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Gideon v. Wainwright A Half Century Later

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Gideon v. Wainwright a Half Century Later

CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE.

By Karen Houppert. New York, New York: The New Press, 2013.
288 pages. \$26.95.

Reviewed by Yale Kamisar^{*}

On May 23, 2013, the Florida Supreme Court ruled that the public defender's office serving the state's largest judicial district (the Miami-Dade County public defender's office, sometimes called PD-11) could withdraw from assigned cases or decline to take new ones.¹ The reason was that a crushing caseload prevented the defender's office from adequately representing indigent criminal defendants.²

As a result, observed the Florida Supreme Court, public defenders routinely "juggle" cases in a crude "triage," focusing on the most serious cases to the detriment of other clients.³ Various witnesses also testified that typically

[t]he assistant public defender meets the defendant for the first time at arraignment during a few minutes in the courtroom or hallway and knows nothing about the case except for the arrest form provided by the state attorney, yet is expected to counsel the defendant about the State's plea offer. In this regard, the public defenders serve "as mere conduits for plea offers." . . . The witnesses also testified that the attorneys almost never visited the crime scenes, were unable to properly investigate or interview witnesses themselves, often had other attorneys conduct their depositions, and were often unprepared to proceed to trial when the case was called. Thus, the circumstances presented here involve some measure of nonrepresentation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment.⁴

More than a few people are likely to be surprised, even shocked, by the sorry condition of Florida's public defender's office. But not anyone who

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1. Pub. Defender, Eleventh Judicial Circuit v. State, 115 So. 3d 261, 282–83 (Fla. 2013). The state supreme court held that the public defender's office could do so if circumstances, since the case was originally brought, "still warrant[ed] granting the Public Defender's motion to decline appointments in future third-degree felony cases under the standards approved in this decision." *Id.* at 264–65.

2. *Id.* at 273–74.

3. *Id.* at 274.

4. *Id.* at 278.

has read Karen Houppert's new book: *Chasing Gideon: The Elusive Quest for Poor People's Justice*.⁵

As Ms. Houppert observes:

Ironically, one of the areas hardest hit by . . . [the] failure of the indigent defense system to keep pace with the demand for representation . . . is in Gideon's home state of Florida. There, the crisis in the overburdened courts reached epic proportions in the last decade. The chief public defender in Miami, struggling with massive caseloads, fell on his sword a few years back, sacrificing his job and reputation by refusing to accept more cases.

. . . .

. . . Starting with Bennett Brummer, [Miami-Dade County's] chief public defender for thirty-two years until 2009, and now continuing with Carlos Martinez, chief public defender since then, PD-11 has fought to reduce its excessive caseloads, which since 2004 began steadily climbing and by 2008 crept as high as seven-hundred-plus [felony] cases a year for some assistant public defenders.

. . . .

. . . [Various] organizations advise a maximum of 150 noncapital felony cases per public defender, per year. Meanwhile, a Florida governor's commission on public defense set a maximum standard of 100 felony cases per lawyer per year while the Florida Public Defenders' Association recommends 200 cases.

No one says seven hundred cases per attorney is okay. And that, Brummer says, is the insane level at which public defenders in his office were expected to work.⁶

When he was nearing the end of his distinguished career, one of my former law professors observed that a dramatic story of a specific case "has the same advantages that a play or a novel has over a general discussion of ethics or political theory."⁷ Ms. Houppert illustrates this point in her very first chapter.⁸

5. KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE (2013). The book was published shortly *before* the Florida Supreme Court ruling, discussed *supra* notes 1–4 and accompanying text.

6. HOUPPERT, *supra* note 5, at 91–94.

7. ELLIOT EVANS CHEATHAM, A LAWYER WHEN NEEDED 22 (1963).

8. The primary heading of the chapter, "Due Process Theater," is based on comments made by public defender Carol Dee Huneke. HOUPPERT, *supra* note 5, at 3, 25. After highlighting the fact that she and other public defenders are under enormous pressure to persuade clients to plead guilty, and noting that "a lot of ills are hidden by bad plea bargains," Huneke adds: "It's like due process theater People are dressed up like lawyers and they're standing next to a client, but they are not really zealously advocating" because they have too many cases to handle, and they simply do not have the time. *Id.*

Houppert is a good storyteller. And she writes with power and style. In the first chapter she tells a story about two Washington state public defenders: Douglas Anderson, who represented a twelve-year-old boy charged with the sexual molestation of a neighboring five-year-old; and Carol Dee Huneke, who represented an eighteen-year-old charged with vehicular homicide.⁹

Anderson was an overworked, indeed, overwhelmed public defender, who just seemed to be going through the motions. Huneke was also overworked, but she was highly motivated and quite effective.

When A.N.J., as he is called in the book, was charged with sexually molesting a much younger boy, his public defender, Anderson (who had over 200 other child criminal cases that year, plus another 200 abuse or neglect cases) urged the boy and his parents to plead guilty, thereby getting a reduction to a lesser felony. When asked by the boy's parents whether their son would always be labeled a "sex offender," Anderson assured them that the label would, or could, be removed at some point, but he admitted that he did not really know when. He promised to get back to the parents on this matter—but never did. The boy pled guilty. The boy and his parents soon learned, however, that once there was a guilty plea the child molestation conviction would *never* come off the records.¹⁰

Anderson made no motions. He filed no pleadings. He interviewed no witnesses. He hired no investigators—perhaps because money to pay for one would come from the flat fee he was paid by the county for representing indigent clients. Even Anderson admitted that the arrangement he had with the county "creates a disincentive" for him to hire investigators. This may explain why, although he had more than 200 juvenile offense cases the year he represented A.N.J., Anderson did not hire an investigator for any of them.¹¹

It was only after A.N.J. pled guilty that his parents learned, to their dismay, that their son's record as a sex offender would *never* be expunged. Moreover, a monitor was likely to put the boy under daily surveillance for many years.¹²

9. *Id.* at 5–6, 16.

10. *Id.* at 16–19.

11. *Id.* at 18–19. When it comes to legal aid for indigent defendants, there are some hard questions that cannot be avoided. But the flat-fee arrangement, which may have led Anderson not to hire a single investigator for the entire year, is not one of them. It should be prohibited.

Moreover, Anderson did not consult a single expert or hire a single one to testify that year. Once again, the reason may have been that the money would have come from the public defender's "own pocket." *Id.* at 19.

Still another arrangement should be noted and prohibited. As Houppert observes, "[b]ecause many flat-fee attorneys also continue in private practice, where they charge paying clients hourly fees, flat-fee defenders are also incentivized to serve their paying clients at the expense of the indigent clients." *Id.* at 32.

12. *Id.* at 19–20.

A.N.J.'s parents turned to two local attorneys in an attempt to overturn their son's guilty plea.¹³ They finally succeeded—six years later! At that time, the state's highest court ruled that the performance of A.N.J.'s court-appointed counsel had been so pitiful that his client would be allowed to withdraw his guilty plea.¹⁴

The other Washington state case Houppert discusses in the first chapter involves eighteen-year-old Sean Replogle, who was involved in a car accident. When the elderly driver of the other car (Lowell Stack) died in the hospital some days later, the state raised the charge against Replogle to vehicular homicide.¹⁵

Because of her excessive caseload, Replogle's public defender, Carol Dee Huneke, asked for a continuance. At first, the trial judge denied it. But Huneke battled on.¹⁶

She got co-workers to submit signed affidavits to the effect that she had been working in the office nearby every Saturday, Sunday, and holiday. She also pointed out that the public defenders were "extremely outnumbered" by prosecutors. As a result, the prosecutors had little incentive to plea bargain. On further reflection, the trial judge decided to grant Huneke a three-week extension.¹⁷

The extension gave Huneke time to hire an expert to investigate the accident in order to recreate it for the jury. Her investigator soon discovered that the state's expert "had doubled the length of the skid marks to do his speed-distance calculations."¹⁸

Once Huneke took the time and trouble to find out more about how the driver of the other car had died, the so-called homicide turned out to be nothing of the sort. The driver of the other car had not died from injuries suffered in the accident but from an infection that had occurred after surgery had been performed to fix a hernia. As the victim's family physician told Huneke when she interviewed him (and as he subsequently told the jury), the emergency room doctors had never notified him that they were planning to perform surgery on the driver of the other car. If they had done so, the family physician would have strongly objected.¹⁹

After all, the hernia had not been bothering the patient for a long time. Moreover, considering the patient's advanced age and fragile condition, a

13. *Id.* at 39.

14. *Id.* at 47.

15. *Id.* at 9.

16. *Id.* at 29.

17. *Id.* at 29–30, 36.

18. *Id.* at 38.

19. *Id.*

hernia operation was a poor option because it might kill the patient.²⁰ Of course, as it turned out, it did.

When Ms. Huneke put Lowell Stack's family doctor on the witness stand, the homicide case against Replogle "fell to pieces."²¹

Chapter Two has a good deal to say about *Gideon v. Wainwright*²² the case and Gideon the person. But there are some problems.²³

Houppert does note that although he wrote the majority opinion in *Gideon* overruling *Betts v. Brady*,²⁴ Justice Black "made no attempt to suggest that the overruling was necessary due to legal and social shifts in the two decades since *Betts*."²⁵ But she does not explain *why*.

It so happens that there is a well-known article, written by Professor Jerold Israel only a few months after *Gideon* was decided, that spells out at considerable length why Black wrote the *Gideon* opinion the way he did.²⁶ (Although Ms. Houppert quotes from a number of other law review articles throughout her book, she never refers to Professor Israel's article.)

Justice Black had written a strong dissent in *Betts*.²⁷ He believed *Betts* was wrongly decided *from the start*.²⁸ Therefore, when he wrote the opinion overruling *Betts*, Black insisted that "the Court in *Betts v. Brady* [had] made an abrupt break with its own well-considered precedents."²⁹ As Professor Israel observes, this is a way of "depreciating the original

20. *Id.*

21. *Id.*

22. 372 U.S. 335 (1963).

23. A minor one, but one that should be noted, is that Ms. Houppert says twice that Justice Black dissented in *Powell v. Alabama*, 287 U.S. 45 (1932). HOUPPERT, *supra* note 5, at 72. Black did not become a Supreme Court Justice until five years after the famous case was decided. See ROGER K. NEWMAN, HUGO BLACK 267 (1994) (noting that Black's first day at the Supreme Court was October 4, 1937). However, he did dissent in *Betts v. Brady*, 316 U.S. 455, 474 (1942), the decision that *Gideon* overruled. *Gideon*, 372 U.S. at 339.

24. 316 U.S. 455 (1942); *see also Gideon*, 372 U.S. at 336 (Black, J., majority opinion).

25. HOUPPERT, *supra* note 5, at 86.

26. Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211. Israel's article has deservedly been called "a classic article on the art of overruling." Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH L. REV. 113, 115 (2012). As Professor Israel points out, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court noted the change in the state of public schools since the ruling in the overruled case of *Plessy v. Ferguson*, 163 U.S. 537 (1896). Israel, *supra*, at 220; *see also Brown*, 347 U.S. at 492-95. As Israel also notes, in *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court made it clear that it considered alternatives to the exclusionary rule, such as tort actions against the offending police officer, inadequate. *See Israel, supra*, at 222; *see also Mapp*, 367 U.S. at 679.

27. *See Betts*, 316 U.S. at 474 (Black, J., dissenting).

28. ANTHONY LEWIS, GIDEON'S TRUMPET 188 (1964).

29. *Gideon*, 372 U.S. at 344.

significance of the rejected case. . . . The Court is placed in a position to reject a precedent and at the same time claim adherence to *stare decisis*.”³⁰

Ms. Houppert maintains that Bruce Jacob’s³¹ chances of prevailing in the Supreme Court were significantly reduced when, only a few months before *Gideon* was to be decided, Justice Frankfurter retired from the Court.³² Houppert calls Frankfurter “a proponent of *Betts*” as well as a “huge proponent of judicial restraint and the importance of precedent.”³³

Justice Frankfurter did join the majority in the 1942 *Betts* case and Justice Black did write a strong dissent in that case. But Anthony Lewis suggests that the difference between the two Justices may have “come down to a question of timing.”³⁴ Frankfurter might have believed, for example, that in the early 1940s the legal profession was unprepared for the burden of providing counsel for indigents or that in those days some states would have strongly resisted a *Gideon*-like decision.³⁵

By the 1960s, according to Lewis, Justice Frankfurter might very well have changed his mind.³⁶ Indeed, Justice Black thought so. Lewis tells us that Justice Black assured his fellow Justices that if Frankfurter had still been on the Court in 1963 he would have voted to reverse *Gideon*’s conviction and overrule *Betts*.³⁷ Moreover, according to Lewis, when Frankfurter learned that Black had told the other Justices that he would have voted with them if he had still been on the Court, Frankfurter responded: “Of course I would.”³⁸

Although Ms. Houppert quotes from Lewis’s book on many other occasions, she never mentions Lewis’s views on how (or why) Frankfurter would have voted if he had still been on the Court when *Gideon* was decided.

30. Israel, *supra* note 26, at 235. However, Israel makes it clear that he does not share Justice Black’s view. He believes, rather, that a “close reading” of *Powell v. Alabama* is that it restricted the duty to provide counsel for indigent defendants to special circumstances, such as illiterate defendants. *Id.* at 236–37. In short, “*Powell v. Alabama* provided a steppingstone to either a *Betts* or a *Gideon*, depending upon how far and fast the Court utilized the opinion’s potential for expansion.” *Id.* at 238. I share Israel’s view.

31. Bruce Jacob represented the State of Florida when the *Gideon* case was argued in the U.S. Supreme Court. LEWIS, *supra* note 28, at 139–40.

32. HOUPPERT, *supra* note 5, at 76.

33. *Id.*

34. LEWIS, *supra* note 28, at 221.

35. *Id.*

36. *Id.* at 221–22.

37. *Id.*

38. *Id.* (internal quotation marks omitted). My understanding is that Frankfurter and Lewis were fairly close. I assume that at some point Lewis heard what Justice Black had said about how Justice Frankfurter would have voted in *Gideon* if he had still been on the Court and Lewis then asked Frankfurter whether Black had been correct.

A big chunk of Houppert's second chapter consists of extracts from the oral arguments in the *Gideon* case.³⁹ It is not clear why. After all, in his 1964 book, Lewis sets forth virtually all of the same extracts from the oral arguments that Houppert does.⁴⁰ If anything, Lewis's coverage is more extensive than Houppert's.

For example, Lewis makes it clearer than Houppert does how Alabama Assistant Attorney General George Mentz irritated the Justices. (Mentz, who had written an amicus brief on behalf of Alabama and North Carolina, the only two states siding with Florida, had also been given some time to argue the case.⁴¹) Consider the following exchanges (both omitted from Houppert's book):

Mentz: "... [P]rosecutors are more lenient with unrepresented defendants"

Justice Stewart: "Isn't that a matter of trial strategy? It might backfire if the prosecutor were tough and the jury saw the defendant there helpless. . . . All you're saying is that the absence of counsel impedes the adversary system of justice."

Mentz: "I didn't mean to go that far."

Justice Stewart: "I'm sure you didn't."

...

Mentz: "In actuality, indigents without lawyers probably get off easier. The average Alabama lawyer is not equipped to deal with the career prosecutor. . . ."

...

Justice Douglas: "Maybe if laymen are as effective as you say, we should get the Sixth Amendment repealed."

Mentz: "Mr. Justice, I didn't mean to go that far."⁴²

Those people who remember the Henry Fonda movie, *Gideon's Trumpet* (based on Anthony Lewis's book of the same name), will be surprised to learn that, according to Ms. Houppert, Mr. Gideon did not write his petition for certiorari all by himself. Instead, Houppert tells us, Gideon needed and obtained the services of a former lawyer and municipal judge, Joseph A. Peel, Jr. After being convicted of murder, Peel was sentenced to life imprisonment, winding up in the same prison where Gideon resided.⁴³

Bruce Jacob represented the State of Florida when the *Gideon* case was argued in the U.S. Supreme Court.⁴⁴ Fred Turner represented

39. See HOUPPERT, *supra* note 5, at 77–86.

40. See LEWIS, *supra* note 28, at 169–81.

41. *Id.* at 152–53, 178.

42. *Id.* at 179–80.

43. HOUPPERT, *supra* note 5, at 99–101.

44. See *supra* note 31 and accompanying text.

Mr. Gideon after his burglary conviction was reversed by the Supreme Court, and he was tried for burglary a second time.⁴⁵ According to Houppert, Jacob and Turner became good friends.⁴⁶ At this point, let Houppert speak for herself:

[Jacob] says he and Turner had many conversations about [Mr.] Gideon. “Fred Turner told me that Gideon told him [that a former lawyer and municipal judge, Joseph Peel, who wound up in the same prison as Gideon,] helped [Mr. Gideon] out,” Jacob recalls. . . . Jacob went on to suggest that Peel not only helped prepare Gideon’s writ, but masterminded the idea of not including any “special circumstances” in it, so that the Supreme Court would be more inclined to use the case as an excuse to reexamine *Betts*. [Jacob] also cynically suggests that Peel may have retained Gideon’s misspellings and grammatical errors to impress the [C]ourt with this determined but unlettered man. In any case, there is little doubt that the colorful Joseph Peel was an unrecognized character in the drama of *Gideon*—in a way that both challenges and affirms the reasoning behind the Supreme Court’s decision.⁴⁷

I have no doubt that Bruce Jacob did accurately report what Mr. Turner told him about Peel’s involvement in the *Gideon* case. I can’t help wondering, however, whether Mr. Gideon did something that irritated Mr. Turner and led Turner to exaggerate Peel’s role in *Gideon*.

Evidently, Mr. Gideon was a difficult person. For example, immediately after a long meeting with Mr. Gideon, shortly before the latter was retried for burglary, a civil liberties lawyer names Tobias Simon said of Mr. Gideon that his “maniacal distrust and suspicion lead him to the very borders of insanity.”⁴⁸ Houppert herself tells us that, shortly after Turner agreed to represent Gideon on his retrial for burglary, Turner “sharply reprimanded Gideon for meddling in the case, telling him, ‘I’ll only represent you if you will stop trying to be the lawyer.’”⁴⁹

From what we know about the former lawyer and judge who is said to have helped out Mr. Gideon in his legal work, Joseph Peel did very few good things in his colorful life. After being convicted of murder, Peel spent more than twenty years in prison.⁵⁰ Then he was paroled because he was dying of cancer.⁵¹ (He died a few days after his release.⁵²)

45. HOUPPERT, *supra* note 5, at 102.

46. *Id.*

47. *Id.*

48. LEWIS, *supra* note 28, at 224, 227–28.

49. HOUPPERT, *supra* note 5, at 89 (quoting Bruce R. Jacob, *Memories of and Reflections about Gideon v. Wainwright*, 33 STETSON L. REV. 181, 259 (2003)).

50. *Joseph A. Peel Jr.; Had Murder Role*, N.Y. TIMES, July 5, 1982, at 17, available at <http://www.nytimes.com/1982/07/05/obituaries/joseph-a-peel-jr-had-murder-role.html>.

51. *Id.*

When he was released, Peel agreed to be interviewed by a Florida reporter and more or less admitted his involvement in the murder which led to his life imprisonment.⁵³ Peel knew he was dying. He knew, too, that this was the reason he had been released from prison. It strikes me that this would have been a propitious time for Peel to note that he had done *a few good things* in his life, too—such as help the famous Mr. Gideon write his petition for certiorari. But Peel never did say anything about that.

We are told very little about Joseph Peel. We know that he was a divorce lawyer.⁵⁴ We don't even know whether he ever practiced criminal law before he became a municipal judge. Nor do we know whether he ever presided over criminal cases when he did become a municipal judge. Nor do we have any idea whether Peel had any interest in constitutional law, generally, or the right to counsel in particular.

Houppert points out that after *Gideon* was decided, thousands of Florida prisoners sought new trials, and that Mr. Peel became so busy assisting his fellow prisoners that “he was called the ‘jailhouse attorney.’”⁵⁵

Arguably, therefore, even though he had not been a criminal lawyer earlier in his career, one might say that Mr. Peel became a proficient lawyer while he was in prison. (At least he did before he wound up in a maximum security cell for practicing law in violation of prison rules.⁵⁶)

However, what Mr. Peel did after *Gideon* was handed down in March of 1963 has little or no bearing on whether he helped Mr. Gideon draft the writ that arrived at the U.S. Supreme Court some fourteen months *before* the *Gideon* case was decided.

According to Houppert, Mr. Peel wanted to impress the Supreme Court with how “unlettered” Gideon was.⁵⁷ If so, why did Peel write Gideon’s petition in such a way (or allow Mr. Gideon to write it in such a way) as to lead an assistant clerk of the Supreme Court, one of the first to read the petition, to conclude that the person who wrote it “seemed likely” to have worked from a copy of the Supreme Court rules?⁵⁸ Was this the best way to let Gideon show the Court how “unlettered” he was?

I submit that there *is* an astonishing story to tell about the *Gideon* case, but one that does not involve Mr. Peel. It is a story first told by Lucas Powe, Jr.,⁵⁹ but one still not generally known.⁶⁰ Because Powe is a

52. *Id.*

53. See Tim Pallesen, *Peel Dies of Cancer Nine Days After Parole*, MIAMI HERALD, at 1, July 4, 1982.

54. HOUPPERT, *supra* note 5, at 100.

55. *Id.* at 101.

56. *Id.* at 101.

57. *Id.* at 102.

58. See LEWIS, *supra* note 28, at 5.

59. According to journalist Jim Newton, “Powe was the first to discover the intertwined history” of *Douglas v. California*, 372 U.S. 353 (1963), and *Gideon v. Wainwright*. JIM NEWTON,

professor of government at the University of Texas, it seems fitting and proper that I tell the story in the pages of the *Texas Law Review*.

There was *another* right-to-counsel case in the U.S. Supreme Court at the time, one that the Court had focused on before it turned its attention to *Gideon*. That other case, *Douglas v. California*,⁶¹ was eventually reargued and decided on the same day as *Gideon*. The *Douglas* case raised the question of whether an indigent person had the right to counsel on appeal, the first appeal as of right.⁶²

To understand *Douglas*, it is helpful to start with the 1956 case of *Griffin v. Illinois*.⁶³ In this case, the Court held that under certain circumstances indigent appellants, those who could not afford to pay for a trial transcript on their first appeal as of right, had to be provided one at state expense.⁶⁴ There was no opinion of the Court. Speaking for four members of the Court, Black wrote a stirring opinion, observing: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."⁶⁵

Not surprisingly, the lawyers for Mr. Douglas relied heavily on Black's language in *Griffin*.⁶⁶ But these lawyers probably had no idea that they had prevailed before their case was ever reargued. As Professor Powe has revealed,⁶⁷ and as the personal papers of Justices Clark and Douglas disclose,⁶⁸ at a 1962 conference, a majority of the Justices agreed that an indigent defendant did indeed have a right to counsel on the first appeal.

That a majority of the Court reached agreement in 1962 about how *Douglas* should be decided affected *Gideon* as well. By deciding *Douglas*, the Court, in effect, also decided *Gideon*.⁶⁹ As Chief Justice Warren

JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 568 n.73 (2006); *see also* LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 379–86 (2000).

60. For example, there is no mention of this story in the leading treatise on criminal procedure, the seven-volume work coauthored by Professor Wayne R. LaFare and several others.

61. 372 U.S. 353 (1963).

62. *Id.* at 355.

63. 351 U.S. 12 (1956).

64. *Id.* at 19–20.

65. *Id.* at 19. Black's opinion was joined by Chief Justice Warren and Justices Douglas and Clark. *Id.* at 13.

66. *See* Brief for Petitioners at 13–21, *Douglas v. California*, 372 U.S. 353 (1963) (No. 34).

67. POWE, *supra* note 59, at 384.

68. *See id.* at 383 & 527 n.7, 384 & 528 nn.7–8 (indicating that Professor Powe cited and drew from the personal papers of Justices Clark and Douglas in presenting the revelation that *Douglas* was essentially decided before the case was reargued).

69. *Id.* at 384.

observed at the 1962 meeting: “[W]e can’t say [an indigent person] must have a lawyer on appeal and [yet] be denied one at trial.”⁷⁰

As surprising as it may seem, when the Court met in conference for the last time in late June, a majority of the Justices (perhaps all of them) agreed that “Fortas [who had just been appointed to represent Mr. Gideon] should have the privilege of arguing the case that interred *Betts* rather than arguing a pro forma case after *Douglas*.”⁷¹

Chapter 3 (called “A Perfect Storm: Looking for Justice in New Orleans”) deals largely with the killing of fifteen-year-old Elliot Porter⁷² and the wrongful conviction of two young men for this crime.⁷³ One witness insisted that she saw the two defendants walking with the deceased on the night of the shooting and then chasing him.⁷⁴ She also claimed she heard shots shortly thereafter.⁷⁵ The witness was Sheila Robertson.⁷⁶ The two young men prosecuted for, and convicted of, the murder were Gregory Bright and Earl Truvia.⁷⁷

Thanks to the excellent work of a new lawyer on the case, Emily Bolton (the director of the newly established Innocence Project New Orleans), the case for the prosecution was eventually demolished and the two convicted men were finally released from prison. Unfortunately, it took a staggering twenty-seven years to bring this about.⁷⁸

The key witness for the prosecution—indeed, the only witness—was Ms. Robertson. She claimed that at about 1 a.m. on the night of the shooting she was sitting at her window, waiting for her boyfriend, when she saw Elliot Porter break away from the two men accompanying him and crawl through a nearby fence. Then she heard shots. Ms. Robertson subsequently identified the two defendants as the two men she saw that night.⁷⁹

Ms. Robertson told the police what she saw. Then she told the grand jury. Finally, she testified at the trial. But major aspects of her version of the events kept changing.

First, she claimed that on the night of the shooting the two defendants warned her not to tell the police what she had seen. Then she told the grand

70. *Id.* at 383.

71. *Id.* at 384; *see also* NEWTON, *supra* note 59 (maintaining that having “secured Fortas to argue *Gideon* as the landmark case,” the Justices “did not then want to steal his thunder by announcing *Douglas* first”).

72. HOUPPERT, *supra* note 5, at 105.

73. *Id.* at 109–10.

74. *Id.* at 108.

75. *Id.*

76. *Id.* at 108–09.

77. *Id.* at 109.

78. *Id.* at 160–61, 174–75.

79. *Id.* at 108–09, 116–19.

jury that *a couple of nights after the shooting* the defendants warned her not to tell the police. At the trial, Ms. Robertson testified—and this was the first time a gun was ever mentioned—that one of the defendants held a pistol to her young child’s head when he “reminded” Ms. Robertson not to contact the police.⁸⁰

Unfortunately, the defense had no idea that this was the first time Ms. Robertson had ever mentioned a gun because the defense had never seen any previous statements by the witness.⁸¹

Public defender Robert Zibilich had been appointed to represent Gregory Bright. (Zibilich was a private attorney who represented his indigent clients as a public defender “while juggling his paying clients.”⁸² All the public defenders in New Orleans operated this way.⁸³)

Without calling a single witness, Zibilich concluded the murder trial in less than two hours. None of defendant Bright’s eight subpoenaed witnesses, several of them alibi witnesses, were ever called to testify. According to Mr. Bright, his attorney told him he was not going to call any witnesses because he thought doing so would “aggravate the jury,” who were already tired and upset that the trial was taking so long.⁸⁴ (Taking so long? The trial took less than two hours.)

Gregory Bright’s first lawyer had never looked at the crime scene (which was only a quarter of a mile down the road from the courthouse). But that was the first thing Mr. Bright’s new lawyer, Emily Bolton, did.⁸⁵ She soon realized that

there was no way the state’s primary witness could have seen what she described taking place on the sidewalk, no way she could have seen the hole in the fence, no way she could have seen [the victim of the shooting] where she said she did. Beneath Sheila Robertson’s third-story bedroom window was a porch roof that completely obstructed her view of the sidewalk.⁸⁶

And that is not all. Ms. Robertson had testified that she could see “pretty good” the night of the shooting because she had “the bathroom, kitchen, and hall lights on.”⁸⁷ However, the kitchen and the bathroom were on the floor *below* the bedroom.⁸⁸

80. *Id.* at 117, 137.

81. *Id.* at 137.

82. *Id.* at 120.

83. *Id.*

84. *Id.* at 139.

85. *Id.* at 163.

86. *Id.*

87. *Id.*

88. *Id.*

Why would Sheila Robertson lie? Ms. Bolton discovered that the state witness's name was not Sheila Robertson, but Sheila Caston—and that Sheila Caston had been arrested for, *inter alia*, forgery, prostitution, drug possession, and distribution. After getting a court order for Caston's hospital records (and those under her alias, Robertson), Bolton learned that the only witness for the prosecution was a “paranoid schizophrenic” who had been “experiencing hallucinations at the time of the [Elliot Porter] murder.”⁸⁹

I have pointed to so many weaknesses in the prosecution's case against Gregory Bright and Earl Truvia that it is hard to believe there are any more. But there are. When Ms. Bolton spoke with the original forensic pathologist about the time of death, he insisted it had to be between 5 a.m. and 8 a.m. According to the pathologist, there was “no way [Elliot Porter] could have been killed at 1:30 a.m. as Sheila had testified.”⁹⁰

Once again, as we saw in the first chapter of Ms. Houppert's book, the third chapter illustrates the great distance between a first-class lawyer and an inadequate one. But is the enormous caseload public defenders must work with making it increasingly difficult for even first-class lawyers to make a difference? On this point, Ms. Houppert is understandably quite pessimistic:

Greg Bright was finally released from prison on June 23, 2003, thanks to the herculean efforts of a team of lawyers who, working for a tiny nonprofit, randomly stumbled on his case and agreed to work his appeal. According to the parameters established by *Gideon*, he had been given a lawyer for his initial trial. But regardless of how ineffective his counsel was, he had no right to an attorney to represent him in most of the complicated legal processes that followed. The fact that there was no possible way for him to do the legwork necessary to investigate the case—visit the crime scene, interview witnesses, secure documents, obtain witness rap sheets, consult psychiatric experts—is considered inconsequential by the government. Making matters worse, Louisiana joins Michigan, Arkansas, and Washington in limiting felons' access to public records, including police reports and DA files.⁹¹

Chapter 4 is largely about Georgia's successful effort (a) to convict Rodney Young of the murder of his ex-girlfriend's twenty-eight-year-old son, Gary Jones, and (b) to sentence the murderer to death.⁹² It is also the story of Joseph Romond (the lead defense lawyer), who is trying his first

89. *Id.* at 164–65.

90. *Id.* at 164.

91. *Id.* at 173.

92. *Id.* at 181–83, 229, 247.

death penalty case.⁹³ (Unfortunately, Romond is “also juggling eight other death penalty cases at the same time.”⁹⁴)

Romond is well aware that Georgia is the only state in the nation that requires evidence “beyond a reasonable doubt” that the murderer is mentally retarded in order for a capital defendant convicted of murder to be spared the death penalty.⁹⁵ He is even more aware that there has never been a jury trial in the history of Georgia when a jury concluded that a defendant was guilty of a capital offense but found him mentally retarded.⁹⁶

It does not help defense lawyer Romond that the murder was especially brutal. As Houppert describes the body of the murder victim—and this is just one of many examples of her robust writing—“[t]he button-down oxford that clothes the corpse is so drenched in deep red blood that it is impossible to detect what color it might have once been.”⁹⁷ Nor does it help the defense that the jury is more likely to identify with the victim of the murder than it would in the ordinary case because the victim of *this* murder “was on his way home from church, still in his church clothes” when he was killed, something the prosecution repeatedly told the jury.⁹⁸

There is a good deal of interesting material in this chapter. We are told that in many parts of the country, African-Americans are greatly underrepresented on juries.⁹⁹ (One probable reason is that African-Americans are struck from juries at three times the rate of whites.¹⁰⁰) To put it another way, “racially biased peremptory strikes” have taken their toll.¹⁰¹ Lawyers “can exclude a juror based on the vaguest of reasons—*not the brightest bulb in the pack, too strident, wears a cross necklace, wears a nose ring, wears pearls, wears patchouli oil*[, etc.]”¹⁰²

Houppert has studied the speeches and writings of such well-respected commentators as Stephen Bright (founder and director of Atlanta’s Southern Center for Human Rights) and Scott Sundby (a law professor who has interviewed hundreds of jurors after their deliberations in capital cases). She has also personally interviewed Professor Sundby.

Bright “explains the clamor for death as something elected officials—politicians, of course, but also elected judges—have generated themselves, fighting a fear of being perceived as ‘soft on crime.’”¹⁰³ Sundby

93. *Id.* at 186.

94. *Id.* at 212–13.

95. *See id.* at 184.

96. *Id.* at 227.

97. *Id.* at 185.

98. *Id.* at 232 (internal quotation marks omitted).

99. *Id.* at 215.

100. *Id.* at 215–16.

101. *Id.* at 215.

102. *Id.*

103. *Id.* at 217.

emphasizes that the presence or absence of African-American males on juries really matters: “‘If you have one African American male juror, the chances of the defendant getting a death sentence go down 40 percent,’ says Scott Sundby. . . . [‘I]f you have five white males on the jury, the chances of death go up 40 percent.’”¹⁰⁴ But Houppert continues:

[Sometimes] the most powerful voices for death can [also] be African Americans, Sundby says “If the African American defendant’s life really parallels that of an African American juror, growing up in this same neighborhood with gangs, and he is looking at this life of violence that led to killing, that juror could go, “‘Hey, that was me and I didn’t end up doing *that!*’”¹⁰⁵

The reader of this chapter learns about the philosophy of group decision making generally and, more specifically, about such matters as the *Allen* charge¹⁰⁶ (sometimes called the “dynamite charge”) when the jury appears to be deadlocked.¹⁰⁷ The reader also learns why “the holdout juror” usually winds up “capitulat[ing] to the majority.”¹⁰⁸

What does any of this have to do with the sorry condition of indigent defense fifty years after *Gideon*?

To use the author’s own words, *Chasing Gideon* is supposed to be a book about how—quite possibly because “no one can generate the political will necessary to change things”—“equal justice for all [still] eludes us.”¹⁰⁹ But Chapter 4 is primarily about the administration of the death penalty. It belongs in a book about capital punishment, not one about the sorry state of indigent defense today.

No doubt Ms. Houppert would disagree with me. In her introduction, she suggests that the Rodney Young case is one where “valiant but underfunded defenders” were overwhelmed, and she observes that “disparate funding levels for prosecutors and public defenders can tip the balance between life and death.”¹¹⁰

No doubt that has happened too many times because, as Professor Peter Arenella has observed, the “resource imbalance” between the state and the defense lawyer is “particularly egregious in death penalty prosecutions.”¹¹¹ Continues Arenella:

104. *Id.* at 220.

105. *Id.* at 221.

106. The so-called *Allen* charge was developed from *Allen v. United States*, 164 U.S. 492 (1896).

107. HOUPPERT, *supra* note 5, at 244.

108. *Id.* at 230.

109. *Id.* at 252.

110. *Id.* at x.

111. Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1235 (1996).

Given the horrific nature of [many death penalty cases], the defendant's life often depends on the defense's ability and capacity to make the client's humanity apparent to the jury deciding his fate at the sentencing phase of the trial. Far too often, underpaid defense lawyers in capital cases spend less time and effort on death penalty cases than the [O.J.] Simpson defense team expended prepping for his preliminary hearing.¹¹²

I very much doubt, however, that the case Houppert concentrates on, the Rodney Young case, was one of those times when the "resource imbalance" between the prosecution and the defense was the basis for the death penalty. I believe that Houppert's own account of the case establishes that much.

Twelve former teachers, coaches, and guidance counselors testified on Mr. Young's behalf. They testified he was in special education classes throughout high school which meant he had an IQ under 70. (However, in precomputer days, records were thrown out after seven years. Therefore, there was nothing on paper which proved definitively that his IQ was below 70.)¹¹³

A social worker at Mr. Young's school, who had grown up in the same neighborhood with him, also told the jury about "the rough and violent neighborhood they lived in."¹¹⁴ The social worker opposed the death penalty for Mr. Young because he believed the defendant could still be rehabilitated.¹¹⁵

Finally, the defendant's sixteen-year-old daughter testified on the defendant's behalf. She pleaded with the jury not to "kill my dad."¹¹⁶

There were undoubtedly a number of reasons that led the jury to convict Mr. Young of murder and sentence him to death. Among them were:

- (1) Although the defendant never admitted he committed the murder, the evidence that he did so was "[o]verwhelming";¹¹⁷
- (2) prosecutors maintained that the defendant murdered his ex-girlfriend's son "in order to . . . scare her back into his arms by making her think that roving, violent gangs were out to get her"¹¹⁸—an especially cold-blooded reason to kill someone;

112. *Id.* (footnotes omitted).

113. HOUPPERT, *supra* note 5, at 208–09.

114. *Id.* at 239.

115. *Id.*

116. *Id.* at 240–41.

117. *Id.* at 206.

118. *Id.* at 183.

(3) the defendant received a football scholarship to attend college, something hard to reconcile with being mentally retarded;¹¹⁹

(4) the defendant held a job (although it was only putting labels on cans);¹²⁰ he “lived more or less on his own, [and] moved through the world like the rest of us”;¹²¹

(5) after repeatedly being punched and kicked, another ex-girlfriend requested a restraining order against the defendant;¹²² and

(6) as previously mentioned, the jury probably empathized with the murder victim because the victim “was just minding his own business”; indeed, the victim had just come home from church.¹²³

I venture to say that, considering the prosecution’s strong case against Mr. Rodney Young, even someone wealthy enough to pay for his own lawyer probably would have been convicted of murder and sentenced to death.

A final comment. In recent years, there has been a good deal of talk about “civil *Gideon*,” “a shorthand for the idea that the right to appointed counsel for indigent criminal defendants recognized in *Gideon* should be extended to civil cases involving interests of a sufficient magnitude,”¹²⁴ e.g., child custody, housing, and domestic abuse cases. Ms. Houppert should have discussed this notion—even if she ultimately rejected it. At this point, the best argument against “civil *Gideon*” is probably the sorry state of “criminal *Gideon*”¹²⁵—a condition vividly illustrated throughout Ms. Houppert’s book.

119. *Id.* at 209–10, 224.

120. *Id.* at 191.

121. *Id.* at 208.

122. *Id.* at 237.

123. *Id.* at 232.

124. Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106, 2108 (2013). See generally Symposium, *Toward a Civil Gideon: The Future of American Legal Services*, 7 HARV. L. & POL'Y REV. 1 (2013). The Supreme Court touched upon this issue but did not resolve it in *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011), where the noncustodial parent was found to be in civil contempt of court for failing to make child support payments and sentenced to prison for one year. *Id.* at 2512–14.

125. Lawrence J. Siskind, *Civil Gideon: An Idea Whose Time Should Not Come*, AM. THINKER, Aug. 6, 2011, http://www.americanthinker.com/2011/08/civil_gideon_an_idea_whose_time_should_not_come.html.