

Revisiting the Past: Capital Representation Pre-Gideon

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Most Florida criminal defense attorneys who undertake the tremendous responsibility of representing defendants facing the death penalty probably cannot remember what life was like in this country in 1963. Few were practicing law back then. Many were yet to be born.

Nevertheless, the year 1963 is a critical milestone for the Florida capital defense bar because it was in 1963 that the United States Supreme Court brought us [Gideon v. Wainwright, 372 U.S. 335 \(1963\)](#) – and with *Gideon*, everything changed.

Before we consider the necessary changes that must be made in the representation of indigent defendants facing capital punishment in Florida – and we will -- it is important to look back to the status quo as it existed pre-*Gideon*.

Gideon did not create the indigent's right to counsel in death penalty cases. Their right to legal representation was created much earlier by the U.S. Supreme Court in *Powell v. Alabama*, 287 U.S. 45 (1932). It was only a few years later that the High Court expanded this right to legal counsel for indigents facing felony charges in federal courts. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

What makes *Gideon* so powerful and worthy of our consideration today is that this single Supreme Court opinion recognized an indigent defendant's legal right to counsel when accused of state felonies. *Gideon*, 372 U.S. at 342. Suddenly, the Sixth Amendment right to the assistance of counsel was found to be essential to a fair trial; consequently, there was to be no distinction between the duty to provide indigents with legal representation in either state or federal courts. If you were poor and facing a felony charge in this country under either state or federal law, you were legally entitled to a lawyer provided to you by the government since you could not afford to hire your own counsel.

Curious by its absence was any instruction in *Gideon* on the means or methods by which the individual states were to accomplish this task. Each state was left to its own devices in how *Gideon's* mandate was to be accomplished, and many looked to Florida – since *Gideon v. Wainwright* originated in our state.

Background of Gideon v. Wainwright

In 1961, Clarence Earl Gideon was convicted for breaking and entering a Panama City, Florida pool hall (with the intent to commit petty larceny) by a Florida jury and sentenced to five years incarceration in the Florida State Prison. Although Mr. Gideon asked the trial judge to provide him with an attorney, the judge declined, explaining that under Florida law only defendants facing capital offenses were entitled to appointed counsel. Mr. Gideon, therefore, represented himself.

He continued to do so after his conviction. Taking advantage of the prison library, Mr. Gideon handwrote in pencil his petition to the United States Supreme Court, as he sued Louie Wainwright as the Secretary to the Florida Department of Corrections. Gideon argued that his Sixth Amendment right to counsel applied to his situation through the Fourteenth Amendment. His constitutional rights had been violated.

Once his pleas reached the High Court, Mr. Gideon was no longer without counsel. The renowned advocate Abe Fortas, later to take his own place as a United States Supreme Court Justice, undertook the representation of the convicted pool hall burglar.

The Gideon Opinion

After hearing oral argument, [an opinion was issued](#) in mid-1963 written by Justice Hugo Black who was joined by Chief Justice Earl Warren as well as Justices Brennan, Stewart, White, and Goldberg. Douglas, Clark, and Harlan concurred. No one dissented.

In *Gideon*, not only did the Court strengthen its support of the *Powell* decision, but it overruled *Betts v. Brady*, a prior decision that found the selective application of the right to counsel was legally acceptable in certain situations. Clark pointed out that there is no Constitutional distinction between capital and non-capital charges. Harlan wrote to point out that merely the charge of a serious crime created the special circumstances that call for legal representation at trial.

Now, the law of the land was that the right to have legal representation was to be considered a fundamental constitutional right and therefore, worthy of the necessary procedural safeguards imposed for due process of law.

The Aftermath for Clarence Gideon

After his case was returned to the Florida Supreme Court, the State of Florida tried Mr. Gideon a second time. In his second trial he was represented by appointed counsel, and summarily acquitted.

The Aftermath for the State of Florida, the Criminal Defense Bar, and Indigents Today

No one in this country was considered to have the legal right to an attorney until the early 1930s, when defendants in federal court facing the death penalty were granted that right by the U.S. Supreme Court. For the next thirty-odd years, no one charged with a serious crime by any state this country was considered to have a right to an attorney provided to him by that state – even if he was facing life imprisonment. *Gideon v. Wainwright* changed all that.

Today, almost a half century later, the result of *Gideon* has been a consistent neglect of the needed infrastructure for indigent criminal defense in Florida, and across the country. Efforts to have effective legislation passed or broadly based executive policies instituted have been frustratingly unsuccessful.

Since the 1980s, it has become increasingly clear that there is simply an incongruity between the needs of appointed counsel to mount a thorough and satisfactory defense and the limited budgetary revenues of state and local governments. Bottom line, *Gideon* (and its progeny) has proven to be more expensive directive than the state governments have been willing to accept.