisted men in the United States Marine Corps, on leave. * * * January 21, 1935, they were indicted; January 23, 1935, they were taken to court and there first give notice of the indictment; immediately were arraigned, tried, convicted, and sentenced that day to four and one-half years in the penitentiary; and January 25, were transported to the Federal Penitentiary in Atlanta. * * * Upon arraignment, both pleaded not guilty, said that they had no lawyer, and – in response to an inquiry of the court – stated that they were ready for trial. They were then tried, convicted, and sentenced, without assistance of counsel.

"Both petitioners lived in distant cities of other states and neither had relatives, friends, or acquaintances in Charleston. Both had little education and were without funds. They testified that they had never been guilty of nor charged with any offense before, and there was no evidence in rebuttal of these statements." In the habeas corpus hearing, petitioner's evidence developed that no request was directed to the trial judge to appoint counsel, but that such request was made to the District Attorney, who replied that in the state of trial (South Carolina) the court did not appoint counsel unless the defendant was charged with a capital crime. The District Attorney denied that petitioner made request to him for counsel or that he had indicated petitioner had no right to Counsel. The Assistant District Attorney testified that Bridwell "cross examined the witnesses;" and, in his opinion, displayed more knowledge of procedure than the normal layman would possess. * * * Concerning what he said to the jury and his cross-examination of witnesses, Bridwell testified: "* * * I told the jury, 'I don't consider myself a hoodlum as the District Attorney has made me out several times.' I told the jury that I was not a native of New York as the District Attorney stated, but was from Mississippi and only stationed for government service in New York. I only said fifteen or twenty words. I said I didn't think I was a hoodlum and could not have been one of very long standing because they didn't keep them in the Marine Corps.

"I objected to one witness' testimony. I didn't ask him any questions, I only objected to his whole testimony. After the prosecuting attorney was finished with the witness, he said, 'Your witness,' and I got up and objected to the testimony on the grounds that it was all false, and the Trial Judge said any objection I had I would have to bring proof or disproof."

Reviewing the evidence on the petition for habeas corpus, the District Court said that, after

trial, petitioner and Johnson "* * * were remanded to jail, where they asked the jailer to call a lawyer for them, but were not permitted to contact one. They did not, however, undertake to get any message to the judge.

"* * * January 25th, they were transported by automobile to the Federal Penitentiary in Atlanta, Ga., arriving * * * the same day.

"There, as is the custom, they were placed in isolation and so kept for sixteen days without being permitted to communicate with any one except the officers of the institution, but they did see the officers daily. They made no request of the officers to be permitted to see a lawyer, nor did they ask the officers to present to the trial judge a motion for new trial or application for appeal or notice that they desired to move for a new trial or to take an appeal.

"On May 15, 1935, petitioners filed applications for appeal which were denied because filed too late."

* * *

One. The Sixth Amendment guarantees that: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. * * * The Sixth Amendment * * * embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer – to the untrained layman – may appear intricate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to "* * * the humane policy of the modern criminal law * * *" which now provides that a defendant "* * * if he be poor, * * * may have counsel furnished him by the state, * * * not infrequently * * * more able than the attorney for the state."

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. * * * " The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.

Two. There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

* * *

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused – whose life or liberty is at stake – is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Three. The District Court, holding petitioner could not obtain relief by habeas corpus, said: "It is unfortunate, if petitioners lost their right to a new trial through their ignorance or negligence, but such misfortune cannot give this court jurisdiction in a habeas corpus case to review and

correct the errors complained of."

The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.

* * *

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. * * * If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.* * *

* * *

Mr. Justice REED concurs in the reversal.

Mr. Justice McREYNOLDS is of opinion that the judgment of the court below should be affirmed.

Mr. Justice BUTLER is of the opinion that the record shows that petitioner waived the right to have counsel, that the trial court had jurisdiction, and that the judgment of the Circuit Court of Appeals should be affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Betts v. Brady

The Court held that poor defendants in state courts were not entitled to counsel in *Betts v. Brady*, 316 U.S. 455 (1942). The Court reviewed the history of the right to counsel and found 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." *Id.* at 471.

The Court concluded: "In the light of this evidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states * * * to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness." *Id.* at 471-72. However, a federal court reviewing a state court conviction was to find a due process violation only if based upon "an appraisal of the totality of facts" it found "a denial of fundamental fairness, shocking to the universal sense of justice." *Id.* at 462. Due process required the appointment of a lawyer only in cases where the penalty was severe, the issues difficult, and the defendant inexperienced. This determination was to be made on a case-by-case basis.

The Court held that Maryland's failure to provide Smith Betts a lawyer at his trial for robbery did not violate due process. If found the issues simple – "there was no question of the commission of a robbery" and "[t]he simple issue was the veracity of the testimony for the State and that for the defendant" – and the defendant was of average intelligence and "not wholly unfamiliar with criminal procedure" because he "had once before been in a criminal court, pleaded guilty to larceny and served a sentence[.]" *Id.* at 472.

Justice Black, joined by Justices Douglas and

Murphy, dissented, expressing the view that the right to counsel was "fundamental" and that the Fourteenth Amendment made the Sixth applicable to the states. Twenty years later, Justice Black would put those views in a majority opinion for the entire Court in *Gideon v. Wainwright.*

Gideon v. Wainwright

Clarence Earl Gideon, charged with breaking into a poolroom in Bay Harbor, near Panama City, Florida, asked for a lawyer at this trial, but was denied one. He represented himself and was convicted. He was sentenced to five years in the state prison.

While there, Gideon filed on October 11, 1961, a sworn, handwritten petition for a writ of habeas corpus in the Florida Supreme Court, alleging that he "was without funds and without an attorney," that he had asked the trial court "to appoint me an attorney but they denied me that right" and "ignored this plea," and that this action by the trial court denied him "the rights of the 4th, 5th and 14th Amendments of the Bill of Rights." The petition was denied by the Florida Supreme Court without requiring a return, without a hearing, and without opinion.

Gideon then prepared in pencil on paper provided by the prison for correspondence the following petition challenging the failure of the judge to provide him a lawyer which he filed in the United States Supreme Court on January 8, 1962:

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No. 2 -- All *letters* must be addressed in the *complete prison name* of the inmate. *Cell number*, where applicable, and *prison number* must be placed in lower left corner of envelope, with your complete name and address in the upper left corner.

No. 3 -- *Do not send any packages without a Package Permit.* Unauthorized *packages* will be destroyed.

No. 4 -- *Letters* must be written in English only.

No. 5 -- *Books, magazines, pamphlets,* and *newspapers* of reputable character will be delivered *only if* mailed direct from the publisher.

No. 6 -- *Money* must be sent in the form of *Postal Money Orders* only, in the inmate's complete prison name and prison number.

INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

In The Supreme Court of The United States
Washington D. C.

Clarence Earl Gideon Petitioner-	Petition for a writ
V.S.	of Certiorari Directed
H. G. Cochran, Jr, as Director, Division of corrections State of Florida	To The Supreme Court State of Florida.

No. 890 Misc.

To: The Honorable Earl Warren, Chief Justice of the United States

Comes now the petitioner, Clarence Earl Gideon, a citizen of The United States of America, in proper person, and appearing as his own counsel, Who petitions This Honorable Court for a Writ of Certiorari directed to The Supreme Court of The State of Florida, To review the order and Judgement of the court below denying The petitioner a Writ of Habeus Corpus.

Petitioner submits That The Supreme Court of The United States has The authority and jurisdiction to review The final Judgement of The Supreme Court of The State of Florida The highest court of The State. Under sec. 344(B) Title 28 U.S.C.A. and Because The "Due process clause" of the

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fourteenth admendment of the constitution and the fifth and sixth articales of the Bill of rights has been violated. ~~Furth~~ Furthermore, the decision of the court below denying the petitioner a Writ of Habeus Corpus is also inconsistent and adverse to its own previous decisions in peralled cases.

Attached hereto, and made a part of this petition is a true copy of the petition for a Writ of Habeus Corpus as presented to the Florida Supreme Court, Petitioner asks this Honorable Court to cosider the same arguments and authorities cited in the petition for Writ of Habeus Corpus before the Florida Supreme Court, In consideration of this petition for a Writ of Certiorari.

The Supreme Court of Florida did not write any opinion, Order of that court denying petition for Writ of Habeus Corpus dated October 30, 1961, are attached hereto and made a part of this petition.

Petitioner contends that he has been deprived of due process of law Habeus Corpus petition alleging that the lower state court has decided a

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federal question of substance, in a way not in accord with the applicable decisions of this Honorable Court. When at the time of the petitioners 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.

Petitioner alleges that prior to petitioners convictions and sentence for Breaking and Entering with the intent to commit petty Larceny, he had requested aid of counsel, that, at the time of his conviction and sentence, petitioner was without aid of counsel. That the Court refused and did not appoint counsel, and that he was incapable adequately of making his own defense. In consequence of which he was made to stand trial. Made a Prima Facia showing of denial of due process of law. (U.S.C.A. Const Amend. 14) William V. Kaiser Vs. State of Missouri 65 ct. 363 Counsel must be assigned to the accused if he is unable to employ

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No. 1 -- Only 2 letters each week, not to exceed 2 sheets letter-size 8 1/2 x 11" and written *on one side only*, and if ruled paper, do not write between lines. *Your complete name* must be signed at the close of your letter. *Clippings, stamps, letters* from other people, *stationery* or *cash must not be enclosed* in your letters.

No. 2 -- All *letters* must be addressed in the *complete prison name* of the inmate. *Cell number*, where applicable, and *prison number* must be placed in lower left corner of envelope, with your complete name and address in the upper left corner.

No. 3 -- *Do not send any packages without a Package Permit.* Unauthorized *packages* will be destroyed.

No. 4 -- *Letters* must be written in English only.

No. 5 -- *Books, magazines, pamphlets,* and *newspapers* of reputable character will be delivered *only if* mailed direct from the publisher.

No. 6 -- *Money* must be sent in the form of *Postal Money Orders* only, in the inmate's complete prison name and prison number.

INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

one, and is incapable adequately of making his own defense Tomkins vs State Missouri 65ct 370 on the 3rd June 1961 A.D. your Petitioner was arrested for foresaid crime and convicted for same, Petitioner recieve Trial and sentence without aid of counsel, your petitioner was deprived 'Due process of law'.

Petitioner was deprived of due process of law in The court the evidence in the lower court did not show that a crime of Breaking and Entering with the intent to commit Petty Larceny had been committed. You- petitioner was compelled to make his own defense, he was incapable adequately of making his own defense Petitioner did not plead no contendere But That is what his trial amounted TO.

DIVISION OF CORRECTIONS

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Wherefore the premises considered it is respectfully contented that the decision of the court below was in error and the case should be review by this court, accordingly the writ prepared and prayed for should be issue.

IT is respectfully submitted

Clarence Earl Gideon

Clarence Earl Gideon
P.O. Box 221
Raiford Florida

State of Florida)
County of Union) ss

Petitioner, Clarence Earl Gideon, personally appearing before me and being duly sworn, Affirms that the foregoing petition and the facts set forth in the petition are correct and true

Sworn and subscribed before me this 5th. day of Jan 1962

Lawrence L Dwyer
Notary Public

Notary Public, State of Florida at Large
My Commission Expires Sept. 19, 1962
Bonded by American Surety Co. of N.Y.

Upon receipt of the Petition, the Court appointed Abe Fortas, one of the most respected lawyers in the nation, a name partner with the Washington law firm of Arnold, Fortas & Porter (now Arnold & Porter), to represent Gideon. Fortas was later appointed to the Supreme Court himself by President Lyndon Johnson. Fortas asked John Hart Ely, a Yale Law student working at the firm during the summer, to assist on the case. He recognized Ely's contribution to the brief in a footnote at its end. Ely went on to become one of the nation's leading constitutional scholars, teaching at Yale Law School, serving as dean of Stanford Law School, and writing an influential book on American constitutional law, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

They presented two questions to the Court in their brief:

> I. Does the denial by a state court of a request by an indigent defendant for the appointment of counsel to assist him at a trial for a serious criminal offense constitute a deprivation of the defendant's rights in violation of the Fourteenth Amendment? Should this Court's holding in *Betts v. Brady*, 316 U.S. 455 (1942), be overruled?
>
> II. In the present case, did the refusal of the state court to appoint counsel to assist Petitioner at trial, Petitioner having expressly requested such assistance, deprive Petitioner, an indigent person, of his rights in violation of the Fourteenth Amendment?

Br. for Pet. at 6.

The brief argued that the assistance of counsel is necessary to "due process," arguing that:

> In the absence of counsel an accused person cannot determine whether his arrest is lawful; whether the indictment or information is valid; what, if any, preliminary motions should be filed. He cannot accurately evaluate the implications of a plea to a lesser offense, and he is at a loss in discussions with the prosecuting attorney relating to such a plea
>
> The indigent, apart from all other considerations, has probably been in jail from the time of arrest because of the inability to furnish bail. How can he prepare his case? And how unreal is it to suppose a layman can conduct a *voir dire* of the petit jury, or cross-examine the prosecution's witnesses, or interpose objections to incompetent and prejudicial testimony. * * *
>
> In the event of conviction, the unrepresented defendant is further seriously disadvantaged at the sentencing phase.
>
> * * * [C]ounsel may be called upon to play a role in sentencing which requires wide knowledge and experience.

Id. at 14-16.

It argued further that there was no distinction between the need for counsel in federal cases, where counsel was required by *Johnson v. Zerbst*, 304 U.S. 458 (1938), and state cases, nor between capital and non-capital cases because some non-capital cases could be more complex than some capital cases.

Fortas' major challenge, as he put it in the brief, was overcoming the argument that requiring that counsel be provided "'would disregard the basic and historic power of the states to prescribe their own local court procedures,' *i.e.*, the demands of federalism. *Bute v. Illinois*, 333 U.S. 640, 668 (1948)." *Brief for Pet.* at 28. Fortas argued that most states – all but five – already provided counsel in felony cases and thus it was not "necessary to dilute, denigrate, and diminish the quality of due process in our criminal proceedings or subtract from the equal administration of justice in deference to the few states, like Florida, which continue to defy the general opinion as to the right to counsel." *Id.*

Second, Fortas argued that a bright line rule which required counsel in all felony cases would result in less friction with the state courts than the

"special circumstances" rule of *Betts v. Brady*, which required the federal courts to examine in each case whether counsel should have been appointed because of the complexity of the case and the abilities of the defendant. The result was a "flood of habeas petitions." *Br. for Pet.* at 34. In short, *"Betts v. Brady* has not meant * * * *less* federal intervention in state criminal proceedings than would be the case if the 14th Amendment were construed to require that counsel be furnished in all state criminal prosecutions. Because of the intensely factual, subjective, and *post-facto* nature of its standards, *Betts v. Brady* means *more* federal intervention on a case by case basis, and in a much more exacerbating form." *Id.* at 12 [emphasis original].

The brief for Gideon concluded with the following:

> In 1942, shortly after *Betts v. Brady* was announced, the present Dean of the Harvard Law School, Erwin N. Griswold, and Benjamin Cohen, Esquire, expressed their protest against that decision in words which, we feel, have been underscored by the passage of time:
>
> > "[A]t a critical period in world history, *Betts v. Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right of counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law."

Br. for Pet. at 46.

Florida responded that Gideon was not entitled to counsel under *Betts*. The case was not complex and nothing about Gideon's mental capacity, age or other factors required the appointment of counsel. It then argued that *Betts* should not be overruled because under principles of federalism the Fourteenth Amendment did not impose any uniform code of criminal procedure on the states. It also argued that a right to counsel, once established, would inevitably include misdemeanors, and even civil cases, and put an enormous burden on the bar and unnecessary expense of taxpayers. Finally, it warned that over 5,000 criminals in Florida's prisons had not been represented by counsel at their trials and possibly would be released if the Court decided in favor of Gideon. It asked the Court that if it did rule for Gideon, that the decision not be applied retroactively.

Twenty-two states,[1] led by Attorneys General Walter Mondale of Minnesota and Edward J. McCormack, Jr., of Massachusetts, filed an *amicus curiae* brief on behalf of Gideon's right to counsel. Massachusetts Assistant Attorney General Gerald A. Berlin wrote the brief with assistance from faculty and students at Harvard Law School, including Dean Griswold. The brief concluded: "*Betts v. Brady*, already an anachronism when handed down, has spawned twenty years of bad law. That in the world of today a man may be condemned to penal servitude for lack of means to supply counsel for his defense is unthinkable. We respectfully urge that the conviction below be reversed, that *Betts v. Brady* be reconsidered and that the Court require that all persons tried for a felony in a state court shall have the right to counsel as a matter of due process of law and of equal protection of the laws."[2]

Alabama, joined by North Carolina, filed an *amicus* brief in support of Florida. It made a strong appeal for federalism and states' rights. It argued that states "should have the widest latitude

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1. The states are listed on the brief in this order: Massachusetts, Minnesota, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Missouri, Nevada, Ohio, North Dakota, Oregon, Rhode Island, South Dakota, Washington, West Virginia and Alaska. New Jersey also agreed to sign, but was inadvertently omitted. A correction was made just in time to be reflected in the United States Reports. Thus, a total of 23 states supported Gideon.

2. *See* Anthony Lewis, GIDEON'S TRUMPET 154-57 (1964).

in the administration of their own systems of criminal justice." Counsel should be provided only when "in the considered judgment of the people of the individual states, such gratuitous services or aid are warranted morally or are feasible financially * * *. Though man's social evolution is slow, history proves that he does advance in all fields. To be lasting, however, his progress must result from his own violition rather than come from judicial fiat."[3] The brief also argued that Alabama lawyers agreed at a recent meeting that a defendant without counsel "stands a better chance of obtaining from a jury either an outright acquittal or less severe punishment than one represented by an attorney."[4] It concluded that any decision to provide counsel to all persons charged with serious crimes should be made by the people of the individual states acting through their elected legislatures or judges.[5]

Justice Felix Frankfurter, one of the strongest supporters of federalism and not placing too many restrains on the states, retired from the Supreme Court on August 29, 1962. President Kennedy replaced him with Arthur J. Goldberg, who joined the Court to hear *Gideon*. The other members of the Court were Chief Justice Earl Warren, appointed by President Eisenhower; Hugo Black and William O. Douglas, both appointed by President Roosevelt; Tom Clark, appointed by President Truman; William J. Brennan, Jr., John Marshall Harlan and Potter Stewart, appointed by President Eisenhower; and Byron White, appointed by President Kennedy.

3. *Id.* at 160-61.

4. *Id.* at 161.

5. *Id.*

Clarence Earl GIDEON, Petitioner,
v.
Louie L. WAINWRIGHT, Director, Division of Corrections.

United States Supreme Court
372 U.S. 335, 83 S.Ct. 792 (March 18, 1963)

Black, J., delivered the opinion of the Court. Douglas, J., filed a concurring opinion. Clark, J., filed an opinion concurring in the result. Harlan, J., filed a concurring opinion.

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

> 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.

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petitioner attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by

the Constitution and the Bill of Rights by the United States Government."[11] * * * [T]he State Supreme Court . . . denied all relief.

* * *

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. In [*Betts v. Brady*, 316 U.S. 455], the Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon the states by the Fourteenth Amendment." * * *

* * *

* * * [I]n 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. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:

> 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 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.

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down" and that it should now be overruled. We agree.

* * *

Mr. Justice DOUGLAS.

* * *

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. * * *

11. Later in the petition for habeas corpus, signed and apparently prepared by petitioner himself, he stated, "I, Clarence Earl Gideon, claim that I was denied the rights of the 4th, 5th, and 14th amendments of the Bill of Rights."

But that view has not prevailed and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

* * *

Mr. Justice CLARK, concurring in the result.

* * *

I must conclude * * * that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty" just as for deprival of "life," and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life – a value judgment not universally accepted – or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

Mr. Justice HARLAN, concurring.

* * *

* * * The Court has come to recognize * * * 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.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights. To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

* * * When we hold a right * * * to be "implicit in the concept of ordered liberty" and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. * * *

Gideon's Retrial

Clarence Earl Gideon was tried again, represented by attorney Fred Turner. A jury acquitted him on August 5, 1965, two years and a day after the first jury had convicted him of the same charge at the trial where he was not represented. As *The New York Times* reported, "[t]he difference between the two trials was that this time Mr. Gideon had a lawyer."[1]

> Mr. Turner found a new defense witness. He developed material to discredit the chief prosecution witness. He talked to the jury about "reasonable doubt" and said that "this country was not founded on a man having to prove his innocence – we're all thankful for that."
>
> The trial began a 9 this morning and lasted most of the day. The jury took an hour and five minutes to decide on its verdict: Not guilty.
>
> * * *
>
> Mr. Gideon cried. He was a free man after nearly two years in the state penitentiary at Raiford, Fla. * * *
>
> * * *
>
> The state had an eyewitness who said he saw Mr. Gideon inside the poolroom. He was Henry Cook, then 20, a dark young man with

1. Anthony Lewis, *High Court Ruling Helps Poor Man to Freedom*, N.Y. TIMES, Aug. 6, 1963.

long sideburns.

Under cross-examination by Mr. Turner today, Mr. Cook said he had once stolen a car and been put on probation. Asked what he was doing outside the poolroom at 5 in the morning, he said he had just returned from an all-night dance, 60 miles away.

* * *

In his closing argument to the jury, Mr. Turner charged that the poolroom had been broken into and robbed by Mr. Cook and some friends. He said that the only logical explanation of Mr. Cook's presence and of what had happened to the missing bottles.

* * *

It was never certain, or likely, that Clarence Earl Gideon would benefit from his victory in the Supreme Court. But it turned out today that a lawyer did make a difference.[2]

Anthony Lewis provides a history of Clarence Earl Gideon's case in GIDEON'S TRUMPET (Random House 1964). In it, after describing Clarence Earl Gideon's initial trial, his petition to the Supreme Court, his representation before the Court by Abe Fortas, the decision, and Gideon's acquittal, Lewis makes the following observation:

The case of *Gideon v. Wainwright* is in part a testament to a single human being. Against all the odds of inertia and ignorance and fear of state power, Clarence Earl Gideon insisted that he had a right to a lawyer and kept on insisting all the way to the Supreme Court of the United States

His triumph there shows that the poorest and least powerful of men – a convict with note even a friend to visit him in prison – can take his cause to the highest court in the land and bring about a fundamental change in the law.

But of course Gideon was not really alone; there were working for him forces in law and society larger than he could understand. His case was part of a current of history, and it will be read in that light by thousands of persons who will known no more about Clarence Earl Gideon than that he stood up in a Florida court and said: "The United States Supreme Court says I am entitled to be represented by counsel."

A brief documentary, *Defending Gideon*, with footage of Clarence Earl Gideon and others involved in the case is available at www.constitutionproject.org/publications-resources/defending-gideon/.

Statement by Attorney General Robert F. Kennedy

If an obscure Florida convict named Clarence Earl Gideon had not sat down in prison with a pencil and paper to write a letter to the Supreme Court, and if the Supreme Court had not taken the trouble to look for merit in that one crude petition among all the bundles of mail it must receive every day, the vast machinery of American law would have gone on functioning undisturbed.

But Gideon did write that letter. The Court did look into his case and he was retried with the help of a competent defense counsel, found not guilty, and released from prison after two years of punishment for a crime he did not commit, and the whole course of American legal history has been changed.

- Attorney General Robert Francis Kennedy
November 11, 1963

Douglas v. California

The Sixth Amendment right to counsel applies only at trial. However, the same day it decided *Gideon*, the Court decided *Douglas v. California*, 372 U.S. 353 (1963), in which it held that an indigent defendant had a right to counsel for his or her first appeal as a matter of right. Quoting *Griffin v. Illinois*, 351 U.S. 12 (1956). Justice Douglas said for the Court's majority:

2. *Id*.

> In either case [denial of transcript or counsel] the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of appeal a man enjoys "depends upon the amount of money he has."

Where an appeal is decided without the benefit of counsel, Justice Douglas wrote, "an unconstitutional line has been drawn between rich and poor." *Id.* at 357.

Justice Clark dissented, saying that "[w]ith this new fetish for indigency the Court piles an intolerable burden on the State's judicial machinery." *Id.* at 359. Justice Harlan, joined by Justice Steward, also dissented, expressing the view that the Equal Protection Clause did not apply and that California's failure to provide counsel did not violate due process. *Id*. at 361-67.

Although the Sixth Amendment does not apply, the Supreme Court has held that a defendant has a right to effective assistance of counsel on appeal from his criminal conviction. *Evitts v. Lucey*, 469 U.S. 387 (1985).

The Court later held in *Ross v. Moffitt*, 417 U.S. 600 (1974), the right to counsel does not apply beyond the first appeal. It held that due process did not require that North Carolina provide indigent defendants with a lawyer to pursue discretionary appeals from the state intermediate appellate court to the state supreme court and applications for review in the U.S. Supreme Court.

* * *