

Gideon at 50

A Clarion Call Still Muted?



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At around 5:30 a.m. on Saturday, June 3, 1961, someone broke into the Bay Harbor Poolroom in Panama City, Florida.¹ What was stolen during the break-in is unclear.² An alleged eyewitness saw someone leaving the poolroom around the time of the break-in. Based on that eyewitness's identification, Clarence Earl Gideon, an indigent man who lived in a nearby boarding house, was arrested and charged with breaking and entering with the intent to commit petit larceny.

Gideon was no stranger to the legal system. He was a convicted felon, resulting from an incident in which he and some friends decided to rob a bank with machine guns. "They broke into a federal armory, got the machine guns, and put them in the back of their old-fashioned-touring car with open sides."³ Unfortunately for Gideon and his cronies, their open-sided car got stuck in a muddy road, and when a deputy sheriff stopped to offer assistance, he saw the machine guns and arrested them.⁴ Gideon was sentenced to a total of six years in federal prison, from which he was released in 1937.⁵

Some suspect his criminal background may have led Gideon to believe he was entitled to appointed counsel, just as he had received on his prior arrests.⁶ Before his trial, Gideon asked the court to appoint a lawyer to represent him but his request was rejected, the trial judge ruling that he was only entitled to appointed counsel in capital cases.⁷

Too poor to hire a lawyer and without the benefit of appointed counsel, Gideon represented himself. Based solely on the eyewitness's testimony, the jury deliberated only an hour before returning a guilty verdict and Gideon was sentenced to five years in prison. Finding no relief in the Florida state courts, Gideon eventually submitted a

petition for a writ of certiorari—handwritten in pencil—to the United States Supreme Court. He claimed that the denial of counsel deprived him of rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution.⁸

On March 18, 1963, the Supreme Court unanimously ruled that the Sixth Amendment's right to counsel applies regardless of whether a defendant can afford to pay a lawyer.⁹ Later cases expanded *Gideon's* scope to include even misdemeanors that might result in jail time,¹⁰ and more recently, the right to counsel has been recognized to require the assistance of *effective* counsel.¹¹

On retrial, Panama City criminal defense attorney W. Fred Turner was appointed to represent Gideon.¹² Turner was "an outstanding criminal defense attorney in the Panama City area for many years, and he then became a circuit judge."¹³ He was able to impeach the credibility of the prosecution's eyewitness by convincing the jury that the witness had lied in the first trial about whether he had been previously convicted of a felony.¹⁴ At the conclusion of the trial, the jury found Gideon not guilty and he was immediately released from custody.

In 1964, Anthony Lewis chronicled the *Gideon* case in *Gideon's Trumpet*.¹⁵ The book's title is an allusion to the biblical story of Gideon, as told in the Book of Judges, in

which an outmanned force overcame overwhelming odds to secure a victory for God.¹⁶ Later a Hallmark Hall of Fame made-for-TV movie starring Henry Fonda as Gideon, *Gideon's Trumpet* left many Americans convinced that the question of providing legal counsel for indigent defendants was a non-issue after the 1963 Supreme Court decision.

Unfortunately, as we note and celebrate the 50th anniversary of one of the seminal cases in American jurisprudence, we cannot honestly claim that *Gideon's* promise has been fulfilled or that we in Michigan are meeting our duty to provide what the Supreme Court has ruled is required: effective counsel for all indigents charged with crimes that could result in the imposition of time in jail.¹⁷ However, it is with a great sense of hope that I report we are closing in on events that could go a long way toward changing the public's perception of Michigan as a poster child of inequity to a role model for how states can provide equal justice for all persons charged with crimes regardless of whether they can afford to hire an attorney.

The new millennium has brought a new awareness of our state's deficiencies in meeting the Sixth Amendment. In the span of nearly 150 years, Michigan had gone from being a leader in protecting the rights of the accused to ranking near the bottom of all

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states.¹⁸ Throughout the long decline, the State Bar of Michigan, particularly through its Criminal Law Section, was a regular critic of the status quo and a leading proponent of reform. In 2002, the Bar took its efforts to a new level, starting with adoption of the ABA's *Ten Principles of a Public Defense Delivery System* by the State Bar Representative Assembly, making Michigan the first state in the country to do so.¹⁹ With backing from the Michigan Public Defense Task Force, the Assembly added an 11th principle, which stressed the importance of supporting programs that improve the system and reduce recidivism.

Advocating for the 11 principles, the State Bar partnered with the National Legal Aid & Defender Association in convincing the state legislature to call for a comprehensive look at the state of Michigan's provision of indigent defense services. NLADA conducted an extensive year-long study of indigent defense services in 10 representative counties, after which it issued its report, *A Race to the Bottom—Speed & Savings Over Due Process: A Constitutional Crisis*, which captured headlines across the state and around the country. It concluded that none of the 10 counties studied met its constitutional obligation to provide competent representation to those who cannot afford counsel. Briefly, the NLADA report found:

- Public defenders are not shielded from undue judicial interference.
- The workload of public defenders is rarely managed and supervised, resulting in too many overworked defense lawyers spread too thin to provide adequate representation.
- Public defense attorneys are rarely provided with sufficient time and confidential space for attorney-client meetings.
- People of insufficient means are routinely denied their right to counsel in Michigan in certain jurisdictions.
- The county-based funding for Michigan's indigent defense system is inadequate. Michigan ranks 44th of 50 states in per-capita spending on indigent defense. Without any statewide oversight or support, counties often struggle to fund constitutionally adequate indigent defense systems.

Armed with the NLADA report, the State Bar and a coalition of partners began to address the systemic failures in Michigan's indigent criminal defense system—an effort that continues today. The coalition includes (among others) the Criminal Defense Attorneys of Michigan; the Michigan Catholic Conference; the American Civil Liberties Union of Michigan; the Crossroads Bible Institute; the Michigan Council on Crime and Delinquency; the Michigan Conference of the NAACP; and, most notably, the Michigan Campaign for Justice, a non-partisan coalition formed in 2009 for the specific purpose of advocating for public defense reform. The large and diverse nature of the organizations coalescing around this single issue speaks to its significance and differentiates the current effort from its predecessors.

After some initial fits and starts, reform efforts gained significant traction after the last gubernatorial election and really gained momentum during the 2012 legislative session. On June 22, 2012, the Indigent Defense Advisory Commission—a high-profile, bipartisan commission appointed by Governor Snyder—unanimously approved a set of findings and recommendations that, if adopted, will change the way the state provides right-to-counsel services.

In August 2012, HB 5804 was introduced to enact the Advisory Commission's recommendations. Under the bill, local control of indigent defense systems would remain in place but the local systems would be required to meet standards established by a permanent indigent defense commission. The commission would not only set standards based on the ABA's *Ten Principles of a Public Defense Delivery System*, but also ensure that counties met the standards. The bill also provided for indigent defense services funding through a blend of county and state resources. Local systems that failed to meet the standards could be taken over by the commission.

Initial signs were positive, as 68 percent of House members signed on as cosponsors of the bill. Despite lively debate, in September 2012 the Michigan House Judiciary Committee voted on an overwhelmingly bipartisan basis to send the indigent defense reform bill to the full House.

The bill passed the House in November—once again with strong bipartisan support—but in the waning days of the lame-duck session, the Senate failed to take action, in large part because of concerns about how to split indigent funding between state and local sources. Finally, at 4:30 a.m. on December 14, 2012, time ran out for any action to be taken before the legislative session's final bell.

The good news is that key legislators from both the Senate and the House have begun working with stakeholders—including the State Bar—to build on last year's efforts and introduce and pass a new bill this session. Thus, there is reason to be optimistic that Michigan will soon take steps to bring itself into compliance with what is mandated by the Constitution, recognized in the "Scottsboro Boys" case, and extended to all criminal defendants facing jail time by the decisions in *Gideon* and its progeny.

Most Michigan lawyers do not practice criminal law. Hopefully, few of us will ever confront the nightmare of having a family member or friend being arrested and facing arraignment or possible jail time. Why, then, is it so vitally important for our profession to support the passage of indigent criminal defense legislation? Let me try to

explain with an account of an incident I recently witnessed.

I accompanied a client to a west Michigan courthouse for her arraignment. There, I saw one defendant after another—some younger than 21 and others who appeared to speak English only haltingly—approach the podium and profess their guilty pleas without the benefit of counsel, not knowing that a competent attorney might be able to help them achieve a fairer result through a plea bargain or have their criminal records wiped clean through a juvenile diversion program. Seemingly oblivious to the impact a guilty plea would have on future job prospects—and ignorant of the fact that entering that plea, though it would not result in jail time, would greatly increase the chance that any subsequent run-in with the law would result in incarceration—one defendant after another was processed through the system like cattle herded through a gate at a meat plant.

Without competent counsel to advise them of their rights or explain the ramifications of their actions, can we truly say these unrepresented defendants had access to justice? Are we willing to say that justice is *only* available to those who can afford it?

Bringing Michigan's faltering system of indigent criminal defense into compliance with constitutional mandates will not be an inexpensive proposition. But as lawyers—members of a profession founded on the idea that equal access to the courts is of paramount importance regardless of socioeconomic status—we know the costs incurred in assuring the appointment of competent counsel for indigent criminal defendants pale in comparison to the alternative: depriving a defendant of his or her constitutional rights based solely on an inability to afford counsel.

In the Book of Kings in days of old, Gideon used a trumpet to vanquish his foes. Fifty-one years ago, Clarence Earl Gideon used a pencil to draft a request that the highest court in the land instruct the states that our constitutional rights were inviolate regardless of economic status. And 50 years ago this month, the Supreme Court agreed with him, unanimously ruling that the Sixth Amendment's right to counsel applies regardless of whether a defendant can afford to pay.

By analogy, Gideon's pencil became a horn, sounding a clarion call for justice regardless of socioeconomic status. Over time, that call has become muted as our state struggled with, and at times ignored, the issue of how best to comply with the minimum standards set forth by the *Gideon* Court. Thanks to those who have worked on this issue, progress is being made. But until we have an indigent criminal defense system that truly offers equal access to justice for every Michigan resident, Gideon's trumpet will remain muted. For justice to ring loud and clear from Temperance to Ironwood and from New Buffalo to De Tour Village, lawyers, legislators, government leaders, and others must keep working to assure that the guarantees afforded by the Constitution are a reality for anyone accused of a crime in our state. ■

FOOTNOTES

1. Jacob, *Memories of and reflections about Gideon v Wainwright*, 33 Stetson L R 184 (2003), available at <<http://ssrn.com/abstract=1132785>>. All websites cited in this article were accessed February 25, 2013. Jacob's writing is the basis of most of this article's discussion of the factual and procedural background in the *Gideon* prosecutions and appeal, and is recommended as an informative and educational resource for anyone wishing to know more about the historical background leading to the Supreme Court's decision to accept Gideon's appeal—as well as some fascinating "inside baseball" observations concerning the people involved in the various stages of the case.
2. According to the prosecutor who handled the case, the poolroom's owner testified at trial that coins were taken from a cigarette machine and jukebox that were broken into, and the thief also took a small amount of wine and beer. *Id.* However, according to the Bluhm Legal Clinic's Center on Wrongful Convictions, in addition to change from a jukebox and cigarette machine, the thief took a large amount of beverages, including four bottles of wine and two dozen bottles of beer and soda pop. Northwestern Law: Bluhm Legal Clinic, Clarence Earl Gideon <<http://www.law.northwestern.edu/wrongfulconvictions/exonerations/flGideonSummary.html>>.
3. Jacob, n 1 *supra* at 206, citing Interview with W. Fred Turner Sr., Cir J (Retired), Panama City, Fla (September 14–15, 2000). As explained later, Turner was Gideon's appointed attorney in his second trial.
4. *Id.*
5. *Id.*
6. *Id.* at 205–206. In the federal courts, counsel was appointed in every criminal case, and Gideon's other felony arrests were in Missouri, which had a statute requiring the appointment of counsel in felony cases. *Id.*, citing Mo. Rev. Stat. § 545.820 (1961).
7. Jacob, n 1 *supra* at 200. The trial court may have been relying on *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932), the famous "Scottsboro Boys" case, which established that the

Sixth Amendment's "assistance of counsel" clause included a right to appointed counsel in certain capital cases, and that this right is binding on the states via the Fourteenth Amendment. This gives me the opportunity to suggest that you take the time to read (or re-read) Hon. Victoria A. Roberts' column from the May 2001 *Michigan Bar Journal*; see Roberts, *The Scottsboro boys: A metaphor for justice*, 80 Mich B J 63 (May 2011), available at <<http://www.michbar.org/journal/pdf/pdf4article251.pdf>>. This article, which originally was a speech given by Judge Roberts, remains one of the best, most moving accounts of the need for equal justice under the law for *all* that I have seen or heard.

8. One example of the type of information available if you read Mr. Jacobs' Law Review article is this nugget:

Did [Gideon] prepare the petition for habeas, the petition for certiorari, and the other court documents by himself or did he receive assistance? Turner, Gideon's attorney at the second trial, says Gideon received the assistance of fellow inmate, former attorney, and later municipal judge, Joseph A. Peel, Jr. . . . According to Turner, Peel, Gideon's cellmate, stood over his shoulder as Gideon wrote and told him what to say. Peel was the convicted murderer of Circuit Judge Curtis E. Chillingworth and Chillingworth's wife Marjorie, of Palm Beach, Florida.

The Chillingworths disappeared from their oceanfront home one night in 1955, and for five years, their disappearance remained a mystery. Finally, Floyd (Lucky) Holzapfel confessed to their murders and testified—as a star witness—against Peel, who had become a municipal judge in West Palm Beach, that he and Peel had split about \$3,000 a week from gamblers and moonshiners for tip-offs when search warrants were issued for raids on moonshine stills or gambling dens. Peel told Holzapfel that Chillingworth, who had become aware of Peel's operations and was about to "blow the whistle," had to die. Unfortunately, because Mrs. Chillingworth was with the Judge when he was murdered, according to Holzapfel, she also had to be killed. [Jacob, n 1 *supra* at 214–215.]

Thus, depending on one's perspective it is either (1) ironic that the efforts of a machine-gun-stealing felon and a disgraced, corrupt, and murderous former circuit court judge resulted in issuance of a Supreme Court opinion responsible for protecting the constitutional rights of untold tens of thousands of falsely accused defendants or (2) a powerful testament to the strength of our Constitution that its protections extend to even the least endearing members of our society.

9. *Gideon v Wainwright*, 372 US 335, 343–344; 83 S Ct 792; 9 L Ed 2d 799 (1963).
10. See, e.g., *Argersinger v Hamlin*, 407 US 25, 37; 92 S Ct 2006; 32 L Ed 2d 530 (1972) (holding that a defendant may not be subjected to actual imprisonment unless provided with counsel).
11. See, e.g., *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (holding that a defendant may obtain relief if he demonstrates both that defense counsel's performance fell below an objective standard of reasonableness and that, but for the deficient

performance, there is a reasonable probability that the result of the proceeding would have been different).

12. Jacob, n 1 *supra* at 257.
13. *Id.*
14. *Id.* at 265–267. Interestingly, this turn of events appears to have resulted from the star witness's failure to understand that the offense to which he had pled guilty (a joyriding charge as a teen) was a juvenile offense and therefore not a felony at all, yet it was his "admission" during the second trial that he had been convicted of a felony—something that he denied in the first trial—that undermined his credibility with the jury and ultimately may have been the deciding factor weighing in favor of his acquittal.
15. Lewis, *Gideon's Trumpet* (New York: Random House, 1964).
16. In the Bible, Gideon and his force of just 300 men defeated a much larger army by surrounding their camp and blaring trumpets (or shofars) and screaming out their praise of the one God. When the 300 trumpets sounded, "all the Midianites ran, crying out as they fled...[and] the Lord caused the men throughout the camp to turn on each other with their swords." Judges 7:17–22 (New International Version), available at <<http://www.biblegateway.com/passage/?search=Judges+7%3A17-22&version=NIV>>.
17. To be clear, Michigan is not alone in this regard. The American Bar Association Standing Committee on Legal Aid & Indigent Defendants, in conjunction with the National Association of Criminal Defense Lawyers, recently issued a 40-page "blueprint for reform" titled *National Indigent Defense Reform: The Solution is Multifaceted*, documenting a daylong discussion of a broad-based symposium of 18 leading innovators (representing all branches and levels of government, prosecutors, defense lawyers, law professors, and nongovernmental organizations). That report contains a number of suggestions, broken down into three broad categories: (1) implementation of front-end reforms such as reclassification and diversion, which help reduce the number of cases entering the system; (2) creation of indigent defense commissions and establishment of public defense training and performance standards; and (3) improved collaboration and cooperation within and outside the criminal justice system to achieve significant, sustainable reform. ABA Standing Committee on Legal Aid & Indigent Defendants, *National Indigent Defense Reform: The Solution is Multifaceted* (Chicago: American Bar Association, 2012), available at <http://www.abanow.org/wordpress/wp-content/files_flutter/1357574231NIDR_Solution.pdf>.
18. See National Legal Aid & Defender Association, *A Race to the Bottom—Speed & Savings Over Due Process: A Constitutional Crisis* (June 2008), pp 1–13, available at <http://www.mynlada.org/michigan/michigan_report.pdf>.
19. See ABA Standing Committee on Legal Aid & Indigent Defendants, *Ten Principles of a Public Defense Delivery System* (February 2002), available at <http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf>. The principles are as follows: (1) the public defense function, including the selection, funding, and payment of defense counsel, is independent; (2) where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar; (3) clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel; (4) defense counsel is provided sufficient time and a confidential space within which to meet with the client; (5) defense counsel's workload is controlled to permit the rendering of quality representation; (6) defense counsel's ability, training, and experience match the complexity of the case; (7) the same attorney continuously represents the client until completion of the case; (8) there is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system; (9) defense counsel is provided with and required to attend continuing legal education; and (10) defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.