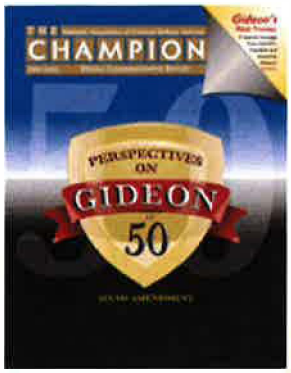

An Imperfect but Honorable Legacy: A Brief Survey Of Cases Following Gideon v. Wainwright

By William R. Terpening

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

Sixth Amendment, U.S. Constitution

As criminal defense lawyers celebrate the 50th anniversary of the landmark *Gideon v. Wainwright*[1] decision, it is instructive, for several reasons, to examine some of the primary cases to flow from *Gideon*. First, these cases reveal the full extent to which the Supreme Court has extended Sixth Amendment right to counsel protection to indigent defendants - and invite us to explore the reasons why the right to counsel has not been extended further. Second, the cases show how, for indigent defendants, many of the Sixth Amendment's protections remain formally unfulfilled by the law. Notwithstanding *Gideon*'s positive impact, some of the cases following *Gideon* have disappointed when it comes to imposing clear safeguards on indigent Sixth Amendment rights. Finally, the policies described in some of the key opinions in this area help explain the dilemmas that have impeded courts from taking steps to extend full process protections to the poor - a goal that, on its face, should seem universally desirable.

Gideon, of course, used the Fourteenth Amendment to apply the Sixth Amendment's right to counsel to felony cases in state court where a defendant's liberty was at stake.[2] What is surprising about *Gideon* is that it does nothing more, in essence, than say what the Sixth and Fourteenth Amendments state on their faces. Many commentators have noted that what is remarkable about *Gideon* is not that it was handed down, but that it took until 1963 for such a decision to exist, and that *Gideon* was a reversal of prior cases embodied in *Betts v. Brady* (*i.e.*, that, notwithstanding the Constitution's clear mandate, the law had ever been any different from what *Gideon* held it to be).[3] This observation is important to heed when surveying some of the opinions following *Gideon*.

The same day the Supreme Court handed down *Gideon* - March 18, 1963 - it also decided a companion case, *Douglas v. California*.[4] In *Douglas*, the Court extended *Gideon*'s declaration that indigents had a right to counsel at trial to direct appeals in state court.[5] In the underlying proceedings, the California appellate court had denied petitioners appointed counsel, even though they were litigating felony charges and were undisputedly indigent.[6] This was based on California's former rule that counsel was appointed in appeals only after the court made an independent investigation to determine whether counsel would be "of advantage to the defendant or helpful to the appellate court."[7] This gave rise to a troubling disparity between those who could afford to retain counsel and those who could not: the indigent defendant had the merits of his case prejudged before he could ever receive counsel, while the defendant of more substantial means could have representation at every stage.[8] Relying squarely on the "equality demanded by the Fourteenth Amendment," Justice Douglas wrote that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.'

Douglas was careful to emphasize that the right to appointed appellate counsel applied only to "the first appeal, granted as a matter of right to rich and poor alike."[10] The Court limited this right to the first stage in the appellate process where claims "have once been presented by a lawyer and passed upon by an appellate court."[11] Obstacles to appointing counsel for indigent appellants in nondirect, collateral proceedings have recurred in Supreme Court decisions in the decades since *Gideon*.[12] In offering appellate protection only narrowly to indigent defendants, the Court telegraphed a long future of legitimate policy-driven concerns that would occasionally impede more rapid or substantial application of the scope of *Gideon*'s rule.

Justice Clark, frankly but too cynically, expressed the central of these policy concerns in his dissent, which argued that "we all know that the overwhelming percentage of in forma pauperis appeals are frivolous," and that California's then-existing approach of screening to select only meritorious appeals for counsel was a sufficient means of allocating scarce resources.[13] Such policy concerns are legitimate, but ignore one problem: the Sixth Amendment's guarantee of counsel is mandatory, not permissive. In many cases following *Gideon* and through this day, there has been a good faith effort to address the fact that the justice system can afford only so many appointed lawyers, and handle only so many cases. Thus, the cases after *Gideon* struggled to answer such policy issues when, from the perspective of pure legal analysis, many of the cases could be resolved by straightforward reference to the Constitution.

In re Gault (1967) broadly protected the procedural trial rights of minors facing restrictions on liberty in state cases, including express acknowledgement that indigent minors in such a position have a right to appointed counsel.[14] As before, the decision was founded on the Sixth and Fourteenth Amendments' plain meaning: "We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel ... [and that] if they are unable to afford counsel, that counsel will be appointed to represent the child."[15] Interestingly - although the Sixth and Fourteenth Amendments provide sufficient basis for the *Gault* holding - the Court, as in other appointed-counsel cases, seemed compelled to secondarily base its opinion on various policy considerations. This included looking to sources as far-reaching as the President's Crime Commission's endorsement of appointing counsel to "assure procedural justice for the child."[16] In this case, as in others that define *Gideon*'s scope, the Supreme Court painfully confronts the tension between the aspirational goal of broadly appointing counsel and the need to allocate limited resources and address other realities, and appears to conclude that it must draw on more than reason and the Constitution to justify any expansion of the right to appointed counsel.

Argersinger v. Hamlin (1972) is another good example of the Supreme Court's tension between resolving *Gideon*-line cases through application of law and struggling to address policy concerns.[17] *Argersinger* settled uncertainty arising from the fact that *Gideon* involved a felony case by holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial."[18] The case addressed a scenario in which an indigent defendant was sentenced to 90 days in jail for carrying a concealed weapon.[19] Notwithstanding that the charge carried a potential sentence of "up to six months," the Florida trial court denied his request for counsel.[20] On appeal to the Florida Supreme Court, the state's highest court erroneously extended, to right to counsel cases, the U.S. Supreme Court's related Sixth Amendment rule that juries were only required in trials "for nonpetty offenses punishable by more than six months imprisonment."[21]

The Supreme Court reversed the Florida court, reasoning that right to jury trial cases had a "different genealogy" from right to counsel cases.[22] Although there was strong historical support for the notion that a jury was only required in "serious criminal cases," no such restriction for right to counsel was to be found within the Sixth Amendment's language or American or English common law.[23] Following the Amendment's plain language, the Court concluded that, although *Gideon*'s facts involved a felony, it was not limited to felony cases. The Sixth Amendment implicitly stands for the proposition that a non-lawyer lacks sufficient legal skill to defend himself, a problem as legitimate in misdemeanor cases as in felony cases.[24] Even in "the problem ... of the guilty plea," "[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."[25]

As in *Douglas*, however, the Supreme Court drew very strong lines restraining *Gideon*'s protections. The Court was adamant that *Argersinger*'s expansion of right to counsel to misdemeanor cases applied only to cases in which incarceration was a possible result. Although the Sixth Amendment does not restrict the right of counsel to cases with a potential for loss of liberty, the Supreme Court avoided the Pandora's Box by finding that "[w]e need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail."[26]

As in other cases in this area, policy concerns loomed large behind simple Sixth Amendment interpretation, likely driving the Court's evident desire to expand *Gideon*'s protections no more than necessary (for example, to criminal cases not threatening loss of liberty).

Justice Powell's concurrence in *Argersinger* illustrates this point. He aptly pinpoints the fact that the *Argersinger* majority opinion provides no rationale for why the Sixth Amendment's plain language should not require appointment of counsel in a much broader variety of cases: "[A]lthough the new rule is extended today only to the imprisonment category of cases, the Court's opinion foreshadows the adoption of a broad prophylactic rule applicable to all petty offenses," including, for instance, minor driving violations.[27] And, regardless of whether the rule was expanded to require appointment of counsel beyond loss of liberty cases, the mere expansion to misdemeanor cases could overwhelm the system. Thus, Powell writes that the majority "opinion is disquietingly barren of details as to how this rule will be implemented."[28] As was the *Douglas* Court, he is appropriately concerned about how the new demand for government-compensated counsel could flood the system, highlighting "the extraordinary demand for counsel" and that "there simply will not be enough lawyers to meet this demand either in the short or long term."[29]

This concern points to a problem concerning whether the Sixth Amendment requires right to *any* counsel, or counsel of some level of experience. Given the resources available to compensate appointed counsel, and the increased demand, Powell was troubled by the potential that indigent clients may receive counsel, but that they would often be "young and inexperienced."[30] He points to a converse problem with the right to appointed counsel rule as well: "Indeed, one of the effects of this ruling will be to favor defendants classified as indigents over those not so classified, yet who are in low income groups where engaging counsel in a minor petty offense case would be a luxury the family could not afford."[31] As such, the rule creates an equal protection problem, accenting "the disadvantage of being barely self-sufficient economically."[32]

To this day - nearly 50 years after *Gideon* - most of these administrative problems (assuring quality of appointed counsel; addressing the equal protection problem faced by those who are poor, but not sufficiently impecunious to be appointed a lawyer; and other resource allocation problems) have been debated but never adequately addressed. The most pressing of these problems, from a defense lawyer's perspective, is the need to assure that all criminal defendants receive a sufficiently sound quality of appointed representation. This issue has been addressed comprehensively in several scholarly articles over the years since *Gideon*,[33] and should be of significant interest to everyone who cares about the substance of right to counsel protection, not the mere formality.

The *quality* of representation is introduced in *Strickland v. Washington* (1984).[34] The *Strickland* Court confirmed that *Gideon* and its progeny did not merely require counsel, but effective counsel: "That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command."[35] Rather, the Sixth Amendment "recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."[36]

Having defined its discussion by articulating such ambitious ideals, however, *Strickland* announced a test for effectiveness of counsel that falls short of the ideal, and that has been often criticized. Resisting "specific guidelines," the Court held that a convicted defendant must satisfy a two-prong showing to reverse a conviction.[37] First, the defendant must show that his attorney's performance was deficient, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."[38] Second, the defendant must show that the lawyer's performance was so poor as to prejudice the defense in an extraordinarily significant fashion, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable."[39] This amounts to a standard requiring subjective "reasonableness under prevailing professional norms," and "judicial scrutiny of counsel's performance must be highly deferential" because second-guessing is all too easy.[40] Such a subjective standard has, correctly, been regarded as backtracking on the protections that *Gideon* provided.[41] As Professor Gerald Uelmen said, "The standards established in *Strickland* sound suspiciously like a resurrection of the totality of circumstances test of *Betts v. Brady*, given a 'respectful burial'" in *Gideon*.[42] Criminal defense lawyers should seek a higher standard for their legal services, after *Gideon*, than *Strickland* allows.

Gideon's broad protection of the indigent defendant's right to counsel has been assaulted with various policy arguments from the onset. Appointing counsel has been attacked, under differing circumstances - for instance, as wasteful of resources and as likely to foster meritless and voluminous trial defenses and appeals. It has also been questioned on grounds that may seem more legitimate for defense lawyers - for instance, on the basis that it creates an equal protection problem by giving indigent defendants access to lawyers, while denying similar access to poor defendants who are not indigent. These criticisms, and many others, have led the courts to attempt to rationalize decisions promoting right to counsel with various policy arguments. In similar fashion, the difficult balance - between the Sixth and Fourteenth Amendment's protection of the role of counsel in a fair trial and the realities of scarce resources - has often prompted compromise that could be regarded as a retraction of some of *Gideon*'s protections. This can be seen in *Strickland*. None of this can diminish the significance of *Gideon*'s accomplishment, half a century ago, of giving real meaning to the Sixth Amendment's right to the effective assistance of an engaged defense lawyer. Nevertheless, the criminal defense bar ought to continually strive to give life to *Gideon*'s highest ideals for its indigent clients.

Notes

1. 372 U.S. 335 (1963).
2. This article does not further address *Gideon* because other articles have analyzed the case in considerable scope and depth.
3. 316 U.S. 455.
4. 372 U.S. 353 (1963).
5. The indigent's right to counsel was already established in federal court. *Id.* at 357.
6. *Id.* at 354.
7. *Id.* at 355.
8. *Id.* at 356.
9. *Id.* at 357-58.
10. *Id.* at 356.
11. *Id.*
12. *See, e.g.,* Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 736-39 (1997) (discussing, among other cases, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989)).
13. 372 U.S. at 358-59.
14. 387 U.S. 1, at 41.
15. *Id.*
16. *Id.* at 38.
17. 407 U.S. 25 (1972).
18. *Id.* at 37.
19. *Id.* at 26.
20. *Id.*
21. *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145).
22. *Id.* at 30.
23. *Id.*
24. *Id.* at 32-33.
25. *Id.* at 34.
26. *Id.* at 37.
27. *Id.* at 52.
28. *Id.*
29. *Id.* at 56.
30. *Id.* at 57, n.21.
31. *Id.* at 51.
32. *Id.*
33. *See, e.g.,* Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev. 2062 (June 2000); Gerald F. Uelmen, *Toward a More Effective Right to Assistance of Counsel: 2001: A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel*, 58 Law & Contemp. Probs. 13, 24-28 (Winter 1995).
34. 466 U.S. 668.
35. *Id.* at 685.
36. *Id.*
37. *Id.* at 687-688.
38. *Id.* at 687.
39. *Id.*
40. *Id.* at 688-89.
41. Uelmen, at 25.
42. *Id.*

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