

# JUSTICE

## Remembering Gideon's Lawyers

By Bruce R. Jacob



It has been almost 50 years since the U.S. Supreme Court handed down its decision in *Gideon v. Wainwright*.<sup>1</sup> At the Supreme Court and in the Circuit Court for Bay County, Fla., where Clarence Gideon received a second trial after his case was remanded by the Court, he received excellent representation by three outstanding lawyers — Abe Fortas, Abe Krash, and W. Fred Turner. There were others involved on his side, but these three were his primary advocates. Fortas and Krash represented him before the Supreme Court, and Turner was his lawyer when he was acquitted at the second trial. As we enter the 50th anniversary of *Gideon*, it is important to remember the contributions these lawyers made to this historic case. I have had the privilege of knowing these men and would like to say a few words about them.

### Abe Fortas

Abe Fortas was the editor in chief of the *Yale Law Journal*. After graduation he served as a faculty member at Yale. He then went to work for the government during the New Deal. In 1946 he was a founding partner of Arnold, Fortas & Porter. It became a very prominent Washington, D.C., law firm. The firm today is known as Arnold & Porter. With offices in many cities and over 800 lawyers, it is one of the largest law firms in the world.<sup>2</sup> When Fortas was appointed as Associate Justice of the Supreme Court in 1965, his name was dropped from the name of the law firm.

As court-appointed counsel for the defendant in *Durham v. United States*,<sup>3</sup> Fortas persuaded the U.S. Court of Appeals for the District of Columbia Circuit to adopt an innovative test for insanity in criminal cases, based almost entirely on medical evidence. *Durham* abandoned the *McNaghten* test,<sup>4</sup> followed in many common law jurisdictions, and adopted the rule for the District of Columbia in

which a defendant was considered not responsible if, at the time of committing the act, he was suffering from a mental disease and the act was a product of that disease. The *Durham* decision is no longer followed, even though some would argue that it was the best test ever conceived for determining whether a defendant should be acquitted of a criminal offense on the ground of insanity at the time the criminal act took place.



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## A Conversation With Bruce R. Jacob

Bruce Jacob, who represented Florida before the U.S. Supreme Court in *Gideon v. Wainwright*, has handled countless pro bono cases during his career. In addition to writing a profile of Clarence Gideon's lawyers, he agreed to answer a few questions about the case and about the state of indigent defense.

**The Champion:** When you argued *Gideon v. Wainwright* in the Supreme Court, did it appear to be a legendary case — one that people would be talking about 50 years later?

**Bruce Jacob (BJ):** Those of us in the Criminal Appeals Division of the Florida Attorney General's Office knew that *Gideon* would be a legendary case, a great case. It involved critical issues in addition to the main question of whether there should be an automatic right to counsel in every noncapital felony case. For example, should such a decision be based on the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment? Would the concept and meaning of the Due Process Clause have to be changed in order for the Court to reach such a result? Should the decision extend to misdemeanors? Should it be retroactive?

**The Champion:** How do you view your role in *Gideon*?

**BJ:** It has always been my view that although a criminal defense attorney should be a zealous advocate for the client, within the bounds of ethical constraints, a prosecutor's position is different. He or she represents all of the people of the state, and this includes defendants in criminal cases. A prosecutor should be extremely fair to defendants, appellants, and petitioners. In *Gideon*, my job was to try to provide the Court with what it needed, in the way of information and argument, to enable it to make the best decision for our legal system. I was not just a pure advocate trying to win a case.

**The Champion:** What was the atmosphere like that day at the Supreme Court?

**BJ:** The atmosphere in the Court on the day of argument in *Gideon* was extremely intense. Based on the transcript, there were 92 questions or interruptions of me during my argument, and most came during the first half hour. A justice would ask a question and, before I could complete an answer, a second justice would ask a question or make a comment. Then, as I was trying to complete my answer to the first question and prepare to answer the second question, a third member of the Court would break in and ask a question.

**The Champion:** You've handled pro bono cases since *Gideon*?

**BJ:** After the *Gideon* decision, in 1963, the Florida Legislature enacted a statewide public defender law that, among other things, allowed a private lawyer (which I was at the time) to sign up with the trial court to become an unpaid, volunteer public defender. On the day that law took effect I signed up, and during the next couple of years the court appointed me to several cases. In 1965-68, while teaching at Emory Law School, I started the

Legal Assistance for Inmates Program for inmates of the U.S. Penitentiary in Atlanta. I was the supervisor and 53 students volunteered to help. During the first two weeks 750 inmates made requests for legal help, and most involved postconviction questions. I taught two clinical courses at Ohio State College of Law, where we represented indigents on a pro bono basis. Since going into law school administration and traditional classroom teaching, I have continued to handle pro bono cases of all kinds. I receive many requests from inmates. I review the trial transcript and other papers and advise on whether the inmate has a meritorious case. Often I tell the inmate that the case does not have merit. There are times when I prepare a petition for the inmate to file. Sometimes I merely send the inmate the results of my research, and other times I become counsel of record. I try to get students involved as much as possible in this work.

**The Champion:** Has the challenging economic climate made today's law students less interested in public interest jobs?

**BJ:** Students today do not have as many choices as they had in the past. Some go straight into public service work. Others go into another area with the idea that eventually they may be able to move into public interest law.

**The Champion:** Are we close to fulfilling the promise of *Gideon*?

**BJ:** The answer is a definite "no." Read the Constitution Project's 2009 *Justice Denied* report. Public defenders often have caseloads so large that it is impossible for them to provide effective representation. In some ways the present situation is worse than it was around the time of *Gideon*. Before *Gideon*, courts reviewing what had occurred at the trial level asked whether the defendant had received a "fair trial" and were generous in overturning convictions and sentences in cases in which it was not clear whether the defendant had been treated fairly. I wrote an article in the *Mercer Law Review* in 1965 in which I found that during a previous one-year period, Georgia appellate courts had reversed convictions in something like 43 percent of cases coming before them. That figure, I am sure, would be unheard of today in any jurisdiction. Appellate courts now are much less likely to overturn convictions and sentences, and I believe there are two reasons for this. First, criminal procedure was simpler in those days. Today it is extremely complex, and the complexity always seems to favor the government, not the defendant. Secondly, courts on review seem to take the position today that since every defendant has been represented by counsel at the trial level, they can assume that each defendant has received a fair trial. Of course, we know that this is not always true.



Fortas also was the personal attorney for, and was a close personal friend of, Lyndon B. Johnson when Johnson was a member of Congress, a U.S. senator, and later president of the United States. Johnson appointed him to the Supreme Court in 1965, two years after the *Gideon* decision.

On June 25, 1962, the Supreme Court appointed Abe Fortas to represent Clarence Gideon in the case then known as *Gideon v Cochran*.<sup>5</sup> I was the attorney for the state of Florida in the case. Although Abe Fortas and I had corresponded after he was appointed to the *Gideon* case, I did not meet or see him until the oral argument, which took place on January 15, 1963, in the Supreme Court. On that day there was a case ahead of ours, the *White Motor Company v. United States* antitrust case.<sup>6</sup> In the Supreme Court, there are backup tables or “ready” tables where lawyers for the next case sit while waiting for their case to be called, and I was sitting at the backup table behind the attorney for the White Motor Company. There was no lawyer seated at the ready table to my right, the table behind Archibald Cox, solicitor general of the United States. Fortas must have made arrangements with the Office of the Clerk to telephone him during the *White Motor Company* arguments, to let him know approximately when the *Gideon* case would be called for argument.

When *White Motor Company* ended and our case was called, Fortas suddenly appeared. My first glimpse of him was seeing him as he approached the podium and began to speak. He was wearing a brown suit, rather than the coat and tails worn by some lawyers who often appear in the Supreme Court. (I was wearing a dark blue suit.) He was in his early 50s, short and dapper-looking, with an unusual, deep voice. Anthony Lewis described him in the book, *Gideon’s Trumpet*:

Fortas is a smallish man with a manner that can be grave or, especially with women, charming. . . . His speech has a slow, deliberate quality, with tangible intellectual force — the word may be tension — behind it. It is hard to imagine him being entirely spontaneous. Not that he lacks humor, but he always seems controlled. A lawyer who has worked with him says: “Of all the men I have met, he most knows why he is doing what he does. I don’t like the s.o.b., but if I were in trouble I’d want him on my side. He’s the most resourceful, the boldest, the most thorough lawyer I know.”<sup>7</sup>

I think that the most unique characteristic about him was his deep, slow, deliberate speech pattern. As Lewis said, each word seemed to be very carefully thought out before being spoken, and it was obvious that there was tremendous intellectual capacity and tension behind each word.

In the middle of Fortas’ argument, the Supreme Court recessed for lunch. Earlier that morning, a representative of the Court explained to me that, at noon, the lawyers whose arguments were then taking place would be led downstairs to a room where lunch would be served. We were allowed to order our food ahead of time. At noon, Fortas and I were led downstairs to a small room with tables and chairs. This was our first meeting. We introduced ourselves and sat together at a very small table in the middle of the room, facing each other. We were the only people in the room, other than the waiter who served us.

Fortas was very friendly and kind to me. He was the older, experienced, famous lawyer and I was just a young 27-year-old attorney with barely three years of experience in the practice of law. He began with an apology. *Gideon* was the first of four companion cases that had been set together for argument, one after the other. The other three cases were *Draper v. Washington*<sup>8</sup> (right to transcript for appeal where the trial judge could deny a request on the ground that issues were frivolous, and where review of the judge’s decision was limited); *Lane v. Brown*<sup>9</sup> (right to transcript for appeal of denial of petition for writ of error coram nobis where, under state law, only the public defender could procure a free transcript, and where in that case the public defender had refused on the ground that the appeal would be unsuccessful); and *Douglas v. California*<sup>10</sup> (right to counsel for the first appeal of right from a criminal conviction). Fortas explained to me that he had sent invitations to the lawyers in these four cases for a dinner party at his home the Sunday evening before the cases were set for argument. The invitation had been sent only a few days before the event. Mine had gone to Tallahassee and was not received by me and my wife, Ann, in time to attend the party. I had worked in the Florida Attorney General’s Office in Tallahassee from 1960 to September 1962 but then had moved to Bartow, Fla., and the firm of Holland, Bevis & Smith. Attorney General Richard W. Ervin and Chesterfield Smith (the head of the Holland firm) allowed me to finish working on *Gideon* after I had left the Attorney General’s Office and had begun working in Bartow. Not realizing that I had moved to Bartow, Fortas sent the invitation to Tallahassee.

During lunch, Fortas talked about Justice Black and how much he admired him. He talked about the case from Texas in which he had represented Lyndon Johnson regarding the election results that led to Johnson’s first term as a U.S. senator. The Democratic run-off for a vacant U.S. Senate seat in Texas, in August 1948, was between Johnson and former Gov. Coke Stevenson. Johnson won by 87 votes, but the outcome was in doubt. A single ballot box in one county contained 202 votes for Johnson in the same handwriting and in the same ink. When election commissioners later opened the box, it was empty. Nevertheless, the Democratic Party executive committee certified Johnson as the victor. Stevenson alleged fraud. He could have gone to state court, but instead decided to go to a friend of his, U.S. District Judge T. Whitfield “Tiddy Winks” Davidson, alleging fraud, and Davidson invalidated the election results. Johnson now was off the ballot for the general election which, in Texas in those days, was always won by the Democratic candidate.<sup>11</sup>

Fortas entered the case. He presented his argument on Johnson’s behalf to Judge J.C. Hutcheson of the U.S. Court of Appeals for the Fifth Circuit, but Hutcheson wanted to wait until later in the fall, when the entire court could hear the case. Fortas then directly presented the case to Justice Hugo Black, because, he said, “[Justice] Black will handle it expeditiously” in his capacity as presiding Supreme Court Justice for the Fifth Circuit.<sup>12</sup> Fortas argued that a federal court should not enjoin a state-run election.<sup>13</sup> Arguments took place for a four-hour period in Justice Black’s office in the Supreme Court building. Stevenson’s lawyers argued vote fraud, while Fortas argued that the U.S. district court had no jurisdiction in the matter.<sup>14</sup> “Obviously, the very [astute] Fortas knew [that such an argument] would strike a chord with [Justice Black], who was forever defending ‘Our Federalism,’ especially states’ rights in the federal system.”<sup>15</sup> Fortas also argued that delay in obtaining judicial relief would effectively bar Johnson from running in the general election. Justice Black ruled with Fortas on September 28, 1948, in Johnson’s favor and set aside the challenged order on the ground that the district court had lacked jurisdiction to enjoin the state election. “Johnson was rapidly certified as [the] Democratic candidate and won election to the Senate in November 1948.”<sup>16</sup>

During the lunch break, Fortas described to me what had taken place in

that Texas case. He had very high praise for Justice Black and for the way Black had handled that matter.

After lunch we returned to the courtroom. Fortas concluded his argument and I made mine for the state of Florida. After the arguments in our case I felt that I had not done a good job, in part because the questioning had been so relentless. I have read the transcript of my hour-long argument and counted 92 questions or interruptions by the members of the Court. Most of them came during the first 30 minutes. Fortas approached my wife, Ann, and me in a corridor in the Supreme Court building and we shook hands. He apologized to Ann for not getting the invitation to us in time to attend the dinner party at his home. He sensed my disappointment regarding my showing in the oral argument and, to make me feel better, said, "You know, you have a wonderful way<sup>17</sup> before the Court." Of course, this made me feel much better.

Two years later, Fortas had been appointed to the Supreme Court and I had become a faculty member at Emory University Law School. The dean invited him to be our Law Day speaker, telling him in the letter that I was a member of the faculty. Justice Fortas accepted, and I will never forget his visit to the school. He entered the main lobby with the dean. The members of the faculty were there, and many students crowded around us. Justice Fortas and I shook hands, and he

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turned to the dean and said in his low-pitched, slow but clear, loud voice so all could hear, "Dean, you have a good man here in Bruce Jacob."

The last time I saw him was during oral arguments in the *Kaufman v. United States* case,<sup>18</sup> on November 19, 1968. He now was an associate justice of the Supreme Court and I was the court-appointed lawyer for Harold Kaufman. He was one of the justices who ruled with me in the decision for my client handed down on March 29, 1969. He died 13 years later, on April 5, 1982.

In 1993, at a program at American University regarding the *Gideon* case, among others in the audience were Justice William Brennan and Chesterfield Smith, former president of the American Bar

Association and head of the Holland law firm. The program featured several speakers including Abe Krash, Fortas' law partner and the principal lawyer assisting him in writing the *Gideon* brief. I told the audience about my favorable experiences with Fortas. Abe Krash told me after the presentations that it was unusual for Fortas to be so good to me, for he was not known for being kind to young lawyers. This point is also made by Bruce Allen Murphy:

Since Fortas was the most organized of three name partners, the job of managing the firm fell to him. This did not make the younger lawyers working for the firm very happy. ... "You should hear what the junior lawyers who come back here say about Fortas," reported an administrator at Yale Law School. "They say he's cold, arrogant, a real son of a bitch, and worse."<sup>19</sup>

This may be true, but he certainly was most gracious and exceptionally kind to me. I will always have the very highest regard for him. He was a very great lawyer, an outstanding justice on the Supreme Court, and a fine man.

### Abe Krash

Abe Krash was a partner of Abe Fortas at Arnold, Fortas & Porter.<sup>20</sup> He was the principal lawyer with Fortas on the brief in the *Gideon* case.

In their brief, the petitioners argued that a defendant in a criminal case cannot effectively prepare a defense and defend himself or herself at trial. Usually, an indigent is in jail and, therefore, is unable to investigate or question witnesses. Not trained in the law, an indigent cannot adequately assess whether to plead guilty or to go to trial. Also, because of a lack of legal training, an indigent obviously is at a loss in conducting a defense at trial.

The underlying assumption of *Betts v. Brady*<sup>21</sup> that the trial judge could safeguard the indigent, unrepresented defendant was strongly disputed by Fortas and Krash. They argued that the "special circumstances" rule of *Betts v. Brady* created friction between state and federal courts because so many cases had been reversed and remanded to state courts since the *Betts* decision in 1942 for violators of the special circumstances doctrine. Their position was that the *Betts* "special circumstances" test was inherently unworkable and, therefore, should be discarded.

Fortas and Krash further argued that the right to appointment of counsel in felony cases had risen to the level of a fundamental right in the years since 1942, and it was only appropriate to extend an absolute right to counsel to

state, as well as federal, cases through the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Based on the transcript of the trial, Fortas and Krash argued that had Clarence Gideon been trained as a lawyer, he would have realized that the defense of voluntary intoxication was available to him. The crime charged — breaking and entering with intent to commit petit larceny — required specific intent, and Fortas and Krash argued that specific intent could not be formed in the mind of a person who was intoxicated at the time of the offense.<sup>22</sup>

I first met Abe Krash at the American University School of Law in 1993 at the Conference on the Thirtieth Anniversary of the United States Supreme Court decision in *Gideon v. Wainwright*. He and I were speakers at that conference, and after the presentations we met and talked for a brief time. It was then that he made the comment to me, described earlier, that while my recollection of Abe Fortas and my experiences with him when I was a young lawyer were the very best, he was not always well liked by young lawyers.

Beginning about 2004, Krash and I became members of the "National Right to Counsel Committee" of the Constitution Project, headquartered in Washington, D.C.<sup>23</sup> He was retiring from practice at Arnold & Porter, and I learned from others that, in addition to practicing, he had been an adjunct professor at the Georgetown Law Center and



Photo: Courtesy of Arnold & Porter

Abe Krash

had served as a visiting lecturer at Yale Law School.

Over several years we attended a series of meetings in Washington, D.C., as members of the National Right to Counsel Committee. In April 2009 the work of the committee culminated in the report of the Constitution Project entitled *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*.<sup>24</sup>

The meetings in which we both participated provided the opportunity to get to know Abe Krash. Like his former law partner Abe Fortas, Abe Krash is a truly great lawyer. He is a gentle, soft-spoken, friendly, very likeable person — a gentleman in every sense. Also, he is completely dedicated to providing quality legal help to indigent defendants in criminal cases. It is a privilege to know him and to have been able to work with him as a member of the National Right to Counsel Committee.

## W. Fred Turner

Fred Turner is the Bay County, Fla., criminal defense lawyer who represented Clarence Gideon at his second trial after the Supreme Court had ruled with Gideon and had remanded the case. Judge Robert McCrary, the circuit judge who tried Clarence Gideon both times, asked Gideon which lawyer he wanted. Turner was known as the best criminal defense lawyer in that area, and Gideon requested him. Turner was appointed to represent Gideon and was successful in obtaining the acquittal at the second trial.

I met Fred Turner for the first time at a dinner meeting of the St. Andrew Bay American Inn of Court, in a restaurant on Panama City Beach, Fla. It was September 14, 2000. When I saw him, he reminded me of the movie star and dancer Fred Astaire.<sup>25</sup> He was about six feet tall and slender. At my table during the dinner, the lawyer sitting next to me, when told how much Turner reminded me of Astaire, said, “It’s strange that you say that, because he’s a dancer.” He explained that, in court, when trying a case before a jury, Turner literally “danced,” moving around like a dancer. The local newspaper published a photo of him, taken while trying a case before a jury, showing him whirling around, with his coattails flapping behind him. Turner was an outstanding criminal defense attorney in the Panama City area for many years, and he then became a circuit judge. When I met him, in 2000, he was about 80 years old. He lived in Panama City and was retired. I got to know him very well between our first meeting and the time of his death, on November 23, 2003.

The part of his life of which he was most proud was the period he spent in the U.S. Army Air Corps during the Second World War. As a young staff officer with the legendary “Flying Tigers,” he flew on planes from India over the Himalayan Mountains into China to provide supplies, ammunition, and equipment to the Chinese who had retreated to the western part of China and were fighting the Japanese. It was an extremely dangerous assignment. If his plane had been downed and the Japanese had captured him, he probably would have been executed.

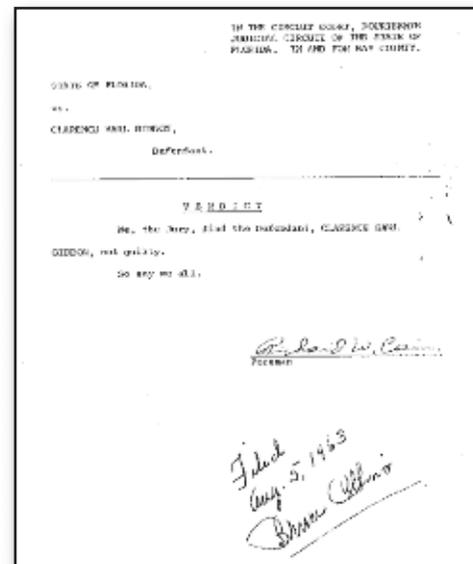
Turner believed that a criminal case was won or lost the moment the lawyers chose the jury. Therefore, selecting the jurors was extremely important.

Turner believed that a criminal case was won or lost the moment the lawyers chose the jury.<sup>26</sup> Therefore, selecting the jurors was extremely important. He said that he “often selected jurors by looking at their shoes.”<sup>27</sup> Presumably, shoes that are “spit shined” indicate a person who is meticulous almost to a fault and might not be entirely sympathetic to a “down and out” defendant who has made mistakes in his life. When trying cases, he wanted to know as much as possible about each prospective juror. He told me the story of a time he traveled to Blountstown to try a case. Blountstown is in another county, about 40 miles northeast of Panama City. He took a friend with him who had been raised there. His friend stood in the rear of the courtroom and, by prearranged signal consisting of pulling on his ear, signaled to Turner whether each potential juror was a kind-hearted, generous person who might be sympathetic to a defendant or a “law and order” type who was likely to vote in favor of the prosecution.<sup>28</sup>

When the six prospective jurors were placed in the jury box in Gideon’s second trial, Turner knew four of them. He struck two of them from the panel because one was a “teetotaler” who had no sympathy for drinkers, and the other “would convict his own

grandmother.”<sup>29</sup> These two were replaced by two more jurors, both of whom Turner knew.<sup>30</sup> Turner was very satisfied with the final six jurors. Of the six jurors, three were gamblers. This was particularly helpful because Gideon’s explanation for having so much change in his pockets when arrested for breaking and entering the Bay Harbor Poolroom with intent to take beer, wine, and coins from the cigarette machine and juke box was that he had won it while gambling.<sup>31</sup>

Henry Cook was the key witness against Gideon. He testified that he stayed



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out all night at a dance in Apalachicola, about 60 miles southeast of Panama City.<sup>32</sup> His friends dropped him off at the Bay Harbor Poolroom, about two blocks from his home. He did not want to go directly home because he was afraid his parents would, as he put it, “get on me” about coming in [after] drinking.<sup>33</sup>

It was about 5:30 a.m.<sup>34</sup> when Cook stepped up to the front window and saw that someone had broken into the Bay Harbor Poolroom.<sup>35</sup> Canvas money bags were on the pool table.<sup>36</sup> The front of the cigarette machine was removed.<sup>37</sup> He testified that he saw Gideon inside the poolroom, standing by the cigarette machine.<sup>38</sup> At the time, Cook had known Gideon for about six months.<sup>39</sup> Cook was looking at Gideon through the window from a distance of six or seven feet, and was sure that the person he saw in the poolroom was Gideon.<sup>40</sup>

Turner’s defense theory was that Cook and his friends were responsible for the break-in at the poolroom.<sup>41</sup> They had been partying and then broke into the poolroom and took beer, wine, and Cokes. His position was that it seemed

unlikely that Gideon, who obviously preferred alcoholic beverages, would have wanted the Cokes, but young boys looking for beverages for a party were far more likely to take Cokes. According to Turner, Cook was acting as the lookout for his friends.<sup>42</sup>

Turner had previously represented Cook and was familiar with his record. Cook previously had been guilty of juvenile delinquency for car theft,<sup>43</sup> and this previous record became a major issue at the second trial, when Turner asked the following question:

**Q:** Have you ever been convicted of a felony?<sup>44</sup>

**A:** I 'stoled' a car one time and got put on probation for it.<sup>45</sup>

Turner then asked, "The last time you testified in this case, you denied that, didn't you?"<sup>46</sup> The prosecutor objected, and the jury was removed from the courtroom so that the judge and the lawyers could discuss the matter.<sup>47</sup> Turner pointed out that at the first trial the following exchange had taken place when Gideon, acting as his own attorney, had cross-examined Cook:

**Q:** Have you ever been convicted of a felony?

**A:** No sir, never have.<sup>48</sup>

After much argument, Judge McCrary called back the jury and allowed the following exchange between Turner and Cook:

**Q:** Mr. Cook, have you ever denied, under oath, that you had been convicted of a felony? Prior to today, I'm speaking of.

**A:** Yes, I did.<sup>49</sup>

The prosecution objected to this, but Turner was allowed to continue as follows:

**Q:** When and where did you deny your criminal record, Mr. Cook?

**A:** Right here, the last time [Gideon] was tried, two years ago.<sup>50</sup>

Therefore, Turner successfully impeached Cook. Prosecutor William Harris then tried to rehabilitate Cook, by asking:

**Q:** What did you mean when you said you had not been convicted of a felony and yet, you say you pled guilty to stealing an automobile?<sup>51</sup>

**A:** Well, I didn't quite understand what a felony was then.<sup>52</sup>

The prosecutor proceeded to ask Cook more questions. During this questioning, Cook happened to mention that his "felony" case had been before a judge known by those in the courtroom to be the local juvenile judge. Thus, Cook's conviction was for a juvenile offense, which is not a felony,<sup>53</sup> and not even a crime. Harris then asked:

**Q:** Don't you know, Mr. Cook, that you can't be convicted, or plead guilty, to a felony in Juvenile Court?<sup>54</sup>

Turner objected, and Judge McCrary sustained the objection. This was the end of the discussion regarding Cook's past record.

This probably was the most critical point in the trial. The prosecution had not bothered to determine ahead of time whether their key witness had a criminal or juvenile record and, therefore, was totally unprepared for Turner's impeachment of their witness.

Also critical to the decision was the failure of the prosecution to call a witness from the first trial, Irene Rhodes. She had been sitting on her front porch and had seen Clarence Gideon emerge from the alley behind the Bay Harbor Poolroom and go into a nearby telephone booth. He made a phone call and a taxi came to pick him up. I asked Turner why she had not been used as a prosecution witness at the second trial. He did not know why, and told me that she was still alive and had been available at the time of the second trial.<sup>55</sup>

I believe Turner won the case for three reasons. First, he did a magnificent job of selecting the six-person jury. Second, one of the two main witnesses for the prosecution, Irene Rhodes, was not used at the second trial. And, third, Turner successfully and very effectively impeached the key witness against Gideon.

Turner did a masterful job of defending Gideon at the 1963 trial, thereby proving the truth of one of the underlying assumptions of the Supreme Court's decision — that being represented by counsel in a criminal case makes a tremendous difference.

Between 2000 and his death in November 2003, Turner and I became friends. We spent a day together in Panama City. We participated in panel discussions in Miami and Tampa and spent two days together in St. Petersburg, mainly talking about the *Gideon* case. During the times we were together, I took notes on his recollections of the *Gideon* case. As a retired circuit judge, he had access to court files. He had a complete set of those files made for me, including pleadings, transcripts of both trials, the sentencing report made by the probation office following the first trial, and much more.<sup>56</sup> He was a very good friend to me.

In September 2000, Turner drove my wife, Ann, and me to the site of the Bay Harbor Poolroom, just east of Millville, the small community where he had been raised, regaling us with anecdotes about his experiences as a defense lawyer, including his representation of Gideon. He was a trial lawyer in the storytelling tradition — who loved to tell stories, largely based on his experiences in trying cases. We stood at the site of the crime. The poolroom and all the other buildings in the vicinity had been demolished, and all that survived were the deserted streets and the foundations of the buildings that had stood there. We stopped and walked around. He showed us where the Bay Harbor Hotel (Gideon had roomed there) and the Bay Harbor Poolroom had been located. Also, he pointed to the spot where the telephone booth had stood. During that tour, Turner made the case come to life again.

## Conclusion

Clarence Gideon did not have a lawyer at his first trial, in 1961, but from that point on he had the very best representation that our legal system could provide. He was assisted in his case by the American Civil Liberties Union,<sup>57</sup> which was an amicus in the case, and by the attorneys general of 22 states, who filed an amicus brief in his behalf in the Supreme Court,<sup>58</sup> and by others including a law student<sup>59</sup> at the Arnold, Fortas & Porter firm. But the principal lawyers who represented him were Abe Fortas, Abe Krash, and W. Fred Turner. We should never forget their contributions to this historic case.

*This article draws heavily from remarks made by Bruce R. Jacob at American University in 1993, printed at 43 AM. U. L. REV. 1, 33-43 (1993); and from Bruce R. Jacob, Memories of and Reflections About Gideon v. Wainwright, 33 STETSON L. REV. 181 (2003).*

## Notes

1. 372 U.S. 335 (1963).
2. This information was obtained from Wikipedia.
3. 214 F.2d 862 (D.C. Cir. 1954).
4. *Daniel McNaghten's Case*, 8 Eng. Rep 718 (1843). Under this test, to establish a defense based on insanity it must be proven that, at the time of committing the act the defendant was laboring under such a disease of the mind as to not know the nature and quality of the act, or, if he did know it, that he did not know that what he was doing was wrong.
5. This was the original name because at that time H.G. Cochran was the head of the Florida Division of Corrections. Between the time the case was argued (January 1963) and the time it was decided (March 1963), H.G. Cochran was replaced by Louie Wainwright. As the attorney for the state, I wrote a letter to the clerk, advising that this change had taken place, and when the opinion was released the case was called *Gideon v. Wainwright*.
6. 372 U.S. 253 (1963).
7. ANTHONY LEWIS, *GIDEON'S TRUMPET* 54 (1964).
8. 372 U.S. 487 (1963).
9. 372 U.S. 477 (1963).
10. 372 U.S. 353 (1963).
11. BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 90-96 (1988).
12. *Id.* at 93.
13. *Id.* at 94.
14. *Id.* at 94-95.
15. HOWARD BALL & HUGO L. BLACK, *COLD STEEL WARRIOR* 152 (1996).
16. *Id.* at 153.
17. I assume that he was using the word "way" to mean "manner."
18. 394 U.S. 217 (1969).
19. *Supra* note 11, at 80.
20. Ralph Temple of Arnold, Fortas & Porter also was one of the lawyers on the brief.
21. 316 U.S. 455 (1942).
22. Br. of Pet. at 7-9, *Gideon v. Wainwright*, 372 U.S. 335 (1963).
23. The reporters in this project were Norman Lefstein and Robert L. Spangenberg. The president and founder of The Constitution Project is Virginia E. Sloan.
24. The full title is THE CONSTITUTION PROJECT, *JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL*, REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE (2009). The report is available at [www.constitutionproject.org](http://www.constitutionproject.org) and [www.nlada.org](http://www.nlada.org).
25. Anthony Lewis, in *Gideon's Trumpet*, also describes Turner as a Fred Astaire look-alike; *supra* note 7, at 229.
26. Interview with W. Fred Turner, Sr. Cir. J. (retired), St. Petersburg, Fla. (Apr. 20, 2001).
27. Letter from W. Fred Turner, Sr. to Bruce R. Jacob (Apr. 27, 2001).
28. *Supra* note 26.
29. *Id.*
30. *Id.*
31. *Id.*
32. Trial transcript of second Gideon trial, at 10.
33. *Id.* at 13.
34. *Id.* at 3.
35. *Id.* at 3-4.
36. *Id.* at 4, 27.
37. *Id.* at 27.
38. *Id.* at 3.
39. *Id.*
40. *Id.* at 32.
41. Anthony Lewis, *supra* note 7, at 237; also see Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 269 (2003).
42. *Id.*
43. Bruce R. Jacob, *supra* note 41, at 258, 259, 265-268.
44. Trial transcript of second Gideon trial, at 35-36.
45. *Id.* at 36.
46. *Id.*
47. Bruce R. Jacob, *supra* note 41, at 266.
48. Trial transcript of second Gideon trial, at 38, 51.
49. *Id.* at 43.
50. *Id.*
51. *Id.* at 48.

52. *Id.* at 49.

53. *Id.* at 58-59. Of course, when a juvenile commits an act, such as car theft, which would be a felony if committed by an adult, the state must prove all the elements of that felony. However, if found guilty, the juvenile is guilty of "juvenile delinquency," which is not a felony.

54. *Id.* at 60.

55. Bruce R. Jacob, *supra* note 41, at 261, 265.

56. The papers he provided to me included the "Pre-Sentence Investigation" report prepared by the Florida Parole Commission in August 1961, following the first Gideon trial. Handing this to me, Fred Turner said, "Bruce, you are going to like this." The report states that "the Defendant admits taking the items from the pool-room after finding the back door open. . . ."

57. J. Lee Rankin, former solicitor general of the United States, was the principal lawyer on the amicus brief for the American Civil Liberties Union, and he participated in the oral arguments in the case.

58. The attorneys general of 22 states filed an amicus brief on behalf of Clarence Gideon. The leader in this effort was Walter F. Mondale, attorney general of Minnesota. He later became vice president of the United States.

59. John Hart Ely was a Yale Law student who clerked in the office of Arnold, Fortas & Porter during the summer of 1962 and conducted research to aid Fortas in putting together the brief in the case. See Anthony Lewis, *supra* note 7, at 122-127. He later became a well-known law teacher and scholar. He was the dean of the Stanford Law School and taught at Yale, Harvard, and the University of Miami before his death in 2003. ■

### About the Author

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