

# BRUCE JACOB: A LEADING VOICE IN PUBLIC DEFENSE

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## I. INTRODUCTION

On the 50th anniversary of the famed *Gideon v. Wainwright*<sup>1</sup> case that provided the right to counsel to indigent defendants in state courts,<sup>2</sup> Bruce Jacob won the National Association of Criminal Defense Lawyer's (NACDL) *Champion of Indigent Defense Award*.<sup>3</sup> The irony here is that Bruce Jacob had represented the State of Florida in the *Gideon* case, advocating for adherence to the case of *Betts v. Brady*,<sup>4</sup> which did not provide the right to counsel for indigent state defendants absent special circumstances.<sup>5</sup> But for those who know Bruce Jacob, this is easily explained as Dean Emeritus Jacob is a man who is a true “minister of justice,”<sup>6</sup> a man who believes in the importance of the right to counsel, but also believes in the values engrained in our judicial system and process. This Essay tells the story behind this

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\* © Gary R. Trombley Family White Collar Crime Research Professor and Professor of Law, Stetson University College of Law. This Essay is written with enormous admiration for my colleague Bruce Jacob. It is his office light which remains on late into evenings and on weekends, that inspires us all.

1. 372 U.S. 335 (1963).

2. The *Gideon* opinion found that the Sixth Amendment's Right to Counsel would be applicable to the states via the Fourteenth Amendment of the Constitution. *Id.* at 343.

3. *News Release: Bruce Jacob to Receive Champion of Indigent Defense Award*, NACDL (July 25, 2013), <https://www.nacdl.org/News.aspx?id=28693>.

4. 316 U.S. 455, 473 (1942) (holding that the Sixth Amendment right to counsel applies only in federal court).

5. See Brief of Respondent, *Gideon v. Cochran*, 1963 WL 66427 (U.S. Jan. 2, 1963) (No. 155) (noting the signature of Bruce R. Jacob as Assistant Attorney General, State of Florida).

6. See MODEL R. PROF'L CONDUCT 3.8 cmt. 1 (AM. BAR ASS'N 2018) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); see also Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1301 (1996) (discussing the history of the term “minister of justice”); Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151, 155 (2011) (discussing in a tribute to Fred Zacharias the phrase “minister of justice”).

prestigious criminal defense award<sup>7</sup> that was given to the man who argued a case that stood against the right to counsel for indigent defendants who faced felony charges in state courts. More importantly, it tells the story of a man who spent fifty years post-*Gideon* working to assure representation for those accused of crimes who could not afford to hire an attorney.

## II. BRUCE JACOB AS A “MINISTER OF JUSTICE”

Lawyers do not always get to pick and choose their clients or their cases. Individuals serving in the public sphere know this well, as those working in either a prosecution or public defense office are typically assigned the cases they will handle, sometimes resulting in caseloads that are exorbitant, especially for public defenders.<sup>8</sup>

In March 1962, Bruce Jacob, then a Florida Assistant Attorney General, was assigned the *Gideon* case, a case that made its way to the United States Supreme Court.<sup>9</sup> Jacob believed he was selected to handle this case, not because he was the newest and youngest in the office, but rather in part because he was the only one in the office who had not briefed and argued a case before the U.S. Supreme Court.<sup>10</sup> More importantly, the key individuals assigning the case had trust in Bruce Jacob,<sup>11</sup> as they should. The late-Anthony Lewis, author of *Gideon’s Trumpet*, emphasized Jacob’s youth in his book about this case. But years later, on the 40th anniversary of the Court’s decision, Lewis noted:

In *Gideon’s Trumpet* I portrayed Jacob as a young assistant attorney general overmatched by the lawyer appointed by the Supreme Court to argue *Gideon’s* case, Abe Fortas – and indeed

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7. See *infra* notes 20–39 and accompanying text.

8. See, e.g., Jesse Coburn, *Maryland Public Defenders Juggle Heavy Caseloads; Critics Say Indigent Clients Suffer*, BALT. SUN (Aug. 20, 2016), <https://www.baltimoresun.com/news/maryland/investigations/bs-md-public-defender-caseloads-20160819-story.html> (discussing the heavy caseloads caused by underfunding indigent defense); John Yang & Frank Carlson, *Missouri Public Defenders Are Overloaded with Hundreds of Cases While Defendants Wait in Jail*, PULITZER CTR. (May 3, 2018), <https://pulitzercenter.org/reporting/missouri-public-defenders-are-overloaded-hundreds-cases-while-defendants-wait-jail> (noting that “320 public defenders handled 80,000 cases, on average more than 240 cases each”).

9. See *Gideon v. Cochran*, 370 U.S. 908 (1962) (certiorari granted).

10. See Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 217–18 (2003) (memorializing Jacob’s reflections on the *Gideon* case).

11. *Id.* at 220.

he was, in terms of experience. But he was *not* overmatched, I've come belatedly to understand, in dedication or moral understanding.<sup>12</sup>

Bruce Jacob could have removed himself from this case prior to the brief being filed or the oral argument, as he left the Attorney General's Office to join the law firm of Holland, Bevis & Smith.<sup>13</sup> Instead, he received approvals from both his new law firm and the Attorney General's Office to remain as counsel on this case.<sup>14</sup> This admirable quality continued with Jacob throughout his career, as he is a lawyer who finishes each case he begins. Even after his recent retirement from teaching law, he continues to handle pro bono cases.

Representing the State of Florida in this case was not an easy role. For example, only two states joined an amicus brief in support of the position advocated by Jacob.<sup>15</sup> In contrast twenty-three state attorneys general were listed on an amicus brief advocating for the recognition of the Sixth Amendment right to counsel for indigent defendants.<sup>16</sup> This did not deter Jacob, who presented a brilliant

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12. Symposium, *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135, 149 (2004) [hereinafter *Gideon at 40*] (explaining his thoughts on *Gideon* as part of a panel discussion on the 40th anniversary of the decision).

13. The firm today is an international firm named Holland & Knight.

14. Jacob, *supra* note 10, at 225–26.

15. See Amicus Brief for the State of Alabama Presented by its Attorney General, MacDonald Gallion, *Gideon v. Cochran*, 1962 WL 115123 (U.S. Dec. 20, 1962) (No. 155) (joined by North Carolina) (advocating that “[a]ny decision to make mandatory the appointment of counsel for all indigents charged with crime in state courts should come not from this Court but from the people of the individual states acting through their elected legislatures or judges”).

16. See, e.g., Brief for the State Government Amici Curiae, *Gideon v. Cochran*, 1962 WL 75209 (U.S. Nov. 23, 1962) (No. 155). This amicus brief was coordinated by then Attorney General of Minnesota Walter F. Mondale and Massachusetts Attorney General Edward McCormack, Jr. See Bruce A. Green, *Gideon's Amici: Why Do Prosecutors so Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2345 (2013) (discussing how rare it is for prosecutors to take a position of the defense as was done in the *Gideon* case). It is interesting to note that Bruce Jacob was the source to the Attorney General of the pending *Gideon* right to counsel case in the Supreme Court. Even though this notification led to the filing of an amicus brief against his position, it provides additional evidence of his being a “minister of justice” as his motivation was to make certain that states were notified of this important issue being heard by the Court. See ANTHONY LEWIS, *GIDEON'S TRUMPET* 141–42 (1964). Jacob rewrites in response to the late-Anthony Lewis questioning him about notifying other states of the pending *Gideon* case:

We weren't concerned about tactics in this case. The issues in the case were of such enormous importance that tactics and strategies seemed out of place. We just wanted the other states to know what was happening. We wanted them to be aware that the rule could be imposed requiring counsel in all felonies, and

argument to the Court.<sup>17</sup> His argument allowed the Supreme Court to hear both sides of an important issue, providing a basis for a thoughtful and landmark opinion.<sup>18</sup>

It is common for criminal defense lawyers to represent clients who may be charged with heinous crimes such as murder, rape, robbery, or arson. The role of representing the client is not an indication of an acceptance of the client's alleged criminal conduct. Rather, it is an important role to assure that our criminal justice system follows the rule of law, which assures everyone alleged to have committed a crime has their case proven beyond a reasonable doubt with all the rights afforded to them under the Constitution.

In the prosecution world, attorneys representing the state have a different role, one that is adversarial, but also one that has the prosecutor as a "minister of justice." Dean Emeritus Bruce Jacob explained this role in the context of the *Gideon* case when he said:

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.<sup>19</sup>

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misdemeanors, and appeals, and we wanted them to have an opportunity to say what they wanted to about these issues if they so desired.

Conference, *Conference on the 30th Anniversary of the United States Supreme Court's Decision in Gideon v. Wainwright: Gideon and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 AM. U. L. REV. 1, 37 (1993) (responding to a prior interview by the late-Anthony Lewis questioning why Jacob had notified states of the *Gideon* case).

17. See *Gideon v. Wainwright Oral Argument*, OYEZ (Jan. 15, 1963) <https://www.oyez.org/cases/1962/155> (providing the full recording of the oral argument, with the majority of Jacob's argument found in part two of the recording).

18. Anthony Lewis, on the 40th anniversary of *Gideon* stated, "to me Bruce Jacob represents the way a lawyer ought to act and think about such matters." *Gideon at 40*, *supra* note 12, at 149.

19. *A Conversation with Bruce R. Jacob*, THE CHAMPION, June 2012, at 17, 17 (discussing his role as counsel on the 50th anniversary of the *Gideon* case).

### III. NACDL'S CHAMPION OF INDIGENT DEFENSE AWARD

Bruce Jacob was awarded the NACDL *Champion of Indigent Defense Award* in July 2013.<sup>20</sup> His receipt of this award recognized his enormous contribution post-*Gideon* in advocating for public defense counsel to have reasonable caseloads, to act effectively in their representation, and most of all, to exist for those who cannot afford counsel. The *Champion of Indigent Defense Award* “recognizes an individual for exceptional efforts in making positive changes to a local, county, state, or national indigent defense system.”<sup>21</sup>

The *Champion of Indigent Defense Award* was created by the Board of Directors of the NACDL on May 5, 2001.<sup>22</sup> The Board Resolution states that “[a]lthough the outstanding representation of every indigent defendant is one of our goals, this award is intended to recognize efforts toward positive systemic changes through legislation, litigation or other methods and not the outstanding representation of individual clients.”<sup>23</sup> The award recipient is selected, following nominations, by the co-chairs of the NACDL Indigent Defense Committee with the advice of the Indigent Defense Award Subcommittee. Luminaries in the public defense world, like Bruce Jacob, have been recipients of this award.<sup>24</sup> Advocates of Bruce Jacob’s nomination for this award

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20. Ivan J. Dominguez & Isaac Kramer, *Jacob Receives Champion of Indigent Defense Award*, NACDL (July 7, 2013), <https://www.nacdl.org/Champion.aspx?id=30025&terms=bruce+jacob>.

21. *Id.*

22. Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers, *Establishing the Champion of Indigent Defense Award*, NACDL (May 5, 2001), <https://www.nacdl.org/About.aspx?id=19651> [hereinafter NACDL, *Establishing the Champion*]. It was renamed the *Public Defense Award* starting February 20, 2016 after the NACDL “formally abandoned the antiquated nomenclature of ‘indigent defense’” and renamed it to reflect those who work in the area of “public defense.” Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers, *Renaming the Champion of Indigent Defense Award*, NACDL (Feb. 20, 2016), <https://www.nacdl.org/resolutions/2016mw01/>.

23. NACDL, *Establishing the Champion*, *supra* note 22.

24. This award has only been given thirteen times since the first award winner received it in 2001. *Champion of Public Defense Award: About the Award*, NACDL, <https://www.nacdl.org/awards/publicdefensechampion/> (last visited Jan. 21, 2019). Individuals who have received this award include Norman L. Reimer, Executive Director of the National Association of Criminal Defense Lawyers. *Id.* Another recipient was the late-Robert L. Spangenberg, “whose five decade career included unparalleled scholarship and advocacy to improve civil legal services and indigent defense systems in the U.S.” *Remembering Bob Spangenberg*, NAT’L LEGAL AID & DEFENDER ASS’N, <http://www.nlada.org/remembering-bob-spangenberg> (last visited Jan. 28, 2019). Professor

included well-known individuals who had observed him over the years.

One of the voices in his nomination for this award was the late Anthony Lewis, the author of *Gideon's Trumpet*, the inspirational work that brought to the public the fight for indigent counsel for an accused in state court.<sup>25</sup> In contrast to Anthony Lewis portraying Jacob as young and inexperienced in his book, Lewis in 2013 was quick to recognize the important role Dean Jacob played in advancing the right to counsel for indigent defendants.<sup>26</sup> Lewis stated, “[f]rom the moment Bruce Jacob got the assignment, as an assistant attorney general of Florida, to oppose Clarence Earl Gideon’s claim of a constitutional right to counsel, he knew that he really hoped that that right would be established by the Supreme Court. It was.”<sup>27</sup> Lewis then tells how Bruce Jacob changed indigent defense representation. He said, “Bruce Jacob devoted much of his legal life to making that right a reality in courts across the country. It was a noble endeavor, bringing luster to the legal profession and to Bruce Jacob.”<sup>28</sup>

Others, such as Paul M. Rashkind, an attorney in the Office of the Federal Public Defender in the Southern District of Florida wrote that “[f]or those of us who live indigent defense every day, we know he is most deserving.”<sup>29</sup> Rashkind went on to support the nomination of Dean Jacob, stating “I fully support the nomination of Bruce Jacob for NACDL’s Indigent Defense award in this, the year of the 50th anniversary of the Gideon decision.”<sup>30</sup> He reminded everyone of Jacob’s words on the 40th anniversary of the *Gideon* decision. At a program for the Florida Association of Criminal Defense Lawyers, Dean Bruce Jacob, in referencing his representation of the State of Florida in the *Gideon* case, said “that

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Norman Lefstein, former dean at Indiana University School of Law at Indianapolis who has written extensively on the problems in public defender offices throughout the country, including authoring the book *Securing Reasonable Caseloads: Ethics and Law in Indigent Defense* (2011), was a recipient of this award in 2005. *Biography – Norman Lefstein*, IND. U. – ROBERT H. MCKINNEY SCH. OF L., <https://mckinneylaw.iu.edu/faculty-staff/profile.cfm?Id=80> (last visited Jan. 28, 2019).

25. LEWIS, *supra* note 16.

26. *Gideon at 40*, *supra* note 12, at 149.

27. Email from the late-Anthony Lewis to Ellen S. Podgor, *Re: Bruce Jacob* (Oct. 6, 2012) (copy on file with *Stetson Law Review*).

28. *Id.*

29. Letter from Paul M. Rashkind, Supervisory Assistant Public Defender, to Ellen S. Podgor 3 (Nov. 6, 2012) (on file with *Stetson Law Review*).

30. *Id.*

was when I was 26-years old and had a lot of faith in legislatures.”<sup>31</sup> Rashkind noted that Jacob then “chuckled and the audience roared” before Jacob added, “I know now that if the Supreme Court had not ruled as it did, Florida still would not have a public defender system.”<sup>32</sup>

Equally strong factors in Jacob’s receiving this award were his roles in major public defense initiatives, his legal scholarship memorializing the *Gideon* trial, and the educational initiatives that he developed to assist in teaching law students the importance of public defense. Jacob was a major player in the 2009 Report of the National Right to Counsel Committee, a report that covered issues such as the *Indigent Defense Today: A Dire Need for Reform* and *How to Achieve Reform: The Use of Legislation and Commissions to Produce Meaningful Change*.<sup>33</sup> This over two-hundred-page report offered explicit recommendations to improve the public defense system.<sup>34</sup>

Additionally, Bruce Jacob has authored many articles that highlight the importance of the *Gideon* decision and the need to provide value to that decision by properly funding public defense.<sup>35</sup> His modesty is reflected in an article he authored for NACDL’s *Champion Magazine*, titled *Remembering Gideon’s Lawyers*, where he discusses all the attorneys related to the *Gideon* case and omits his own role.<sup>36</sup> He also has been a strong advocate for clinical education, especially in the public defense sphere.<sup>37</sup>

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31. *Id.* at 2.

32. *Id.*

33. THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL chs. 2–3 (2009), <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

34. *Id.* Two past recipients of the *Champion of Indigent Defense Award* served with Jacob in writing this report, Robert L. Spangenberg and Norman Lefstein.

35. *E.g.*, Bruce R. Jacob *The Gideon Trials*, 99 IOWA L. REV. 2059 (2014); Bruce R. Jacob, *50 Years Later: Memories of Gideon v. Wainwright*, 11TH CIRCUIT HIST. NEWS, Fall 2013, at 1; Bruce R. Jacob, *The Post-Gideon Crisis in Indigent Criminal Defense*, NEWSL. C.R. L. SEC. OF THE NAT’L B. ASS’N, July 2013; Bruce R. Jacob, *50 Years Later: Memories of Gideon v. Wainwright*, 87 FLA. B.J., March 2013, at 10; Bruce R. Jacob, *Remembering Gideon’s Lawyers*, THE CHAMPION, June 2012, at 16.

36. Jacob, *Remembering Gideon’s Lawyers*, *supra* note 35, at 16.

37. Professor Bruce Jacob has served as a professor and director of the clinical programs at the Ohio State University College of Law, has worked on a clinical project at both Emory Law School and Harvard Law School, and has been a strong and forceful advocate for clinical education at Stetson University College of Law. While at Emory Law School he started the inmate legal assistance program for prisoners at the Atlanta Penitentiary, called the “Legal Assistance for Inmate’s Program.” As a law student at Harvard, he co-founded the “Prisoner Legal Assistance Program.”

Dean Jacob's work has been recognized by other entities, including The Constitution Project, which honored him along with three other individuals, with its *Champion of Justice Award*.<sup>38</sup> Jacob has also appeared on numerous programs to support funding for public defense.<sup>39</sup>

#### IV. CONCLUSION

So, while it may have seemed odd that the man who represented the State of Florida in *Gideon* is one of the strongest advocates for public defense, the symmetry between these two roles is clear when one considers the man in both roles is Dean Emeritus Bruce Jacob. In many ways he is no different than the criminal defense attorney who represents his client to the fullest, often with little chance of success. Whether one serves as a prosecutor or defense counsel, one serves a legal process that demands effective representation of one's client. Bruce Jacob has clearly achieved that success.

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38. The others who he was honored with were Anthony Lewis (author of *Gideon's Trumpet*); Abe Krash (law partner to Abe Fortas who assisted in writing *Gideon's* brief); Walter Mondale (who as Attorney General of Minnesota organized the writing of the amicus brief in support of *Gideon's* right to counsel). *Constitutional Champion Award*, THE CONSTITUTION PROJECT, <https://constitutionproject.org/about-us/constitutional-champion-award/> (last visited Jan. 2, 2019).

39. See, e.g., Bobby Blanchard, *50th Anniversary of Court Appointed Legal Council Celebrated at Capitol*, KUT (Mar. 18, 2013), <http://www.kut.org/post/50th-anniversary-court-appointed-legal-council-celebrated-capitol> (showing that Bruce Jacob appeared in places like the Texas Legislature to speak about the importance of funding indigent defense).