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IX. *Gideon v. Wainwright:* A Lesson in the Obvious[314]

Hon. Judith S. Kaye

Gideon v. Wainwright[315] has always held special significance for me because it was handed down the very week of my admission to the Bar of the State of New York. At the time I considered it a particularly thoughtful gesture on the part of the nine Justices of the United States Supreme Court to extend this unanimous welcome, and to assure me that I had chosen my livelihood well. Lawyers, declared Justice Black, are "necessities, not luxuries."[316]

But the *Gideon* opinion, then as today, offered a brand new lawyer many serious lessons about the importance of the right to counsel, about the meaning of fairness and equal justice, and about the judicial process itself. It was remarkable in 1963, as it still is today, that a case that began with a habeas corpus petition written in pencil by an inmate at the Florida State Prison could end by toppling a Supreme Court precedent of two decades' standing and establishing a constitutional landmark that continues to this day to inspire the most profound dialogue about the fundamental nature of this nation's pledge of justice for all.

Gideon is a case that speaks to everyone. You don't have to be a lawyer to appreciate the plain good sense that motivated it. Professor Yale Kamisar recently referred to *Gideon v. Wainwright* as "one of the most popular decisions ever handed down by the United States Supreme Court."[317] I don't know whether that is attributable more to Hugo Black or to the great talents of Anthony Lewis. It is some mark of the enduring popularity of

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314. This section of the conference was presented by the Hon. Judith Kaye — LL.B., New York University, 1962. Upon graduating from law school, Judith Kaye was an associate in the litigation department of Sullivan & Cromwell. She was associated with the firm of Olwine, Connelly, Chase, O'Donnell & Weyher in their litigation department from 1969-83 and became a partner in 1975. During her twenty-one years in private practice, she was an active member of the New York bar. She was Director and then Vice President of the Legal Aid Society from 1975-83. In 1983 she was appointed Associate Judge of the New York Court of Appeals and currently holds this position.

315. 372 U.S. 335 (1963).

316. *Id.* at 344.

317. Kamisar, *The Gideon Case 25 Years Later*, N.Y. Times, Mar. 10, 1988 at A27, col. 1.

Gideon that only recently I was able to buy another copy of the book *Gideon's Trumpet* at the SUNY-Albany campus bookstore, where it is required reading for the introductory political science course, and a copy of the movie for ten dollars at a drug store in the Colonie Mall, just outside Albany. And I don't know whether that is attributable more to Anthony Lewis or to the great talents of Henry Fonda.

Actually, every time I read the book or see the movie, as a character I seem to favor Fred Turner even over Clarence Gideon, or Abe Fortas, or the fabulous Velva Estelle Morris, Gideon's loyal landlady (played in the movie by Fay Wray, King Kong's friend). To be sure, Gideon, already a multiple loser, had uncommon persistence and Abe Fortas, already a multiple winner, had uncommon persuasiveness (as well as a lot of very good help). But it was Fred Turner, the Panama City trial lawyer — applying all the skills developed by advocates over years in the trenches — who singlehandedly drove home the point made by the Supreme Court in the *Gideon* opinion: that it is essential to a fair trial that defendants have effective counsel.

Fred Turner actually proved in a way everyone can understand that it's not just the rules of evidence and technical points of criminal law that require the assistance of a lawyer — though they surely do. He proved that you need a lawyer as much for the obvious things about a case as the arcane points of law. When Gideon at his first trial himself examined the operator of the Bay Harbor Poolroom — doing, in Justice Black's words, "about as well as could be expected from a layman,"[318] — he elicited testimony that some money, beer and wine had been stolen, and he left it at that. But it was Fred Turner in Gideon's second trial who picked up on that point and established exactly what was missing from the Bay Harbor Poolroom — twelve bottles of Coca-Cola, twelve cans of beer, four-fifths of wine and about $65 in change. Then he examined the cab driver, Preston Bray, who had driven Gideon downtown that fateful night:

Q: Did he have any wine on him?
A: No Sir.
Q: Any Beer?

318. *Gideon*, 372 U.S. at 337.

A: No Sir.
Q: Any Coca-Cola?
A: No Sir.
Q: Did his pockets bulge?
A: No Sir.[319]

In summation Turner then asked the jury three pointed questions:

> What happened to the beer and the wine and the cokes? Mr. Gideon carried one hundred dollars' worth of change in his pocket? Do you believe that?"[320]

Well, they didn't. Why, I've often wondered, didn't that obvious point occur to anyone earlier? With Gideon having allegedly been under surveillance at all times, what had become of the proceeds of the theft? In his first trial, Gideon simply insisted that he was innocent, he didn't do any breaking and entering. That was the theme as well as the substance of his sterile examinations of witnesses and arguments to the jury, and it got him five years in state prison. He didn't know how to establish his innocence, and the state didn't lift a finger to help him. It took an experienced advocate dedicated to his client's interests to fashion Gideon's protestations of innocence into a story for the jury, a rationalization, a reasonable doubt that resulted in his acquittal. Until Gideon had a lawyer, no one else in the justice system had that function, or responsibility, or commitment.

If Fred Turner taught us the difficulty and importance of seeing the obvious, so did Hugo Black. In his *Gideon* opinion Justice Black expressed, simply and directly, the "obvious truth,"[321] the high principle that was immediately plain to everyone: "[I]n our adversary system of criminal justice," he said, "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This noble ideal [of a fair trial] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[322] Indeed, looking at the simple good sense of those words, it's hard to think that the law ever allowed

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319. A. LEWIS, *supra* note 69, at 234.
320. *Id.* at 237.
321. *Gideon*, 372 U.S. at 344.
322. *Id.*

otherwise.

But Justice Black had struck that same blow for simple decency in just about the same words twenty years earlier, when he wrote that denial of the right to counsel in serious criminal cases defeats "the promise of our democratic society to provide equal justice under the law." Those words are taken from the dissent in *Betts v. Brady*,[323] where the Supreme Court ruled six to three that the fourteenth amendment does *not* embody an inexorable command that an accused be afforded counsel. In the view of some, *Betts v. Brady* was outdated and wrong before the ink was dry on the opinion. It must have been an exquisite pleasure for Justice Black twenty years later in *Gideon* to announce for a unanimous Supreme Court: We agree.[324]

As to *that* judgment I prefer a perception made by Clarence Gideon himself, in the extraordinary twenty-two page hand printed letter he had sent to Abe Fortas at the outset of their relationship. In Gideon's words, "each era finds an improvement in law, each year brings something new for the benefit of mankind. Maybe this will be one of those small steps forward."[325] The *Gideon* case in 1963 represented exactly that sort of gradual improvement, advancement, evolution in thinking, and that's why — when the "obvious" was ultimately discovered by the Supreme Court — the decision immediately enjoyed such popularity among the legal profession, the press and the public. On the one hand it took a long time — far too long—to come to enlightenment. But on the other hand we did.

Today, twenty-six years after my own admission to the bar, I have the privilege of viewing *Gideon v. Wainwright* from a different perspective — that of a state court judge. While I would agree that there have been some deeply disturbing developments in the law in the intervening years, it is also true that there has been some improvement. Rather than focus on *Gideon* lost, or betrayed, or questioned, or unfulfilled — and it is in a sense at least all of those — I want to spend a moment on something more positive.

In the 1960s it was hardly surprising that, having been de-

323. 316 U.S. 455, 474 (1942) (Black, J., dissenting).
324. *Gideon*, 372 U.S. at 345.
325. A. LEWIS, *supra* note 69, at 78.

nied counsel by the Florida state courts, Clarence Earl Gideon should have sought and obtained justice from the United States Supreme Court. Ralph Abernathy said it in the 1950s: "God spoke from the federal court."[326] So did Monrad Paulsen when he said: "[I]f our liberties are not protected in Des Moines, the only hope is in Washington."[327] The federal courts for decades have functioned as the fount of individual rights and liberties. In our system of federalism, as Justice Harlan noted in his *Gideon* concurrence, the state courts were the ones "charged with the front-line responsibility for the enforcement of constitutional rights."[328] But it had become painfully apparent by the 1950s that many state courts were failing in that front-line responsibility. By the time *Gideon's* decade ended, the Supreme Court had incorporated large portions of the Bill of Rights into the fourteenth amendment and applied them to the states. The Supreme Court in those years busily raised, widened and remade the federal constitutional floor, which then was accepted by states as their state constitutional ceiling. The Supreme Court had become the touchstone for all constitutional decision-making concerning individual rights. For those of us educated and trained as lawyers in these years, resort to the federal courts grew to be instinctive in matters of constitutional right, as it remains for many today.

Of course the state courts have long contributed to shaping national constitutional law. In *Betts*, for example, when the Supreme Court asked itself whether the furnishing of counsel in all cases was dictated by fundamental principles of fairness, it looked to state practice for that answer.[329] The Supreme Court undertook a thorough review of common law and constitutional law within each of the states, and based upon its perceptions of state law, held that "the considered judgment of the people, their representatives and their courts [was] that appointment of

326. A. LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES 22 (Vintage ed. 1986) (quoting Abernathy).

327. Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1084 (1985) (quoting Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 640 (1951).

328. *Gideon*, 372 U.S. at 351 (Harlan, J., concurring) (footnote omitted).

329. *See* Betts v. Brady, 316 U.S. 455 (1942).

counsel is not a fundamental right, essential to a fair trial."[330] Twenty years later the Court in *Gideon* said that conclusion was dead wrong. In the *Gideon* opinion Justice Black noted as well that "twenty-two states, as amici curiae, "or friends of the court," had agreed that *Betts* was an "anachronism" even when the Supreme Court handed it down."[331] Some friends.

We have so many more recent examples of the influence of state courts on the development of national law — like *Mapp v. Ohio*,[332] where the Supreme Court changed direction and applied the exclusionary rule nationally, noting that since its own prior decision declining to do so, two-thirds of the states had themselves adopted it. And in *Batson v. Kentucky*[333] the Supreme Court reversed its earlier ruling on the discriminatory use of peremptory challenges, basically adopting procedures in use in several states. A similar process is under way right now, as *Gates*,[334] *Leon*,[335] *Strickland*[336] and other recent decisions of the Supreme Court are tested in the state court laboratories.

State courts throughout the country recently have also become more aggressive participants in the process of defining and protecting individual rights. It's a fine thing for state courts to serve as laboratories and reference points for the United States Supreme Court in fashioning national constitutional rights. But they also can independently write their own material under state constitutions. Every state has one, and every judge and lawyer takes an oath to uphold it. As my friend Judge Marie Garibaldi recently wrote for the New Jersey Supreme Court: "That the United States Supreme Court has overruled *Swain* in *Batson* does not mean that the laboratories operated by leading state courts should close up shop. . . . *Batson* is not the final word in this area."[337] In New Jersey and in many other states, now the state supreme courts have asserted themselves as the final word in the area under their own state constitutions. All sorts of

330. *Id.* at 471.
331. *Gideon*, 372 U.S. at 345.
332. 367 U.S. 643 (1961).
333. 476 U.S. 79 (1986).
334. Illinois v. Gates, 462 U.S. 213 (1983).
335. United States v. Leon, 468 U.S. 897 (1984).
336. Strickland v. Washington, 466 U.S. 668 (1984).
337. State v. Gilmore, 103 N.J. 508, 522, 511 A.2d 1150, 1157 (1986).

grounds have been advanced in support of state law decisions affording greater individual rights under state constitutions than Supreme Court holdings under the federal charter.

Whatever the precise catalyst — whether the Supreme Court's retreat from earlier decisions, or the explicit green light it gave to the states for development of state jurisprudence, or the infectious activity of sister states, or the writings and expectations of litigants and commentators, or all of these and more — in matters of individual rights state courts seem increasingly to be turning to their own state constitutions as the dispositive ground for their decisions, which may then be immune from further review. We now see not only decisions, but also symposiums, textbooks, law school courses devoted to the subject of state constitutional law. These days when a state court considers whether to follow or reject a Supreme Court precedent, or when it reconsiders a case on remand from the United States Supreme Court, it's a real event with by no means a foreordained result.

So I think we rightly mark as one recent advance in the law the more visible assertion of state courts throughout the nation as front-line enforcers of state constitutional rights.

A quarter of a century after *Gideon*, another truth has emerged as obvious. What was in 1963 such an expression of common sense decency that the public could immediately recognize and applaud it, has with time become clouded. We may still refer to the noble ideal that every defendant stands equal before the law, but in fact we have reconciled ourselves to standing short of achieving it. Ironically, with society and the law moving briskly toward a new century, there may well even be greater imbalances and distances between individuals like Clarence Gideon and acquittals after trial with effective counsel at defendants' side. The law grows increasingly sophisticated as public dedication to the principle of equal justice seems to dwindle.

So what's to celebrate, you ask. We can celebrate the fact that the spark of *Gideon* is still alive and undoubtedly will be kept alive by marking each anniversary, by collective and individual efforts to give meaning to its message, by courses that teach the "obvious truth" of *Gideon*. If the battle seems disheartening today, think what the odds must have looked like to Clarence Earl Gideon. Yet as *Gideon's Trumpet* describes, even

as a five-time loser facing five years in the penitentiary a flame still burned in him. "He had not given up caring about life or freedom; he had not lost his sense of injustice."[338]

After the Supreme Court decision, a newspaper reporter asked Gideon, "Do you feel like you accomplished something?" He responded, "Well, I did."[339]

Of course he did. He did and we will.

338. A. LEWIS, *supra* note 69, at 6.
339. *Id.* at 238.