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III. *Gideon v. Wainwright* A Quarter-Century Later†

Yale Kamisar††

In a brief working paper sent to all conference participants, Professor Burt Neuborne suggested that we might consider several themes, among them "*Gideon* Celebrated," "*Gideon* Fulfilled," and "*Gideon* Betrayed." I think these are useful headings.

A. *Gideon Celebrated*

In the course of my remarks this morning, I am going to say some unkind things about how the U.S. Supreme Court has applied (perhaps one should say, failed to apply) the *Gideon* "principle"⁶⁶ in the twenty-five years since it sustained Clarence

† This is a footnoted and somewhat expanded version of the keynote address I delivered at a conference on "*Gideon* Revisited: A 25th Anniversary Program," held on October 22, 1988. The conference was sponsored by The Legal Aid Society and presented at the Association of the Bar of the City of New York.

The paper's structure and content continue to reflect the occasion and the forum for which it was originally designed. I have also tried to retain the "conversational" quality of the remarks as originally given. I am indebted to Professor Michael B. Mushlin for his valuable assistance in transforming a long speech into a short article.

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66. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that an indigent defendant has an "automatic" or "flat" right to free counsel, at least in all serious criminal cases). Rejecting the contention that *Gideon* should apply only to "nonpetty criminal offenses," i.e., those offenses punishable by more than six months imprisonment, the Court in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), applied *Gideon* to instances where a defendant is imprisoned for any offense, whether classified as petty, misdemeanor, or felony. But *Scott v. Illinois*, 440 U.S. 367 (1975), held that the sixth and fourteenth amendments require only that no indigent misdemeanor be incarcerated unless he is afforded the right to counsel. Whether the Burger Court "expanded" or "contracted" *Gideon* is arguable. A fairly generous reading of *Gideon*, the day after it was decided, would have been that it applied to all "nonpetty" offenses. The Burger Court went beyond that interpretation of *Gideon* in one respect (*Argersinger*), but fell short in another (*Scott*).

Closely related to, and predating the *Gideon* "principle" is the *Griffin-Douglas* "equality" principle. *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956), held that, under certain circumstances at least, effective appellate review and "fourteenth amendment equality" required that indigent defendants be provided a trial transcript at state expense. Somewhat surprisingly, the *Gideon* Court did not rely on *Griffin* at all, but in another case decided that same day, *Douglas v. California*, 372 U.S. 353 (1963) (requiring a state to provide an indigent with counsel on his first appeal from a criminal conviction), the Court reaffirmed and significantly expanded the *Griffin* "equality" principle. Although a

Gideon's claim that he was entitled to appointed counsel. This is not to deny, however, that, as Abe Krash, co-author of the magnificent brief on Mr. Gideon's behalf, noted shortly after the case was decided (and I am happy to see that Mr. Krash is with us today) "the *Gideon* case represents an important step in the evolution of the Court's attitude towards individual rights."⁶⁷ It is "a great case" because it gives "significant expression to two of this country's deepest ideals and aspirations — a fair trial and just treatment of the poor and disadvantaged."⁶⁸ Nor is it to deny, as Anthony Lewis, author of the highly acclaimed book about the case, *Gideon's Trumpet*,⁶⁹ observed earlier this year (and it is fitting and proper that Mr. Lewis is also with us today), that "the romance of *Gideon* remains undiminished."⁷⁰ Let me dwell on that for a moment or two.

1. *The Romance of Gideon*

Clarence Earl Gideon was not an heroic figure. He was a small-time gambler, a sometime hobo, and an "ex-con." Mr. Lewis called him "a used-up man."⁷¹ An unkind observer might have called him a "bum."

In a phrase, Mr. Gideon was "a little man." Whether or not it is true that only little people pay taxes, in those days, in a number of states, they didn't get lawyers — not even when, as in Gideon's case, they were charged with a felony punishable by a long prison term. (Mr. Gideon was convicted of burglary, and a Florida judge sentenced him to five years in the state prison.)

For once in his life, however, Clarence Gideon "kicked back" and won. When his efforts to obtain appointed counsel were rebuffed, he retorted: "The United States Supreme Court

forceful argument can be made that the right to assigned counsel should apply to permissive review procedures as well as to appeals of right, the Court in *Douglas* stressed that it was dealing only with *the first appeal*, granted as a matter of right, and a decade later that is where the Court drew the line. See *Ross v. Moffitt*, 417 U.S. 600 (1974) and the discussion at notes 189-211 *infra*.

67. Krash, *The Right to a Lawyer: The Implications of Gideon v. Wainwright*, 39 NOTRE DAME L. REV. 150, 159 (1964).

68. *Id.* at 160.

69. A. LEWIS, *GIDEON'S TRUMPET* (1964).

70. Lewis, *A Muted Trumpet*, N.Y. Times, Mar. 17, 1988, at A31, col. 1.

71. A. LEWIS, *supra* note 69, at 96.

says I am entitled to be represented by counsel.”⁷² Of course, the Supreme Court hadn’t said that *yet*. But it was about to do so — in this very case.

Most of us experienced a surge of pride when the highest Court of the land reached down to hear this little man’s case and appointed Abe Fortas, “a high-powered example of that high-powered species, the Washington lawyer,”⁷³ to serve as counsel for petitioner in this case. In a sense, the high Court not only appointed a great lawyer to represent Mr. Gideon’s interests, but a great law firm. For how did Mr. Fortas begin?

By calling in one of his partners, Abe Krash, . . . asking him to organize research [for the case, and telling him that] he wanted to know everything there was to know about the right to counsel. There immediately got underway the extraordinary process by which a large firm digests a legal problem.⁷⁴

Most of us felt even more pride when twenty-two state attorneys general, as friends of the Court, joined Mr. Gideon’s lawyers in urging the Court to establish an absolute constitutional right to assigned counsel in criminal cases, at least in all serious ones.⁷⁵ I know of no other instance where so many of the states’ chief law enforcement officers asked the Court to expand the rights of the accused. Hopefully, this will happen again sometime. I think it fair to say, however, that it occurs about as often as the appearance of Halley’s Comet.

But let me add a sober note. Although the *Gideon* case and the events surrounding it make a good story, it is not quite the enchanting, glorious story many people think it is.

For one thing, Mr. Gideon was appointed counsel by the Supreme Court only *after* the Court decided to review his case. Thus, Mr. Gideon had to “go it alone” in persuading the Court to take his case.

Mr. Gideon was lucky. At the time he sought review in the

72. *Gideon v. Wainwright*, 372 U.S. 335, 337 n.4 (1963).

73. A. LEWIS, *supra* note 69, at 48.

74. *Id.* at 120.

75. Twenty-two states signed up. However, a twenty-third state, New Jersey, had agreed to sign, but had inadvertently been omitted. A. LEWIS, *supra* note 69, at 147-48. According to Lewis, a correction was made in time to be reflected in the permanent bound volumes of Supreme Court opinions. But the bound volume I have does not reflect the correction. See generally A. LEWIS, *supra* note 69.

highest Court of the land, that Court was probably waiting for a case like his because it was probably looking for an opportunity to establish an absolute right to counsel in all serious criminal cases.

However, so many litigants who have lost below are clamoring for the high Court's attention that an indigent defendant seeking to overturn his conviction probably needs the assistance of counsel as much or more *before* the Court grants review than afterwards. It is no small task to identify and to present the relevant issues and to persuade the Court that one's case is worthy of review. Nevertheless, both before and after the *Gideon* case, the Supreme Court "has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or petitions for [review] in this Court."⁷⁶ Indeed, a decade after *Gideon*, the Court made clear that the constitutional right to appointed counsel does not extend beyond the first appeal as of right.⁷⁷

For another thing, the *amicus* brief filed by the twenty-two state attorneys general was hardly a spontaneous outpouring of support for the right to assigned counsel. The presence of so many states on the side of *Gideon*, rather, was the result of a great deal of hard work by two extraordinary state attorneys general: Edward McCormack, Jr. of Massachusetts and Walter Mondale of Minnesota.

I was teaching at the University of Minnesota at the time and I was in fairly close contact with Mr. Mondale. I can tell you that he and Mr. McCormack exhorted and entreated many of their counterparts to sign that famous *amicus* brief. Messrs. McCormack and Mondale used all the good will they had acquired and all the considerable powers of persuasion they possessed to get some twenty other states to "come aboard." Nor should we forget that although virtually every state attorney general was contacted and urged to side with Mr. *Gideon*, twenty-four states declined — including the great states of California, Pennsylvania, Texas, and (yes!) New York.⁷⁸

76. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974).

77. *Id.* See also *infra* text accompanying notes 189-211.

78. Two states, Alabama and North Carolina, sided with Florida. See A. LEWIS, *supra* note 69, at 152.

Moreover, and this undoubtedly was the price that had to be paid to get so many states to join the Massachusetts — Minnesota brief, the state attorneys general who supported Mr. Gideon's claim gave the constitutional right to counsel a rather narrow reading. They sided with Mr. Gideon on the understanding that the new constitutional right would operate prospectively only, would be limited to felony cases, and would not "attach" until the judicial process had begun.⁷⁹ (The brief concluded by urging the Court to "require that all persons *tried* for a felony in a state court" be afforded the right to counsel.)⁸⁰

Thus, even a strong critic of the Warren Court's search and seizure and confession cases would have had little difficulty signing the Massachusetts — Minnesota brief. Indeed, earlier this year Anthony Lewis reported that former Attorney General Edwin Meese III had no quarrel with the *Gideon* case.⁸¹ (I assume Mr. Meese meant that he had no quarrel with the case so long as one read it the way he would like to read it — limited to its particular facts.)

2. *The Trouble with the Rule of Betts v. Brady*

One cannot appreciate the significance of *Gideon* without understanding the inadequacies of *Betts v. Brady*,⁸² the 1942 case that *Gideon* overruled. Another reason to dwell on the *Betts* doctrine for a while is that in recent years it has

79. See Brief for the State Governments, Amici Curiae, at 2-3, 16, 21-23, *Gideon v. Wainwright*, 372 U.S. 335 (1963) [hereinafter Brief]. The brief stressed that a criminal trial "is a highly complex, technical proceeding requiring representation by a trained legal adviser who can securely guide the accused through the maze of pitfalls into which he might otherwise stumble." Brief at 3.

As it turned out, of course, the Court rejected all three of the "conditions" suggested by the state attorneys general. *Gideon* was accorded full retroactive effect, *Linkletter v. Walker*, 381 U.S. 618, 639 (1965); it applies to minor offenses, whether classified as petty or misdemeanor, where a defendant is in fact sentenced to jail (even for one day), *Argersinger v. Hamlin*, 407 U.S. 25, 32-33 (1972); and it comes into play when a person is indicted or otherwise formally charged with a crime, *Massiah v. United States*, 377 U.S. 201 (1964); or subjected to "custodial interrogation," *Miranda v. Arizona*, 384 U.S. 436 (1966).

80. Brief, *supra* note 79, at 24-25 (emphasis added).

81. Lewis, *supra* note 70.

82. 316 U.S. 455 (1942), *overruled*, *Gideon v. Wainwright*, 372 U.S. 335, 336-45 (1963).

reemerged in several contexts.⁸³

At the time of *Betts*, the sixth amendment right to counsel had already been construed as requiring *federal* courts to provide indigent defendants with counsel in all serious cases.⁸⁴ But the *Betts* Court rejected the argument that the sixth amendment right to counsel was a “fundamental” right fully applicable to the states via the fourteenth amendment.

Instead, the *Betts* Court formulated a “prejudice” or “special circumstances” test: an indigent defendant, at least in a non-capital case,⁸⁵ had to show specifically that he had been “prejudiced” by the absence of a lawyer or that “special circumstances,” such as the defendant’s low intelligence or lack of education or the complexity of the offense charged, rendered criminal proceedings against him without the assistance of counsel “fundamentally unfair.”

One doesn’t have to go any further than the *Betts* case itself to see the problem with this approach. The Court noted that Mr. Betts, a farm hand, out of a job and on relief, “was not helpless,” “had once before been in a criminal court [and] pleaded guilty,” and was “not wholly unfamiliar with criminal procedure.”⁸⁶ I guess he learned some criminal procedure by osmosis when he had appeared in criminal court on that previous occasion or when he had served time for larceny. Well, I have appeared in a doctor’s office many times and I am not wholly unfamiliar with medicine. But does it follow that I am qualified to practice medicine?

The *Betts* Court purported to be rejecting a rigid rule in favor of a more flexible, fact-sensitive one.⁸⁷ But that wasn’t the way the *Betts* doctrine worked. Instead, it soon developed its own set of hard and fast rules.

83. See *infra* notes 114-29 and accompanying text.

84. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

85. In *Bute v. Illinois*, 333 U.S. 640, 660 (1948), and subsequent non-capital cases, the Court indicated that there was a “flat” requirement of appointed counsel in capital cases. In *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961), a capital case, the Court operated on the assumption that there was such a flat rule. For an explanation and criticism of the pre-*Gideon* distinction between capital and non-capital cases, see Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 230-31 (1959).

86. 316 U.S. at 472.

87. *Id.* at 472.

Mr. Betts was indicted for robbery, a crime that carried a long prison term (in fact, he was sentenced to eight years). When he asked that counsel be appointed for him, the Maryland trial judge retorted that it was not county practice to appoint counsel for indigent defendants "save in prosecutions for murder and rape."⁸⁸ When, twenty years later, Mr. Gideon requested that counsel be appointed for him, the Florida trial judge didn't take much time giving him the bad news: "[U]nder 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."⁸⁹ So much for the touted flexibility of the old *Betts* rule.

When, in pre-*Gideon* days, the trials of unrepresented indigent persons got underway, there must have been numerous occasions when the lay defendants performed so badly, e.g., trying to cross-examine a witness or trying to keep out certain evidence, that any trial judge paying the slightest attention had to realize that they sorely needed the assistance of a lawyer. How many times did a trial judge stop the proceedings and say to the hapless defendant — "We can't continue like this. You need a lawyer. You're too confused." Or — "You're too frightened." Or — "You're too dull-witted." Or — "It's become clear to me that the issues in this case are a good deal more complex than I first thought." So far as I can tell, it never happened. Not once.

Because I wrote two long articles on the *Betts* rule, I read many, many pre-*Gideon* cases. And I read many law review articles and student notes about the *Betts* rule. But I never came across a case, or heard about one, where it happened.

I have saved the worst that can be said about the *Betts* doctrine for last. Its greatest weakness — its most frustrating feature — is that the likely adverse consequences of deprivation of counsel served as justification for the deprivation.

On rare occasions, a record may contain egregious errors that leap out at any objective observer and demonstrate that an unrepresented defendant did *not* get a fair trial. But a bare record can never establish that an unrepresented defendant *did* get a fair trial. What does it prove that the record reads well? How

88. *Id.* at 457.

89. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963).

would it have read if the defendant had had a lawyer? A record produced without the input of a defense lawyer does not and cannot reflect what defenses and mitigating circumstances a trained advocate would have seen or what lines of inquiry she would have pursued or what evidence or witnesses a competent pretrial investigation would have turned up.

But the failure of the unrepresented defendant to develop a satisfactory theory or, if he does, to support it with adequate evidence — likely consequences of being without the aid of counsel inside and outside the courtroom — makes the case seem exceedingly simple and the defendant look overwhelmingly guilty. The lack of defense counsel often *makes it appear* that no lawyer could have saved the defendant anyway and thus the lack of counsel often *serves as justification* for the lack of counsel.

The judge who presided at Mr. Gideon's first trial for burglary told us that "he did as well as most lawyers would have done in handling this case."⁹⁰ This evaluation of Mr. Gideon's performance might have seemed credible if, after his conviction was overturned, he had not been tried again (and acquitted), this time with court-appointed counsel at his side.

As every competent lawyer knows, what occurs in the courtroom only represents a fraction of the work done in the preparation of a case. Not infrequently, a defendant needs the services of a lawyer outside the courtroom more than he does inside. Before his first trial, however, even if he had the ability to do so, Mr. Gideon was hardly in a position to run down sources of information and otherwise conduct an adequate investigation. He was, as so many indigent defendants awaiting trial are, in jail.⁹¹ But Mr. Gideon's lawyer had more room to maneuver. Before the second trial began, he "spent three full days . . . interviewing witnesses and exploring the case."⁹²

As a result, the defense was able to negate, or at least blunt, almost all the damaging evidence the prosecution offered at Gideon's retrial.⁹³ Indeed, the defense not only badly shook the

90. See A. LEWIS, *supra* note 69, at 238.

91. *Id.*

92. *Id.*

93. See generally *id.* at 230-37.

prosecution's principal witness, but was able to make a plausible case that the witness, not Gideon, had been involved in the burglary.⁹⁴

Because the U.S. Supreme Court upheld Mr. Betts' conviction, he did not have the benefit of a second trial with the assistance of counsel. A majority of the U.S. Supreme Court didn't think a defense lawyer would have affected the outcome. "The simple issue," the Court told us, "was the veracity of the testimony for the State and that for the defendant."⁹⁵ In denying Mr. Betts collateral relief, the Maryland Court of Appeals (in an opinion later paralleled in its entirety by a majority of the Supreme Court) had similarly concluded: "[I]n this case it must be said that there was little for counsel to do on either side."⁹⁶

Only a court that took a cursory glance at the record could have said that. It so happens that a year before the Supreme Court decided the *Gideon* case I spent many an hour studying the transcript of Mr. Betts' trial.⁹⁷ I came away convinced that there was a great deal that a competent defense lawyer could have done. Consider, for example, the serious problems raised by the pretrial identification of Betts.

The robbery victim, one Bollinger, told the police that the robber "had on a dark overcoat and a handkerchief around his chin and a pair of dark amber glasses." Because the robbery had occurred when it was "fairly dark," Mr. Bollinger "wasn't sure [he] could identify [the robber] without the glasses and the handkerchief."⁹⁸

Mr. Bollinger did identify Mr. Betts, but he did not pick him out of a lineup. The *only* person Bollinger was asked to identify was Betts — wearing a dark coat, dark glasses and a handkerchief around his chin.⁹⁹

Whose coat? Whose dark glasses and handkerchief? None of these items were ever offered in evidence. The prosecution

94. See *id.* at 230-31, 234, 236-37.

95. *Betts v. Brady*, 316 U.S. 455, 472 (1942).

96. Trial Record, *Betts v. Brady*, 316 U.S. 455 (1942).

97. See Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962) (analysis of, and extensive quotations from trial transcript at 42-56).

98. *Id.* at 43.

99. *Id.* at 43, 48-49.

failed to establish that Mr. Betts even owned a dark overcoat or a pair of dark glasses.¹⁰⁰

The trial of Betts was rather disjointed but after reading the transcript a half-dozen times, I found it

difficult to avoid the conclusion that the following bootstraps operation occurred: Bollinger described to the police the various items the robber was supposed to have worn; the police simply went out, begged or borrowed the requisite coat, glasses and handkerchief, and slapped them on Betts; Bollinger then made his identification, based largely on the coat, glasses and handkerchief the police had put on Betts.¹⁰¹

Yet none of the courts that considered the *Betts* case seemed to be aware that there was any problem with the pretrial identification.

B. *Gideon Unfulfilled*

As is true of most landmark cases, *Gideon* can be read very narrowly or very broadly. Reading it expansively, reading it for all it may be worth, *Gideon* holds out the promise, or at least the hope, that the "right to counsel" will come to mean that *whenever* a person is enmeshed in legal proceedings — civil or criminal — that may result in a grievous loss, the outcome should not turn on the inability of that person to afford a lawyer. A quarter-century after *Gideon*, however, as we are all painfully aware, that is not what the right to counsel means or is likely to mean in the foreseeable future.

As Andrew Scherer has recently observed, we are living "[i]n an age characterized by diminishing availability of housing for low-income households and a marked growth in homelessness. . . ."¹⁰² Yet in New York City alone, 25,000 evictions take place each year.¹⁰³

Tenants caught up in eviction proceedings face at least "an imminent threat of a disrupted life and displacement from

100. *See id.*

101. *Id.* at 49.

102. Scherer, *Gideon's Shelter: The Need To Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 562 (1988).

103. *Id.* at 558.

[their] home[s],”¹⁰⁴ and, at worst, the distinct possibility that they will be unable to find any alternative housing, and thus be subject to “the devastating consequences that homelessness engenders.”¹⁰⁵ And I think we may safely say, without conducting or referring to any surveys,¹⁰⁶ that the great majority of tenants facing eviction cannot afford a lawyer, have no legal training, are confronted with and baffled by documents filled with legalese and overwhelmed by the landlords’ lawyers.¹⁰⁷ Yet no jurisdiction to date has established a right to appointed counsel for people faced with eviction.¹⁰⁸

We live in a society that likes to brag about “equal justice.” In such a society, the eviction for nonpayment of rent of thousands of low-income tenants who lack the legal resources to articulate or to substantiate the affirmative defenses and counterclaims that may be available (such as the condition of the premises) is, to put it mildly, anomalous — and, to put it strongly, scandalous. Yet there is little reason to be optimistic. It took forty years to expand the constitutional right to appointed counsel from a right in certain capital cases to a right in certain misdemeanor cases.¹⁰⁹ I am afraid that it may take another forty years before we see the emergence of a federal constitutional right to appointed counsel in eviction proceedings.

Of course, “[s]tate courts are free to formulate their own analyses of the states’ constitutional requirements of due process”¹¹⁰ And state statutory provisions and common law may also prove useful.¹¹¹ Hopefully, we may soon see a breakthrough

104. *Id.* at 591.

105. *Id.*

106. For those who feel the need for such surveys and their findings, see *id.* at 572 n.59.

107. According to a report on New York City’s Housing Court, “the landlords’ attorneys are so at home in the court that they appear to tenants to be court personnel.” *Id.* at 574 (footnote omitted).

108. See *id.* at 563.

109. For a brief discussion of the journey from *Powell v. Alabama*, 287 U.S. 45 (1932) to *Argersinger v. Hamlin*, 407 U.S. 25 (1972), see Scherer, *supra* note 102, at 561-62.

110. Scherer, *supra* note 102, at 583.

111. As the Court observed in *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 33 (1981) “wise public policy . . . may require that higher standards be adopted [by the states] than those minimally tolerable under the [federal] Constitution.”

on this front.¹¹² A state might, for example, base a “bright-line” rule regarding appointment of counsel in eviction proceedings on a state “poor persons” statute, authorizing the appointment of counsel in civil matters for persons who cannot afford the costs of pursuing or defending the proceeding.¹¹³

Why am I so pessimistic about the development of a federal constitutional right to appointed counsel in this area? One reason is the Supreme Court’s decision in *Lassiter v. Department of Social Services*,¹¹⁴ where a five to four majority rejected the contention that an indigent person has a “flat” right to appointed counsel when a state seeks to terminate her parental right.

Lassiter is disappointing not only because it failed to fulfill the promise of *Gideon* but because five members of the Court seemed to have suffered amnesia — the majority opinion reads as if the *Betts v. Brady* approach had never been discredited.

The *Lassiter* Court told us that “the case presented no specially troublesome points of law, either procedural or substantive.”¹¹⁵ I must say I wince when a court says that — on the basis of a record made *without* the assistance of counsel. How do we know what “troublesome points of law” a lawyer might have presented — or what troublesome facts she might have uncovered?

The *Lassiter* Court told us:

While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in

112. In *Donaldson v. State of New York*, 548 N.Y.S.2d 676 (1st Dep’t 1989) the plaintiffs sought a declaratory judgment entitling indigent defendants facing summary eviction to assigned counsel and a writ of mandamus to compel the implementation of a program to assign such counsel. The First Judicial Department of the Appellate Division of the Supreme Court found it lacked jurisdiction and transferred the case to the Supreme Court, Bronx and New York Counties.

On February 24, 1989, a lawsuit was filed in the First Judicial Department of the Appellate Division of the New York State Supreme Court on behalf of two men threatened with eviction. The lawsuit, *Donaldson v. Cuomo*, seeks to extend the right to counsel to indigent people facing eviction proceedings. The complaint claims that the right to counsel in eviction proceedings is provided for in the United States Constitution and the New York State Constitution. N.Y. Times, Feb. 25, 1989, § 1, at 31, col. 5.

113. See Scherer, *supra* note 102, at 584-87.

114. 452 U.S. 18 (1981).

115. *Id.* at 32.

her son, the weight of the evidence that she had few sparks of such interest was sufficiently great that the presence of counsel for [her] could not have made a determinative difference.¹¹⁶

It's hard to talk about the "weight of the evidence" when we don't know what evidence a competent attorney might have gathered. Assuming *arguendo* that the defense Ms. Lassiter did offer would not have prevailed even if she had had the assistance of a lawyer, we do not know what *other* defenses a lawyer might have presented. After all, although Mr. Betts' "alibi" defense — the only one he presented — did seem quite weak, he had a number of other, and stronger, defenses he never made because he wasn't aware that he had them.

It strikes me that parental status termination proceedings cry out for the participation of lawyers on *both* sides. *Lassiter* involved a complex and unruly statute. As the American Bar Association (ABA) pointed out in its *amicus* brief, the decisions in the area are quite subjective, the judicial criteria very diverse, and the proceedings prone to error.¹¹⁷ According to studies cited or summarized in the ABA brief, parents represented by counsel have far greater success in maintaining the parent-child relationship than those parents who have to "go it alone."¹¹⁸

Expert testimony from doctors, psychologists and social workers will often be necessary in parental termination proceedings. Will parents know without counsel how to obtain such experts? Even if they do, will they know how to qualify them, formulate hypothetical questions or avoid leading questions? And how in the world can these unrepresented parents be expected to cross examine *the state's* experts effectively?

At one point, Ms. Lassiter did try to cross examine a social worker, but her efforts were rather pathetic. Again and again she started to "make a speech" and again and again the judge interrupted, telling her not to "testify," but to ask questions, if she had any.¹¹⁹ About the only thing that Ms. Lassiter's "cross examination" accomplished was to anger the judge.

116. *Id.* at 32-33.

117. Brief for American Bar Association, *Amicus Curiae*, at 8-9, *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981).

118. *Id.* at 4.

119. See *Lassiter*, 452 U.S. at 54, n.22.

The *Lassiter* majority relied heavily on *Gagnon v. Scarpelli*,¹²⁰ which held that there is no flat right to appointed counsel in probation revocation proceedings. *Scarpelli* marked another instance where the Court forgot the inadequacies of *Betts* and the teachings of *Gideon*.

In probation revocation proceedings, the *Scarpelli* Court told us, counsel should be provided on a due process case-by-case basis¹²¹ and, "presumptively," where there are "substantial reasons which justified or mitigated the violation, and make revocation inappropriate"¹²² and where these reasons "are complex or otherwise difficult to develop."¹²³ In passing on a request for the appointment of counsel, added the Court, "the responsible agency should also consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself."¹²⁴

This, of course, is *Betts v. Brady* all over again. In order to get a lawyer the probationer must establish *without a lawyer* that there are substantial reasons that make revocation inappropriate and that these reasons are "difficult to develop."¹²⁵ There may be such reasons, but the probationer may not be able to articulate them or even be aware that they exist without the assistance of counsel.

How can we tell whether or not the case for revocation is a "doubtful" one without the impact of a lawyer? And how can we tell whether a probationer is "capable of speaking effectively for himself" without knowing what there is to be said on his behalf?

Even assuming *Scarpelli* was correctly decided (and I do not think it was), it can be distinguished from *Lassiter*. The *Scarpelli* Court emphasized that in a revocation hearing the state is not represented by a prosecutor (but by a parole officer) and that formal procedures and rules of evidence are not employed.¹²⁶ Thus, "[t]he introduction of counsel into a revocation proceeding will alter significantly the nature of the

120. 411 U.S. 778 (1973).

121. *Id.* at 790.

122. *Id.*

123. *Id.*

124. *Id.* at 790-91.

125. *Id.* at 790.

126. *See id.* at 788-89.

proceeding.”¹²⁷

But the same cannot be said for the method chosen by the state to extinguish Ms. Lassiter’s parental rights: the decision maker is a judge, the state is represented by an attorney and the hearing is conducted pursuant to the formal rules of evidence and procedure.¹²⁸ As the *Lassiter* dissenters put it:

The procedures devised by the State vastly differs from the informal and rehabilitative probation revocation decision in *Scarpelli*. . . Indeed, the State here has prescribed virtually all the attributes of a formal trial as befits the severity of the loss at stake in the termination decision — every attribute, that is, except counsel for the defendant parent.¹²⁹

I can hear the cry of protest now: if we do not limit the right to appointed counsel, as the *Lassiter* Court did, to situations where an indigent person “loses his physical liberty if he loses the litigation,”¹³⁰ where *do* we draw the line? If the *Gideon* principle applies to parental termination proceedings, why doesn’t it also apply, for example, to child custody fights growing out of divorce actions?

I think parental termination proceedings can be distinguished without too much difficulty from what might be called “private custody fights.” But first let me dwell on what is at stake in a case like *Lassiter*. As the dissenting justices pointed out, the parent may suffer a loss of liberty — permanent depri-

127. *Id.* at 787. But see Kadish, *The Advocate and the Expert-Counsel in the Penitentiary Correctional Process*, 45 MINN. L. REV. 803 (1961):

The issue is not whether the lawyer’s paraphernalia of technicalities appropriate to other areas are proper in [probation and parole revocation proceedings]; no one has seriously suggested that rules of pleading and evidence should be imported into [such] hearings. The issue is whether the attorney may speak for his client, given the areas of relevance of parole and revocation proceedings and always subject to the authority of the agency to draw the ground rules. A sensible and pragmatic adaption of the nature of legal advocacy to the needs and purposes of the inquiry is as plausible in [revocation hearings] as it has proven to be in such “non-legal” areas as labor arbitration and the regulatory and adjudicative work of administrative agencies.

Id. at 838.

128. See *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 42-44 (1981) (Blackmun, J., dissenting).

129. *Id.* at 44.

130. *Id.* at 25.

vation of "her freedom to associate with her child"¹³¹ — that can be at least as grievous a loss of liberty as incarceration. An indigent person charged with a criminal offense is entitled to appointed counsel, you will recall, if sentenced to *one* day in jail. My children have long since reached maturity, but I can say unhesitatingly (and surely I am not alone) that I would rather have gone to jail for thirty or sixty days than to have been permanently deprived of their companionship, care and custody — indeed, even the right to communicate with them or to know how they were doing.¹³²

The "wedge" argument in the right to counsel context does not impress me, perhaps because down through the years it has been made so often in this area. The *Betts* Court, for example, could see virtually no stopping point to defendant's argument that he was entitled to appointed counsel. The Court voiced fear that defendant's reasoning would apply to traffic court proceedings.¹³³ Of course, decades later the Court managed, without much difficulty, to find a stopping point short of such proceedings.

The "wedge" objection can be used to condemn any principle whatever, because there is no principle that does not become troublesome if it is extended far enough. "[W]here to draw the line . . . is the question in pretty much everything worth arguing in the law,"¹³⁴ but the "wedge" objection "would make it impossible to draw a line, because the line would have to be pushed farther and farther back until all action became vetoed."¹³⁵

One can usually "draw the line" without extending a principle very far if one wants to do so. Now, how would I distinguish

131. *Id.* at 59 (Stevens, J., dissenting).

132. As Justice Blackmun noted in his dissent: "A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decisions affecting the child's religious, educational, emotional, or physical development." *Id.* at 39 (footnote omitted).

133. See *Betts v. Brady*, 316 U.S. 455, 473 (1942), *overruled by* *Gideon v. Wainwright*, 337 U.S. 335 (1963). Similarly, in the landmark case of *Griffin v. Illinois*, 351 U.S. 12 (1956), (establishing an indigent defendant's right to a free transcript on appeal), the state argued that defendant's logic would compel compulsory stenography before every justice of the peace, police court or magistrate." Brief for Respondents at 9, *Griffin v. Illinois*, 351 U.S. 12 (1956).

134. *Irwin v. Gavit*, 268 U.S. 161, 168 (1925).

135. G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 315 (1957).

“private custody fights” from parental termination proceedings? If a person cannot afford to hire a lawyer to fight his or her spouse for custody of their children, that is most unfortunate. But the argument for appointed counsel in parental termination proceedings strikes me as a good deal more compelling. In such proceedings, *the government* — with its enormous investigative and prosecutorial resources — is setting machinery in motion to abrogate the parent-child relationship. “[When] problems of poverty . . . arise in a process initiated by government for the achievement of basic governmental purposes . . . [and] one of its consequences [is] the imposition of severe disabilities on [those] proceeded against, the government should have to take reasonable measures to eliminate this factor.”¹³⁶

I am tracking the language of the 1963 Report of the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice.¹³⁷ As that Report emphasized, “the essence of the adversary system is challenge” — “a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process.”¹³⁸ When the state seeks to deprive a person of the freedom to associate with his or her child, no less than when a state seeks to put a person in jail, that person should be able to challenge official decisions and assertions of authority vigorously and properly. In parental termination proceedings, no less than in criminal proceedings—

Persons (unable to finance a full and proper defense) are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss of the interests of accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that the conditions produced by the

136. REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 10 (1963) [hereinafter ALLEN REPORT]. The report is often called the Allen Report, after the chairman of the committee, Professor Francis A. Allen. Although portions of the report were quoted with approval in *Escobedo v. Illinois*, 378 U.S. 478, 490 n.13 (1964), and *Miranda v. Arizona*, 384 U.S. 436, 472-73 n.41 (1966), it appeared too late to be mentioned in the *Gideon* case.

137. ALLEN REPORT, *supra* note 136.

138. *Id.* at 10.

financial incapacity of the accused are detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community.¹³⁹

C. *Gideon Betrayed: The Death Penalty Cases*

So far, I have been concentrating on non-criminal proceedings or what might be called quasi-criminal cases. But the failure to fulfill the promise of *Gideon* may be seen in what might be called the "hardest core" criminal cases — the death penalty cases. Indeed, death case defense lawyers have been so poorly paid and so badly supported, and so many have performed so inadequately, that I think it no exaggeration to call the administration of justice in this sector "*Gideon* betrayed."

We like to say that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has"¹⁴⁰ and we like to think that we have made great progress in assuring that this does not occur. But lawyers who specialize in capital punishment cases have another saying and, I am afraid, a more truthful one: "People with money don't get the death penalty."¹⁴¹

Some may wonder why I am talking about the death penalty at all — for New York does not have that penalty; Governor Cuomo has consistently vetoed bills authorizing such a penalty. But as Professor Vivian Berger observes in the current issue of the New York State Bar Journal, "[s]urely . . . a time will come when the state acquires as Chief Executive someone who either supports execution or declines to counter the lawmakers' wishes."¹⁴² Moreover, and more fundamentally, to hold a conference on the right to counsel twenty-five years after *Gideon* without discussing the effective assistance of counsel (or the lack of it) in death penalty cases would be to play Hamlet

139. *Id.* at 10-11.

140. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion).

141. Hengstler, *Attorneys for the Damned*, A.B.A. J., Jan. 1, 1987 at 56-57. Death penalty lawyers also say that "Capital punishment is for them who have no capital." Judge, *Death Row Defense*, *Wall Street Style*, AM. LAW., Jan.-Feb. 1989, at 35-36.

142. V. Berger, *Rolling the Dice to Decide Who Dies*, N.Y. ST. BAR J., Oct. 1988, at 32.

without the ghost.

1. *The Importance of the Penalty Trial and the Exacerbation of the Death Penalty's Uneven Application at this Trial*

Ever since 1976, when the United States Supreme Court upheld some of the state capital punishment procedures enacted after *Furman v. Georgia*,¹⁴³ the trial of a capital defendant has been divided into two parts: first, there is the guilt trial or guilt phase, in which the jury decides whether the defendant is guilty of a capital crime; second, if the jury does so decide, there is the capital sentencing proceeding — the penalty trial or penalty phase — in which the jury (or, in a very few states, the judge) decides whether or not the defendant should be sentenced to death. Professor Gary Goodpaster has put it well:

The guilt trial establishes the elements of the capital crime. The penalty trial is a trial for life. It is a trial *for* life in the sense that the defendant's life is at stake, and it is a trial *about* life, because

143. 408 U.S. 238 (1972)(per curiam). A 5-4 decision struck down the capital punishment laws of 39 states, concluding that the imposition and carrying out of the death penalty under the arbitrarily and randomly administered system in these states constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. Each of the five majority Justices wrote separate opinions giving individual reasons for his conclusions; none joined the opinion of any other in the majority. *Furman* "so starkly deviated from the traditional format that it can be characterized as a decision in which there was not only no Court opinion but no Court — only a confederation of individual, even separately sovereign, Justices." Burt, *Disorder in the Court*, 85 MICH. L. REV. 1741, 1758 (1987). For a discussion of how Justice Brennan and some of his colleagues "approached 'first principles'" in *Furman*, see Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 323-31 (1986)(text of the 1986 Oliver Holmes, Jr. lecture at Harvard University).

Many states responded to *Furman* by passing two types of death penalty statutes, mandatory capital punishment laws and "guided discretion" ones which required the sentencer to weigh various aggravating and mitigating factors in deciding whether a particular defendant should be executed. See Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 915-16 (1982). The mandatory laws were struck down in *Woodson v. North Carolina*, 428 U.S. 280 (1976); but the guided discretion statutes were upheld in *Gregg v. Georgia*, 428 U.S. 153 (1976), where a 7-2 majority rejected the basic contention that "the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment." *Id.* at 168. In companion cases to *Gregg*, the same 7-2 majority sustained the constitutionality of two other state capital-sentencing procedures which, it concluded, essentially resembled the Georgia system. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

a central issue is the meaning and value of the defendant's life.¹⁴⁴

Recent decisions of the U.S. Supreme Court have enhanced the importance of the "trial for life." The Court has made it clear that the death penalty sentencer must take into account *all* mitigating circumstances, including the defendant's background, character, and unhappy upbringing.¹⁴⁵ But the sentencer need only consider and, of course, *can* only consider the mitigating evidence that is *introduced*.¹⁴⁶ And the quantity and quality of the mitigating evidence presented turns largely on the skill, dedication, judgment, resourcefulness, and funding of the capital defendant's attorney.¹⁴⁷ Thus, although the penalty trial affords an able defense lawyer the opportunity to present an enormous amount of material "personalizing" and "humanizing" the capital defendant, "it also exacerbates the disparity in capital defendants' representation at trial, which, in turn, may be expected to exacerbate the death penalty's uneven application."¹⁴⁸

It would be hard to overestimate the importance of the "trial for life." Even in the most outrageous and gruesome murder cases, juries have voted for life — when presented with evidence that permits them to see the defendant as a human being — when provided some basis for mercy, such as the terrible circumstances affecting the defendant's formative development.¹⁴⁹ Thus, I think it fair to say that "[a] true advocate cannot permit a capital case to go to the sentencer on the prosecution's one-sided portrayal alone and claim to be rendering effective assistance."¹⁵⁰

Unfortunately, too often the defense lawyer does let the

144. Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983).

145. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

146. See *Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 RUTGERS L.J. 261, 293 (1984).

147. *Id.* at 293-94. "Broad variations in attorney skill, experience, judgment — in short, varying levels of defense attorney competency [at the penalty trial] — can [bring about] 'freakish' and 'arbitrary' results as much as evidentiary rules or jury selection."

148. W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* 69 (1987).

149. See V. Berger, *supra* note 142, at 34; Goodpaster, *supra* note 144, at 335-38; Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 807, 843 & n.329 (1986).

150. Goodpaster, *supra* note 144, at 335.

capital case go to the jury on the prosecutor's one-sided version alone. In one case, for example, the jury was not told (a) that when defendant was an eleven-year-old boy he found his father, a World War II hero suffering from psychological problems as a result of his war experience, dead on the garage floor, a victim of self-inflicted asphyxiation; and that (b) there was good reason to believe that defendant's subsequent behavior was due largely to his father's suicide.¹⁵¹ In another case, the jury was not informed that defendant was on the borderline of mental retardation and that his parents had cruelly neglected him as a child and then abandoned him.¹⁵² In still another case, the jury was not told that when defendant was a child his violent alcoholic father had thrown heavy objects at him and his siblings for the fun of it, that defendant had run away from home at the age of twelve, and that he had then been taken in by a man who sheltered him in return for homosexual favors.¹⁵³ In all these cases, the defendant was sentenced to death.

These cases are not isolated phenomena; "there has been a surprisingly large number of cases in which defendants have been executed after their attorneys presented little or no mitigating evidence at their penalty trials."¹⁵⁴ Indeed, one close student of the problem has gone so far as to say: "Ineffective assistance of counsel completely permeates the penalty phase of capital trials. . . . [M]any defense attorneys do little or nothing by way of investigation geared to sentencing issues and hence do not themselves learn what they should be spreading before the jury."¹⁵⁵

There are several reasons why defense lawyers perform so badly so often at the penalty trial. For one thing, a defense lawyer may not understand the dynamics of this phase of a capital

151. This is the case of John Spenkellink, who in May of 1979 became the first person in 12 years to suffer involuntary execution. See W. WHITE, *supra* note 148, at 55. For a poignant account of the events surrounding the execution and the last-ditch efforts of Spenkellink's lawyers' efforts to save his life, see Burt, *supra* note 143, at 1805-13.

152. See Goodpaster, *supra* note 144, at 301-02 (discussing the case of Earl Lloyd Jackson).

153. See V. Berger, *supra* note 142, at 34 (discussing an actual but unidentified case).

154. W. WHITE, *supra* note 148, at 55. See also Goodpaster, *supra* note 144, at 337 & n.151; Tabak, *supra* note 149, at 805-06.

155. V. Berger, *supra* note 142, at 37.

case. For another, he may not have developed a meaningful rapport with his client.¹⁵⁶ Moreover, because he is often middle class and white, while his client is often poor and black, the defense lawyer may be (or feel) ill-equipped to enter his client's community and gain the trust of residents who can provide helpful information.¹⁵⁷ But one major reason, surely, why too often the defense attorney presents little or no mitigating evidence at the penalty trial is that it takes a great deal of time and money to gather the evidence and probably the assistance of experts to organize and interpret it — and many states, to put it mildly, are not accommodating:

Counsel will have to explore the defendant's past, upbringing and youth, relationships, treatment by adults, traumatic experiences, and other formative influences. Counsel will have to uncover witnesses from a possibly distant past, not only relatives, but childhood friends, teachers, ministers, neighbors, all of whom may be scattered like a diaspora of leaves along the tracks of defendant's travels.¹⁵⁸

Most defense counsel simply do not have the time to find or interview [the witnesses who can trace the path of defendant's life for the jury]. So unless the defense is granted funds for an investigator — and in many states it is not — gathering information for the penalty trials will be problematic. . . . The ability to put someone's life story together requires a talent that is not in the typical criminal defense lawyer's repertoire. [Most defense lawyers] would be able to present the defendant's story more effectively if they had the help of an interpretive psychologist who could assist them in collecting and organizing the material to be presented and in interpreting (or explaining) the material in a way the jury will understand. Again, however, the extent to which funds are available to supply interpretive psychologists for capital defendants varies from state to state.¹⁵⁹

156. See W. WHITE, *supra* note 148, at 56.

157. See Tabak, *supra* note 149, at 804.

158. Goodpaster, *supra* note 144, at 321.

159. W. WHITE, *supra* note 148, at 57. See also Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 65-66 (1986): "Many persons executed or now scheduled to be executed in Mississippi or Louisiana, for example, would not receive a death sentence in California. California is not a more lenient jurisdiction, but it provides considerable resources for the defense of capital cases that these other states do not provide."

I suspect that many a capital defense lawyer would chuckle at the suggestion that he had the time and the resources to uncover the mitigating circumstances *theoretically possible* to present at the penalty trial. Even one who realizes that "[t]here is simply no comparison between the public's willingness to support more spending to prosecute people and put them in jail and their willingness to spend money to see that people's constitutional rights to effective assistance of counsel are in fact protected"¹⁶⁰ may be shocked to learn how scandalously little capital defense lawyers are paid in some states.

In Louisiana, court-appointed attorneys are paid only \$1,000 in capital cases and lack the resources to hire expert witnesses or to conduct thorough investigations.¹⁶¹ How much money does it take to hire defense experts? According to a leading California death penalty commentator, it is "not unusual" for that state to provide \$30,000 or \$40,000 for defense experts.¹⁶² How much money would a wealthy person spend financing a defense in a capital case? It is hard to say, because so few capital defendants are wealthy. But recently a New Orleans business executive charged with murder spent \$250,000 mounting a successful defense.¹⁶³

160. Lerner, *Response*, 14 N.Y.U. REV. L. & SOC. CHANGE 101 (1986). According to one estimate, "it costs prosecutors between \$500,000 and \$1.8 million to win a death sentence." Kaplan, *Death in the U.S.A.*, Nat'l L.J., Feb. 15, 1988, at 33.

161. See Goodpaster, *supra* note 159, at 66 n.47.

162. *Id.*

163. Hengstler, *supra* note 141, at 58. Since delivering these remarks, I have come upon an article that illustrates the severe financial constraints under which many death penalty lawyers have to operate. Judge, *supra* note 141, at 36. When two young lawyers were appointed to represent indigent capital murder defendant Samuel Bice Johnson in Mississippi, each was paid the \$1,000 "maximum" for their work. "The case nearly pushed [the lawyers'] fledgling practices into insolvency, yet requests for additional money were routinely denied." *Id.* The state court not only refused to pay for the various experts the defense lawyers requested, but denied them the funding to bring out-of-state character witnesses to the penalty (or sentencing) hearing. *Id.* Indeed, none of the members of the defendant's immediate family were able to testify on his behalf at the sentencing hearing because they resided in upstate New York and could not afford to travel to Mississippi, where the hearing took place. One of Johnson's lawyers could only tell the jury that Johnson's family members were not present because "[t]hey couldn't make it. They didn't have the money . . . If they were nearby they would be here. They would've testified and they would have begged for his life." *Id.*

In September of 1982, after a two-day trial, Johnson was sentenced to die in the gas chamber. But while Johnson was on death row, Anthony Paduano, a young associate at Cahill, Gordon & Reindel, in New York City, agreed to represent him in postconviction

Stephen Bright of the Southern Prisoners' Defense Committee in Atlanta recently observed: "I know a Mississippi lawyer who has spent 400 hours working on [a capital case] and can only get \$1,000. I can make more money pumping gas than working a capital case."¹⁶⁴ As recently as 1985, capital defense lawyers in Virginia were only paid an average of \$687 per case — a figure that, as the president of the state bar noted, amounts to only a dollar an hour in some cases.¹⁶⁵

The same year, the Alabama Supreme Court held that the statutory limits of \$1,000 for compensation and \$500 for expenses did not deny a capital defendant his right to effective counsel because lawyers are "directed by their consciences and . . . ethical rules" to serve their capital clients "well."¹⁶⁶ I would like to put that proposition to the test by asking the

proceedings. Other Cahill lawyers soon joined Paduano in his efforts to save Johnson's life, and after protracted litigation the Cahill team persuaded the U.S. Supreme Court to overturn Johnson's death sentence. *Johnson v. Mississippi*, 108 S. Ct. 1981 (1988).

In urging the jury to sentence Johnson to death, the prosecution had repeatedly referred to his 1963 assault conviction in New York as an aggravating circumstance justifying the ultimate sanction. Johnson's trial lawyers had objected that this conviction was too remote to support the death penalty, "but they had neither time nor resources to investigate further." Judge, *supra* note 141, at 37. The Cahill team, however, did have the time and resources — and the determination. After being rebuffed in the lower New York courts, the Cahill lawyers persuaded the highest court of New York to vacate Johnson's 1963 conviction on the ground that his constitutional rights had been violated in that case. *Id.* at 37-40. Even then, the Mississippi Supreme Court denied relief and set another date for Johnson's execution. But the Cahill team persuaded the U.S. Supreme Court to overturn Johnson's death sentence. *Id.* at 40-42.

As of December 1988, "29 Cahill lawyers and 27 summer associates had logged 7,886 hours on the case. Billings and expenses, including support staff, have exceeded \$1.7 million." *Id.* at 42. As Cahill partner Floyd Abrams (who argued Johnson's cause in the U.S. Supreme Court) observed:

Think if the resources poured into this case at the end had been poured in at the beginning Suppose instead of two young lawyers having a total of two thousand dollars for everything, they'd had twenty-five thousand, fifty thousand, one hundred thousand. It might well be that instead of the more than one-and-a-half million dollars we've spent on this, none of this would have been required.

Id. at 42.

164. Hengstler, *supra* note 141, at 58.

165. See Tabak, *supra* note 149, at 801-02.

166. *Ex parte Grayson*, 479 So. 2d 76, 79-80 (Ala.), *cert. denied*, 474 U.S. 865 (1985). *But see Makemsom v. Martin County*, 491 So. 2d 1109 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987), holding the \$3500 maximum fee for capital defense lawyers, "as applied to many of today's cases, provides for only token compensation" and thus "interfere[s] with the . . . sixth amendment right to . . . counsel." 491 So. 2d at 1112.

judges of the Supreme Court of Alabama to work at the rate of \$1,000 a month for just a few months. After all, are not *the judges* of Alabama “directed by their consciences and ethical rules” to serve their state “well”? If we are supposed to assume that lawyers will perform well, even though they don’t work for money, aren’t we entitled to assume the same thing about judges?

2. *The Heavy Burden of Establishing That Defendant was Deprived of the “Effective Assistance” of Counsel*

As early as the landmark case of *Powell v. Alabama*,¹⁶⁷ the Court pointed out that when a court is required to appoint counsel, that duty “is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of *effective aid* in the preparation and trial of the case.”¹⁶⁸ *Powell* and subsequent cases “establish a right to effective assistance [of counsel] that apparently extends to all proceedings for which there would be a right to appointed counsel under either the Sixth Amendment, due process, or some other constitutional provision.”¹⁶⁹

In theory, therefore, a new lawyer on appeal or on collateral review can overturn a capital conviction or a death sentence by establishing that the defendant was the victim of “ineffective” trial counsel. But, *in actuality*, this is a herculean task.

A goodly number of the most talented and dedicated members of the private bar have collaterally attacked capital convictions or death sentences. (I am happy to see that one such lawyer, Ronald Tabak, is with us today.) But it is extremely difficult for even the very best lawyer, entering the fray after direct review is complete (the point at which private death penalty lawyers typically become involved), to “pick up the pieces.” As Justice Marshall recently observed: “In the changed legal environment death penalty lawyers now face, this assistance — laudable and valuable as it is — often comes too late to help a convicted defendant. Counsel on collateral review is boxed in by

167. 287 U.S. 45 (1932).

168. *Id.* at 71 (emphasis added). Since the trial court had failed to make an “effective appointment of counsel” in the *Powell* case, the defendants were denied due process.

169. 2 W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 11.7 (a) (1984).

any mistakes or inadequacies of trial counsel.”¹⁷⁰

When Justice Marshall spoke of “the changed legal environment death penalty lawyers now face,” he had in mind such cases as *Strickland v. Washington*,¹⁷¹ the seminal 1984 ruling on the standards to be applied (and they are very formidable ones) in determining whether a defendant did in fact receive the “effective assistance” of counsel guaranteed by the sixth amendment.

Under *Strickland*, in order to get his conviction or death sentence reversed, a defendant must show *not only* that his lawyer was deficient at the guilt trial or capital sentencing proceeding — that “identified acts or omissions of counsel were outside the wide range of professionally competent assistance”¹⁷² — but also that this deficient performance was prejudicial. Establishing that counsel’s performance was professionally unreasonable is no small feat, but this is not enough. To obtain relief, defendant must also show that there is a reasonable probability — “a probability sufficient to undermine confidence in the outcome” — that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹⁷³

This is to require a great deal. This is to require too much. This is “far less a standard for effective assistance of counsel than a standard for disposing of effective assistance of counsel claims.”¹⁷⁴

A death row inmate who claims that counsel’s assistance at the guilt trial or penalty trial was so “ineffective” as to require reversal of his capital conviction or his death sentence shouldn’t have to clear *two* formidable hurdles. It is difficult enough to overcome the first hurdle, to establish that a lawyer’s performance was deficient:

Judicial scrutiny of counsel’s performance must be highly deferential . . . [A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of professional assistance; that is, the defendant must overcome the presumption

170. Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 4 (1986).

171. 466 U.S. 668 (1984).

172. *Id.* at 690.

173. *Id.* at 694.

174. Goodpaster, *supra* note 159, at 80.

that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case.

[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.¹⁷⁵

If a death row inmate can clear this high hurdle, that ought to be enough. As dissenting Justice Marshall maintained, "[i]n view of all the impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel" — difficulties "exacerbated by the possibility that evidence of injury . . . may be missing from the record precisely because of the incompetence of defense counsel" — we should not "impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice."¹⁷⁶ If that strikes too many as too drastic, then the burden should be on the government to show that counsel's deficient performance was harmless beyond a reasonable doubt.¹⁷⁷

In establishing its two-pronged test for determining when a defendant has been denied the effective assistance of counsel, the *Strickland* Court viewed a capital sentencing proceeding as if it were an ordinary trial.¹⁷⁸ But applying a "prejudice" test to

175. *Strickland*, 466 U.S. at 690. As Professor Goodpaster observes, the *Strickland* Court "simply declares [the strong presumptions of attorney competence and of the reliability of trial results] and makes no effort to establish a factual basis for them or otherwise to justify them The presumption is merely an expression of confidence in the workings of the adversary system; belief in the system, not knowledge of its actual operations, animates it." Goodpaster, *supra* note 159, at 73. See also V. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths — A Dead End?*, 86 COLUM. L. REV. 9, 101 (1986): "The truly troubling feature of [*Strickland*] is that a majority of the justices have now placed their imprimatur on the 'comfortable fiction' that grossly defective assistance is anomalous, an exceptional 'breakdown in the adversary process' rather than a symptom of widespread collapse in the delivery of defense services." Moreover, "[w]ealth discrimination and criminal defense financing problems are endemic to the criminal justice system, and the new effective assistance rules neither lessen nor even acknowledge them." Goodpaster, *supra* note 159, at 75.

176. *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting). At this point Justice Marshall's criticism of the *Strickland* test is not limited to capital cases. See also V. Berger, *supra* note 175, at 88-96 (rejecting the concept of actual prejudice as a component of ineffective counsel claims).

177. See V. Berger, *supra* note 175, at 96.

178. *Strickland*, 466 U.S. at 687.

such a proceeding strikes me as particularly anomalous — almost bizarre.

The Court has told us that the capital sentencing jury is called upon to make “the often highly subjective, ‘unique, individualized judgment regarding the punishment that a particular person deserves,’ ”¹⁷⁹ and that a court on appellate or collateral review “would be relatively incapable of evaluating the ‘literally countless factors that [a capital sentencer] consider[s]’ in making what is largely a moral judgment of the defendant’s desert.”¹⁸⁰ How can any court go about *analyzing* whether, and to what extent, a deficient performance by defense counsel influenced a “highly subjective, individualized judgment” or “a moral judgment of the defendant’s desert”?

A lawyer trying to save the life of a capital defendant must usually do what the great defense lawyers have always done in capital cases — appeal to the emotions of the sentencer.¹⁸¹ How can any court *analyze* whether or not a deficient performance by defense counsel affected a jury’s *emotional* response?

As Professor Goodpaster has asked: “How can a reviewing court possibly determine how [a jury] would have responded *emotionally* to evidence [it] did not hear?”¹⁸² How can any court say with *any* confidence that the failure to present a history of child abuse or the failure to reveal that defendant suffered an early injury that caused brain damage, or the failure to disclose that when defendant was young his father committed suicide or his mother was murdered was *not* “prejudicial”?

No doubt there are judges who think they can make such determinations. But they “overlook the fact that many juries confronted with extremely egregious murders have nevertheless voted life sentences.”¹⁸³

179. *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) (quoting *Zant v. Stephens*, 462 U.S. 868, 900 (1983) (Rehnquist, J., concurring in judgment)).

180. *Caldwell*, 472 U.S. at 341 n.7 (quoting *Zant*, 462 U.S. at 901). See also W. WHITE, *supra* note 148 at 86;

[T]he type of issues to be determined at the guilt and penalty stage are quite different. At the penalty stage, the sentencer is less concerned with resolving discrete factual questions than with making a moral judgment on the basis of its total view of the defendant and the circumstances of the offense.

181. See W. WHITE, *supra* note 148, at 82-83.

182. Goodpaster, *supra* note 159, at 84 (emphasis added).

183. Tabak, *supra* note 149, at 807.

In the setting of the capital sentencing proceeding, I submit, the search for "prejudice" is even more speculative and even less rewarding than was the search for "prejudice" under the old rule of *Betts v. Brady*.

3. *Must (Should) Indigent Death Row Inmates Be Furnished Counsel to Pursue State Collateral Proceedings?*

The right of a prisoner seeking habeas corpus (or other postconviction relief) to legal assistance — even a prisoner on death row — has generally been viewed as quite limited. Although a majority of states provide for the appointment of counsel in postconviction proceedings at the discretion of the court and in some jurisdictions appointment appears to be mandatory once an evidentiary hearing has been granted,¹⁸⁴ "[c]ourts have generally held that there is no constitutional grounding for requiring the appointment of counsel in what is basically a civil proceeding."¹⁸⁵

Those jurisdictions which automatically appoint counsel once an evidentiary hearing is granted may seem quite generous, but they appoint counsel *only after* the petition is filed and then *only if* a nonfrivolous claim is raised. The trouble is that you usually need a lawyer to draft a petition demonstrating that you deserve an evidentiary hearing. In other words, you usually need a lawyer to show why you should be provided a lawyer.

In some respects this situation is not unlike the one at issue in *Douglas v. California*,¹⁸⁶ a case decided the same day as *Gideon*. *Douglas* struck down on equal protection grounds a practice whereby an indigent defendant, but not his more affluent counterpart, had to "run [the] gauntlet of a preliminary showing of merit" to have his appeal presented by counsel.¹⁸⁷ Thus, "the indigent, where the record [was] unclear or the errors [were] hidden, [had] only the right to a meaningless ritual, while the rich man [had] a meaningful appeal."¹⁸⁸

The *Douglas* opinion emphasized, however, that it was not

184. 1 STANDARDS FOR CRIMINAL JUSTICE § 5-4.2 (2d ed. Supp. 1986).

185. 3 W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 27.9 (a) (1984).

186. 372 U.S. 353 (1963).

187. *Id.* at 357.

188. *Id.* at 358.

requiring "absolute equality" throughout the criminal process; all that was at issue was the first level of appeal, "*the one and only appeal* an indigent has as of right"¹⁸⁹ And a decade later, in *Ross v. Moffitt*,¹⁹⁰ the Court declined to apply the "equality principle" to the later stages of the criminal appellate process.

If *Ross v. Moffitt* were the only relevant case, it would not even be arguable that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions. After all, "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review."¹⁹¹

But there is another Supreme Court case to be taken into account, one that points in a different direction — a "right of access to the courts" case called *Bounds v. Smith*.¹⁹² This case rejected the argument that a prisoner's constitutional right of access to the courts means only that the government cannot deny or obstruct a prisoner's access, or that it "merely obliges States to allow inmate 'writ writers' to function."¹⁹³ *Bounds* held, rather, that the right to access "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."¹⁹⁴

189. *Id.* at 357.

190. 417 U.S. 600 (1974).

191. *Pennsylvania v. Finley*, 481 U.S. 551, 556-67 (1987). Building on the premise that one has no underlying constitutional right to appointed counsel in state postconviction proceedings, *Finley* held that if a state does establish such a right it need not comply with federal constitutional procedures for withdrawal of appointed counsel — "procedures which were designed solely to protect [an] underlying constitutional right." *Id.* at 557.

192. 430 U.S. 817 (1977).

193. *Id.* at 823.

194. *Id.* at 828. Nor did the Court, per Justice Marshall, view collateral proceedings as simply a phase of the criminal process even further removed from the criminal trial than discretionary appellate review:

[W]e are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by . . . [a trial and an appellate court], they frequently raise heretofore unlitigated issues The need for new legal research or advice to make a meaningful initial presentation to a trial court . . . [in a collateral proceeding] is far greater than is required to file an adequate petition for discretionary review.

Id. at 827-28.

Dissenting Justice Rehnquist protested:

It would seem, *a fortiori*, to follow from . . . [*Ross v. Moffitt*] that an incarcerated prisoner who has pursued all his avenues of direct review would have no constitutional right whatever to state appointed counsel to represent him in a collateral attack on his conviction Yet this is the logical destination of the Court's reasoning today. If "meaningful access" to the courts is to include law libraries, there is no convincing reason why it should not also include lawyers appointed at the expense of the State.¹⁹⁵

I think that Justice Rehnquist was quite right about the implications of *Bounds*. Indeed, I would go further. There *is* a convincing reason why meaningful access to the courts *should* include lawyers appointed by the State — "'meaningful access' to the . . . courts can seldom be realistically advanced by the device of making law libraries available to prison inmates untutored in their use."¹⁹⁶

The promise (or fear) that the reasoning in *Bounds* would lead to a constitutional right to appointed counsel in collateral proceedings has been realized — at least in the Fourth Circuit, and at least with respect to death row inmates.

Two years ago, in the *Giarratano* case, a U.S. district court in Virginia ruled that the constitutional right of access to the courts calls for the appointment of counsel for death row inmates seeking habeas corpus relief.¹⁹⁷ Three considerations — the limited amount of time death row inmates have to prepare and present their petitions; the complexity and difficulty of death penalty jurisprudence; and the emotional instability of inmates bracing themselves for impending death — led the district court to conclude that death row prisoners "are incapable of effectively using lawbooks to raise their [postconviction] claims."¹⁹⁸

This conclusion is hardly surprising. I know some law stu-

195. *Id.* at 840-41 (Rehnquist, J., joined by Burger, C.J., dissenting).

196. *Id.* at 836 (Stewart, J., joined by Burger, C.J., dissenting).

197. *Giarratano v. Murray*, 668 F. Supp. 511 (E.D. Va. 1986), *aff'd in part and rev'd in part*, 836 F.2d 1421 (4th Cir.), *diff. results reached on reh'g*, 847 F.2d 1118 (4th Cir.), *rev'd*, 109 S. Ct. 2745 (1989). The district court found inadequate the assistance provided by seven part-time attorneys, who had to meet the needs of over 2,000 prisoners. *Id.* at 514.

198. *Giarratano*, 668 F. Supp. at 513.

dents who are incapable of using lawbooks effectively. But we are not talking about marginal law students. Many death row prisoners can neither read nor write.¹⁹⁹ The Georgia Clearinghouse on Prisons and Jails suggests that of the 1900 prisoners on death row nationwide at the time of the estimate, at least 250 may be mentally retarded.²⁰⁰ "Further, many death row inmates suffer from mental illness."²⁰¹ On top of all this, no less a veteran of capital habeas litigation than Judge John Godbold, former Chief Judge of the U.S. Court of Appeals for the Eleventh Circuit, has called such litigation "the most complex area of the law I deal with."²⁰²

This year, impressed with, and persuaded by, the district court's findings in the *Giarratano* case, a majority of the U.S. Court of Appeals for the Fourth Circuit, sitting en banc, affirmed.²⁰³ As for the Supreme Court cases that seem to stand for the proposition that there is no right to appointed counsel in state postconviction proceedings,²⁰⁴ they were not "meaningful access" cases, they did not address the rule announced in *Bounds* and, "most significantly," they did not involve the death penalty.²⁰⁵

There is much to be said for the result the Fourth Circuit reached in *Giarratano*,²⁰⁶ especially if we mean what we say

199. Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 516 (1988). In 1982, after extensive evidentiary hearings, a federal district court found that more than half of Florida's inmates were functionally illiterate. *Id.* at 549.

200. *Id.* at 550.

201. *Id.* at 551.

202. "You Don't Have To Be A Bleeding Heart," *Representing Death Row: A Dialogue between Judge Abner J. Mikva and Judge John C. Godbold*, 14 HUM. RTS. 22, 24 (Winter 1987). See also Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. A. B. A. CITY N.Y. 859 (1987); "A death penalty case will be as difficult and demanding litigation as you will ever participate in. It will require a substantial investment of time. The law is difficult. It's complex. It changes every week. Research is tough." *Id.* at 871.

203. *Murray v. Giarratano*, 847 F.2d 1118 (4th Cir.), *aff'd in part and rev'd in part*, 847 F.2d 1421 (4th Cir.), *diff. results reached on reh'g*, 847 F.2d 1118 (4th Cir.), *cert. granted*, 109 S. Ct. 303 (1988), *rev'd*, 109 S. Ct. 2765 (1989).

204. See *supra* notes 189-91 and accompanying text.

205. *Giarratano*, 847 F.2d at 1121-22 (1988).

206. For a powerful argument in support of a right to appointed counsel in capital collateral proceedings, published some time after I delivered these remarks and shortly before the U.S. Supreme Court handed down its decision in *Giarratano*, see Mello, *Is*

when we say that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."²⁰⁷ But there is also something to be said for the view of the Fourth Circuit dissenting judges that the majority's holding cannot be squared with U.S. Supreme Court precedent,²⁰⁸ that "there is no support for the view that death penalty cases are subject to a separate set of standards for postconviction review,"²⁰⁹ and that "[u]nder the guise of meaningful access, the majority has established a right to appointed counsel where none is required by the Constitution"²¹⁰ — or, at least, by U.S. Supreme Court precedent.

I have spoken to a number of law professors and death penalty lawyers who like the result a majority of the Fourth Circuit reached in *Giarratano*. None of them are eager to see the U.S. Supreme Court grant certiorari in this case. All would rather have the High Court postpone consideration of this issue for several years, hoping that in the meantime other lower courts will follow the lead of the Fourth Circuit.²¹¹

There a Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?, 79 J. CRIM. L. & CRIMINOLOGY 1065 (1989).

207. *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

208. *Giarratano*, 847 F.2d at 1123 (Wilkinson, J., concurring in part and dissenting in part).

209. *Id.* at 1124.

210. *Id.* at 1125 (Wilkins, J. concurring in part and dissenting in part).

211. A week after I delivered these remarks, however, the U.S. Supreme Court granted certiorari in *Murray v. Giarratano*, 109 S. Ct. 303 (1988). A 5-4 majority per Chief Justice Rehnquist, then reversed the Fourth Circuit, *Murray v. Giarratano*, 109 S. Ct. 2765 (1989). The majority deemed *Ross v. Moffitt* and, more specifically, *Pennsylvania v. Finley* (discussed *supra* note 191), controlling. These cases, especially *Finley*, observed the Court, mean that a state is not constitutionally required to appoint counsel for indigent prisoners seeking postconviction relief and this rule

should apply no differently in capital cases than in noncapital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.

Giarratano, 109 S. Ct. at 2770-71.

The pivotal fifth vote was cast by Justice Kennedy, who concurred "on the facts and record of this case." *Id.* at 2773 (Kennedy, J., concurring). He recognized that "collateral relief proceedings are a central part of the review process for prisoners sentenced to

D. *Some Final Remarks*

A quarter-century ago, commenting on *Gideon* and its aftermath in his celebrated book about this celebrated case, Anthony Lewis wrote: "The Supreme Court had sounded a trumpet. The response had to come from society."²¹²

I did not fully agree with Mr. Lewis at the time — not if he meant that "having sounded the trumpet, the Court may with safety and prudence lay that trumpet down"²¹³ — and I still am not in agreement with him. Others on the program may take issue with me, but I, for one, doubt that "political action" or the "response of society" (or call it what you will) can be expected to fulfill the promise of *Gideon* without further direction and encouragement (and sometimes stiff prodding) by the Court and/or the courts with a small "c".

It is interesting to note that Florida, the state in which the *Gideon* case arose, has become "a pioneer in crafting a legislative solution" to the postconviction attorney crisis on death row by creating a publicly-funded state agency that handles only habeas death cases.²¹⁴ But how did this come about?

State trial judges stayed the execution of two prisoners because they lacked postconviction counsel. The state attorney general sought to have the stays lifted in the Florida Supreme

death;" that "a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings;" and that the complexity of death penalty jurisprudence "makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Id.* at 2772. However, Justice Kennedy then observed that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing for postconviction relief." *Id.* at 2773.

I do not think the second point is worth very much. It is hard to see how Virginia's seven part-time lawyers can possibly meet the needs of over 2,000 prisoners. The first point may prove significant. Justice Kennedy may not allow the execution of a death row inmate who has *not* secured counsel for his state postconviction proceeding. On the other hand, under the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(q), 102 Stat 4181, 4393 (1988), attorneys will be appointed in *federal* habeas corpus proceedings challenging a death sentence. Justice Kennedy may consider this sufficient, depending on how the Court applies its procedural default rules in such a setting.

212. A. LEWIS, *supra* note 69 at 193 (1964).

213. Kamisar, Book Review, 78 HARV. L. REV. 478, 484 (1964).

214. Mello, *supra* note 199 at 516-17. See generally Singer, *Enemies under the Same Roof*, THE AM. LAW., Jan.-Feb. 1988, at 147.

Court, but was rebuffed. Chief Justice Joe Boyd "asked, rhetorically, whether death row inmates are not 'entitled to at least have some lawyers talk to them before they die when they haven't seen lawyers in years?'"²¹⁵ The Florida Attorney General's office got the message: the state courts would block any scheduled execution of an inmate who lacked counsel even though a volunteer attorney turned up shortly before the execution.²¹⁶

At this point, the state attorney general became "the principal proponent" of legislation establishing an office for capital collateral representation.²¹⁷ Absent such legislation, he could see "capital punishment in Florida coming to a grinding halt."²¹⁸ "If we are going to continue to have executions in Florida," he told the state legislature, "this is a step we should take."²¹⁹

This is an illustration of how state courts can inspire or induce "political action" fulfilling the promise of *Gideon*. And this, in brief, is the story of how "a state staunchly in favor of the death penalty came to create an agency to fight it."²²⁰ And fight it vigorously the agency has.²²¹

I have dwelt on the *Giarratano* case at some length. Permit me to say another word about it. *Giarratano* was a class action brought by death row inmates in the state of Virginia. But representing these inmates in the U.S. Court of Appeals for the Fourth Circuit were four lawyers from Paul, Weiss, Rifkind, Wharton & Garrison: Steven Landers, Jay Topkis, Alisa Shudofsky and Clyde Allison. And on the American Bar Association's amicus brief was a fifth lawyer from this city (and one of our panelists today): Ronald Tabak of Skadden, Arps, Slate, Mea-

215. Tabak, *supra* note 149, at 831.

216. Mello, *supra* note 199, at 600-01. When the state appealed the stays of execution a lawyer represented one of the prisoners in the Florida Supreme Court, but he had entered the case only days before. *Id.* at 600.

217. *Id.* at 600-01.

218. *Id.* at 601.

219. *Id.* at 601-02.

220. Singer, *supra* note 214, at 148. According to a 1986 Amnesty International U.S.A. survey, 84% of Florida residents favor capital punishment in murder cases. *Id.*

221. Although there is reason to believe that the attorney general thought the establishment of the state agency, the Office of the Capital Collateral Representative, would speed up executions, this is not the way it has turned out. During the two years before the agency began operations in October of 1985, there were 12 executions. In the two years since, only four executions occurred. Although 64 death warrants were signed by the governor, the agency obtained stays of execution in 60 cases. *Id.*

gher & Flom.²²²

As long as we have such people in our profession, the trumpet will sound again. For lawyers such as these will not *let* the courts lay that trumpet down.

222. A tip of the hat, too, to the many lawyers and summer associates at Cahill Gordon & Reindel who logged close to *eight thousand* hours on behalf of death row inmate Samuel Bice Johnson. *See supra* note 163.