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IV. The History of *Gideon v. Wainwright*

Abe Krash
Anthony Lewis

A. *The* Gideon *Brief*[223]

When Tony Lewis and I were chatting before the panel this morning, he was trying to cheer me up a little by telling me it wasn't such a long time ago. I was reminded of Judge Arnold's remark. He said, "As I grow older, I find that the things I remember best never took place."

The fact is that I have a very vivid memory of that summer in 1962 when I worked on the *Gideon* brief. Abe Fortas was appointed by the Supreme Court as counsel to represent Gideon, and I was a young lawyer working at Arnold, Fortas & Porter. Fortas invited me to work with him on the brief after the Supreme Court had granted certiorari. One must appreciate that Gideon's petition was handwritten and that there were about 1,200 petitions of that sort before the Court. The Court, in granting certiorari, had asked counsel to consider whether the Court should reverse *Betts v. Brady*[224] — the case which had decided that a defendant was entitled to counsel in state criminal proceedings only on a showing of special circumstances. The order granting certiorari, and the appointment of Abe Fortas, were clear signals that momentous things were about to take place.

Abe Fortas was not a specialist in criminal law, and yet, in thinking of his life, it is worth recalling that he was involved as counsel or judge in three of the greatest criminal cases of the past half century. He was appointed counsel for petitioner by the U.S. Court of Appeals for the District of Columbia Circuit in a case called *Durham v. United States*.[225] In its opinion, the court announced a new test for the insanity defense in criminal

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223. This section of the conference was presented by Abe Krash — Partner, Arnold & Porter, District of Columbia; LL.B., University of Chicago, 1949; Member, President's Commission on Crime in the District of Columbia, 1965-66; Visiting Lecturer in Law, Yale Law School, 1978-79, 1981, 1983; Adjunct Professor, Georgetown University Law Center, 1989-90.

224. 316 U.S. 455 (1942).

225. 214 F.2d 862 (D.C. Cir. 1954).

cases. Fortas argued that the insanity defense should be reformed to take into account developments in psychiatry. *Durham* was one of the early great cases on the insanity defense, and it had "a tremendous and continuing impact upon the course of the debate"[226] concerning criminal responsibility. Second, he was, of course, counsel in *Gideon*. Third, when Fortas was an Associate Justice on the Supreme Court, he wrote the opinion for the Court in the *Gault* case which involved the right of juveniles to counsel.[227] In these three great cases, Abe Fortas' imprint can be seen very distinctly.

Fortas was a marvelous advocate, and when he called me in and we began to ponder the *Gideon* case, the questions that he put to me and to my colleagues who were working on the case were these: First, how do we convince the Court that changing the existing rule, so as to provide counsel in all criminal cases, is not a radical step? Second, how do we deal with the disagreement within the Court, with respect to federalism? Because he wanted to get a unanimous Court, both questions needed answers. On the first question, that is, how do we show the Court that we were not seeking a radical ruling, you must first remember what the situation with respect to the right to counsel was at that time. The Supreme Court had decided as of 1962 that in all federal criminal prosecutions, accused persons were entitled to a lawyer, whether it was a capital case or a noncapital case.[228] Second, the Court had decided that in state criminal cases involving capital offenses, the accused was entitled to counsel whether or not he could afford one.[229] Third, the Court had decided that in state felony prosecutions, where there were special circumstances presented, the accused was entitled to counsel.[230] Special circumstances was a category that kept changing and growing.[231] It involved such things as the complexity of the charge, whether the accused was a young person, the experience of the accused and so on.[232] This category was a rapidly expanding one.

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226. GOLDSTEIN, THE INSANITY DEFENSE 83 (1967).
227. *In Re* Gault, 387 U.S. 1 (1967).
228. Carnley v. Cochran, 369 U.S. 506, 514-15 (1962).
229. Hamilton v. Alabama, 368 U.S. 52, 54 (1961).
230. Betts v. Brady, 316 U.S. 455 (1942).
231. *See, e.g.*, Williams v. Kaiser, 323 U.S. 471, 474-77 (1944).
232. *See, e.g.*, Chewning v. Cunningham, 368 U.S. 443, 446-47 (1962); Hudson v.

Fortas wanted to convince the Court that a ruling for Gideon would not be a revolutionary step; it would be an evolutionary step. Our position was that granting a right to counsel in all state felony cases would not be a major transformation. I think that was the first significant point.

The second problem was how to deal with the federalism issue. In the Supreme Court, at that time, there was a great ongoing debate as to the status of the Bill of Rights under the fourteenth amendment. The issue was whether the fourteenth amendment incorporated all of the Bill of Rights or only some of them. The Court had held that some were incorporated but not all.[233] We had to convince those Justices who were reluctant to expand the incorporation doctrine. Also, there was a division within the Court as to whether an incorporated right was granted in the same way against a state as it was against the federal government.[234] If the right to counsel was incorporated in the fourteenth amendment, would it be subject to the same requirements in state cases as in federal prosecutions. The great insight that Abe Fortas had on this problem of federalism can be expressed this way: The special circumstances rule is a rule that those persons who favor federalism should oppose. Under that rule, after each person was tried and convicted in a state court and his conviction affirmed on appeal, a postconviction petition was presented to a federal court, and a federal judge was required to review what the state court judge did. The phrase we used in the brief to describe this process was "*ad hoc* and *post facto*."[235]

In other words, in every case, under the *Betts* rule, a federal court looked at what happened in the state court case, and it did so after the fact. What could be more irritating to state judges? What could be more contrary to federalist principles than to have a federal court reviewing, case by case, the actions of state court judges? Fortas's insight was that the special circumstances rule was anti-federalist and that a rule requiring the appoint-

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North Carolina, 363 U.S. 697, 701-04 (1960).

233. Adamson v. California, 332 U.S. 46, 50-53 (1947), *overruled by*, Malloy v. Hogan, 378 U.S. 1 (1963).

234. Poe v. Ullman, 367 U.S. 497, 515-17 (1961) (Douglas, J., dissenting).

235. Brief for Petitioner at 9, Gideon v. Wainwright, 372 U.S. 335 (1963).

ment of counsel in all cases would be less of an irritant. That profound insight was an insight that persuaded Justice Harlan,[236] who was reluctant to expand the incorporation doctrine. As you will recall, the Supreme Court's decision in *Gideon* was unanimous.

It seems to me that the significance of *Gideon* is that, notwithstanding the criticisms that have been made of Supreme Court opinions of the Warren era, the *Gideon* decision has been immune from attack even by the most severe critics of the Warren Court. Some critics have urged the Court to abandon the decisions excluding evidence obtained by an illegal search and seizure.[237] Various critics have assailed the *Miranda* rule.[238] Other decisions of the Warren Court with respect to the rights of the accused are under assault.[239] But no responsible voice today urges that *Gideon* should be reversed. The right to counsel in criminal prosecution is now accepted as a fundamental basic right. Even the most conservative, even the most extreme revisionist critics of the Court, do not say today, "we should abandon the doctrine of the *Gideon* case." If one stands back for a minute and looks at the sweep of history, the *Gideon* case is a decision of enormous consequence and importance. It is a landmark in American constitutional law because it affirmed a right that is now fundamentally accepted in our society.

In that sense, it is appropriate to celebrate *Gideon*. The Supreme Court upheld the right to counsel in a unanimous decision which a quarter of a century later remains unchallenged. I think that is a development of profound and enduring significance.

Let me say just a word about the issues with respect to the right to counsel today. The issues, of course, have greatly changed since 1962. As with any great decision, one begins to refine and develop it. The first question that emerged after

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236. *Gideon*, 372 U.S. at 349-52.

237. Note, *Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1987-1988*, 77 GEO. L.J. 489, 594 (1989)[hereinafter *Eighteenth Annual Review*]; United States v. Spadaccino, 800 F.2d 292, 297 (2d Cir. 1986).

238. *Eighteenth Annual Review*, *supra* note 237, at 641. *See also* Oregon v. Elstad, 470 U.S. 298 (1985).

239. *Eighteenth Annual Review*, *supra* note 237, at 594.

Gideon is what do we mean by the right to counsel? Is any lawyer sufficient, or do we mean that the accused is entitled to effective assistance of counsel? How do you give content and meaning to the right? The second question is how far does the right to counsel extend? When we say that you have a right to counsel of your choice, what does that mean? That is the issue involved in the *Monsanto*[240] case recently decided in the Second Circuit under the Comprehensive Forfeiture Act.[241] This statute provides that, in certain circumstances, a defendant's assets can be forfeited.[242] The question is, can you take away a man's assets so that he can't pay counsel of his choice? Obviously, persons of limited means or indigent persons can't choose counsel in the same way a person of means can. What then does it mean to say that you have a right to counsel? And then there is, of course, the issue which Professor Kamisar addressed: to what kinds of proceedings does the right to counsel extend? How far should we go with it? In a fair and just society may a woman be deprived of the right to her child without the assistance of a lawyer? Is it just that persons who have been convicted of capital offenses and who are then engaged in postconviction proceedings do not have the benefit of counsel? Is that the kind of society we want to have?

It must be emphasized that *Gideon* was a criminal case and there are difficult questions concerning the right to counsel in civil cases. *Gideon* was not an equal protection case. It was a case involving the rights of accused persons in state criminal prosecutions. However, it has had emanations which can be said to extend beyond that. Those issues are the issues of today.

The point I would like to leave you with is that I think it is appropriate to celebrate *Gideon* because it does survive and remains as a beacon in the law. After a quarter of a century, it is a decision which I still regard as among the great moments of my professional life.

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240. United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988), *rev'd*, 109 S. Ct. 2657 (1989).

241. 18 U.S.C. § 1963(e) (Supp. IV 1986); 21 U.S.C. § 853(e)(1)(A) (Supp. IV 1986).

242. *Monsanto*, 852 F.2d at 1403-04.

B. *A Journalist's View*[243]

I am expected to be the celebrator here today. I will do that rather briefly despite Yale Kamisar's criticisms. He may well be right but, looking back, I cannot help being romantic about what happened in the *Gideon* case. After the Supreme Court agreed to hear the case and appointed Abe Fortas as counsel to this impoverished, longtime resident of the penitentiary, I followed the progression of the case; the briefing and arguing by Abe Fortas, Abe Krash, and John Hart Ely, a young Yale law student who was there for the summer and has since gone on to become a Harvard law professor, Dean of the Stanford Law School, and now a professor at Stanford. I think anyone who had watched the preparation of this case was impressed with the care, the vision, and the imagination used in briefing a case that, frankly, I think all of us knew really had to be won. It was not a case where you were desperately trying to save a client. It was a case where you were trying to present the Court with the soundest and most convincing reasons for doing what it seemed set to do. I think if you had seen that process, you would have felt proud of law and lawyers in this country and yes, a bit romantic about it, as I was.

I dug out the piece of the argument in the Supreme Court where Abe Fortas said, as he concluded, "Betts against Brady was wrong when decided; I think time has illuminated that fact. But I think that perhaps [time has now made it possible for] the correct rule, the civilized rule, the rule of American constitutionalism, the rule of due process,"[244] to be stated by this Court. I think we are all entitled to feel retrospectively celebratory even though we fully recognize the inadequacies that Yale Kamisar has pointed out.

I want to tell you a little anecdote to further indicate my feelings about this matter: what happened to me in Hollywood, not usually a place of reality. This time it was.

After the case and after my book, David Rintels, a screen

243. This section of the conference was presented by Anthony Lewis — Columnist, New York Times; Lecturer on Law, Harvard Law School; Author, GIDEON'S TRUMPET; B.A., Harvard University, 1948.

244. Petitioner's Rebuttal Argument at 58, Gideon v. Wainwright, 372 U.S. 335 (1963).

writer and director, decided to make a film about the book. David wrote the screenplay and arranged to have it produced. It starred Henry Fonda as Gideon. He asked me whether I would like to watch the filming and I did. I had nothing to do with it except to sit there and to observe this rather fascinating process. Much of the time was spent in the Chino Prison, a large California prison where many scenes were shot, although many of these were later cut. I discovered, to my amusement, that three or four prisoners at Chino had personally known Clarence Earl Gideon, even though he was a prisoner in Florida. This is perhaps indicative of a society unto itself where many prisoners have been in many prisons.

The scene of Gideon's second trial was filmed in an old courthouse in a Los Angeles suburb. You remember, of course, that he was convicted at his first trial. After he won his appeal in the Supreme Court, he had a second trial. Gideon refused the offer of the American Civil Liberties Union (ACLU) to represent him without charge, saying, with characteristic stubbornness, that he didn't want the ACLU to represent him. The judge then appointed a local Panama City, Florida lawyer named Fred Turner to represent him. The actor playing Fred Turner in this scene was a young Hollywood character actor named Lane Smith. Lane Smith was very industrious. He really wanted to get the part right. He asked what Fred Turner was like during that trial. I proceeded to describe him as a rather dapper man; he reminded me of Fred Astaire a bit. Lane listened.

Then the scene took place. The actor jurors sat in the jury box, and Lane Smith came on with a flower in his buttonhole, rolling a pen between his fingers, looking very confident and debonair. A witness for the prosecution took the stand. This witness, a taxi driver named Preston Bray, answered a phone call from Gideon and picked him up by request at 4:00 A.M. the morning of the break-in at the Bay Harbor Pool Room in Panama City. The prosecutor elicited from the driver, on direct examination, the fact that Gideon said to Bray, "Just remember you haven't seen me. Don't tell anybody you saw me."

I had forgotten this. It was years later and I thought to myself, that's very damaging. Fred Turner stands up, rolls that pen between his fingers and says, "Mr. Bray, did Gideon ever say that to you before?" "Yes, he says it all the time." Well, that put

a slightly different light on it. Turner then said, "Mr. Bray, why do you suppose he says that?" The cab driver says, "I think it's woman trouble." Turner, sort of looking over at the jury, rolls the pen and says, "I guess we know about that." And as I was sitting there, they said, "cut." That was the end of the scene. I turned to the person next to me and said, "By God, a lawyer really does make a difference."