

The *Gideon* Trials

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I. INTRODUCTION

This Essay is about the trials of Clarence Earl Gideon that took place before and after the decision in *Gideon v Wainwright*.¹ Gideon was convicted of breaking and entering with intent to commit petit larceny in Bay County, Florida. He sought review and won before the United States Supreme Court. The Supreme Court returned his case to Florida where he was acquitted at a second trial.²

Gideon had no counsel at his first trial, but he did have an attorney at the second—Fred Turner, a local criminal defense lawyer and later Circuit Judge. Turner and I met in Panama City, Florida, in 2000, and we formed a friendship that lasted until his death in 2003.³ Turner knew that I planned to write about *Gideon* and we carried on lengthy discussions on the subject. Turner supplied much of the information that forms the basis for this Essay.

A. *THE OFFENSE, ARREST, CHARGE, AND DENIAL OF COUNSEL*

On June 3, 1961, at about 5:30 in the morning, a breaking and entering took place at the Bay Harbor Poolroom, in the small community of Bay Harbor, a few miles east of downtown Panama City, Florida. The intruder had smashed a window in the back of the poolroom and used a large garbage can to climb in through the now open window. Once inside, that person drank a number of beers, and broke into the jukebox and the

1. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. This Essay is about the trials. I have concentrated on the Supreme Court proceedings in Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181 (2003).

3. We corresponded and phoned each other regularly. I personally received eighteen letters from Mr. Turner. I also had copies of six letters he sent others in which he discussed the *Gideon* case. In 2000, Mr. Turner took my wife, Ann, and me to the scene of the breaking and entering of the Bay Harbor Poolroom and gave us a tour of the area. Mr. Turner and I served together in two panel discussions regarding *Gideon*, one at the University of Tampa on April 19, 2001, and the other in Miami on March 18, 2003. We spent time together in Panama City, St. Petersburg, Tampa, and Miami. Turner stayed overnight at the Stetson College of Law. All of our times together were spent in discussing the case. In a letter to me dated November 18, 2002, he wrote: "Our lives are intertwined with this Missouri vagabond, whether we like it or not, so, we are relics, so to speak, of what purports to be a legal watershed and are obligated to repeat to differing audiences our roles in this notable case." Letter from the Honorable W. Fred Turner, Judge of the Fourteenth Judicial Circuit, State of Fla., to author (Nov. 18, 2002) (on file with author). Correspondence ended when Turner passed away in late 2003.

cigarette machine, taking an undetermined amount of cash, all in coins. Some wine was also taken from the premises.

Police arrested Clarence Earl Gideon, who lived in a rooming house across the street from the poolroom, later that morning at a bar in Panama City. He had paid for a number of drinks with change, and had \$25.28 with him, all in change, when arrested.⁴ Prosecutors filed an information against him, charging the offense of breaking and entering of “the Bay Harbor Poolroom, property of Ira Strickland, Jr., lessee, with intent to commit a misdemeanor within said building, to wit, petit larceny”⁵ He was arraigned on July 31 without counsel and pled not guilty. The trial was set for August 4.⁶

The three main participants in both of Gideon’s trials were Gideon, Judge Robert McCrary, and William Harris, the Assistant State Attorney. The next Subparts look more closely at each of these participants.

B. CLARENCE EARL GIDEON

Clarence Earl Gideon was born in Hannibal, Missouri, on August 30, 1910. His father died when he was three, and he was raised by his mother and stepfather.⁷ He had an eighth grade education.⁸ At fourteen, he ran away from home to California, but returned to Hannibal one year later.⁹

At fifteen, he broke into a country store and stole some clothing. Police arrested Gideon the next day when the store owner saw him wearing the stolen clothes.¹⁰ Gideon was convicted as a juvenile and sent to a reformatory to serve a three-year sentence.¹¹ He was paroled after one year.¹²

Gideon got a job in a shoe factory and married his first wife. They lived together for a year.¹³ At eighteen, his adult criminal record began. In November 1928, he received a ten-year sentence in the state penitentiary in

4. Transcript of Record at 22, 89, 91, *State v. Gideon* (Aug. 5, 1963) [hereinafter *Second Trial Transcript*].

5. This is taken from the information in the Circuit Court file in the case. Circuit Court File, *Gideon v. Cochran* (No. C-1371). At that time, in Florida, the dividing line between grand larceny and petit larceny was \$50. In Gideon’s case, the amount taken from the juke box and cigarette machine was unknown, and that was probably why the charge was for “petit” rather than grand larceny. The requisite amount to elevate a charge from petit larceny to grand larceny was increased by the Legislature a couple of years later.

6. This information is taken from the record before the United States Supreme Court in *Gideon*. Transcript of Record at 2, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155) [hereinafter *Sup. Ct. Record*]. The first trial proceedings, including the transcript of testimony, can be found in this document.

7. ANTHONY LEWIS, *GIDEON’S TRUMPET* 65–66 (Vintage ed. 1966).

8. *Id.* at 66.

9. *Id.*

10. *Id.* at 67.

11. *Id.*

12. *Id.*

13. *Id.*

Missouri for the crimes of burglary, larceny, and robbery.¹⁴ This apparently ended the marriage. He was released on parole early in 1932, when he was twenty-two years old.¹⁵

His next conviction as an adult took place later in 1934, in a Missouri federal court.¹⁶ He and his accomplices planned to rob a bank and wanted machine guns to commit the crime. They broke into a United States armory, stole machine guns and put them in the back seat of their old-fashioned touring car, which had open sides. The car got stuck in the mud, and a deputy sheriff stopped to help them.¹⁷ The officer saw the clearly visible machine guns and placed Gideon and friends under arrest.¹⁸ Gideon was convicted and sentenced to two three-year sentences for possession of government property.¹⁹ He was granted conditional release in 1937.²⁰

Gideon's next trial came in 1939 when he was charged under the Missouri second-offender habitual criminal statute for burglary and larceny. Gideon was sentenced to ten years for the burglary and five for the larceny, the sentences to run concurrently. He escaped from prison in 1943, but was apprehended in 1944. The burglary and larceny sentences were commuted, but he was given ten years for the crime of escape.²¹

Gideon left prison in about 1950 and married again, but the couple separated in 1951.²² He was arrested in 1951 in Texas for the crime of burglary in the nighttime, receiving a sentence of two years.²³ He was released after serving thirteen months.²⁴ Later in 1953, Gideon was diagnosed with tuberculosis. Gideon received eighteen months of treatment for that illness in a hospital in New Orleans. He left the hospital in 1954.²⁵

In 1955, he married a third time, and he and his wife moved to Orange, Texas,²⁶ where they bought a pool hall and beer parlor called "Smitty's Bar." At the time of the poolroom break-in in 1961, Gideon was using "Smitty" as an alias.²⁷ After six months in Orange, he left his wife and they divorced.²⁸

14. *Id.*

15. *Id.*

16. Pre-Sentence Investigation Report at 2, Gideon v. Cochran (1961) (No. C-1371).

17. Interviews with W. Fred Turner, Sr., in Panama City, Fla. (Sept. 14-15, 2000).

18. *Id.*

19. Pre-Sentence Investigation Report, *supra* note 16, at 2.

20. *Id.*

21. *Id.*

22. LEWIS, *supra* note 7, at 68.

23. Pre-Sentence Investigation Report, *supra* note 16, at 2.

24. LEWIS, *supra* note 7, at 68.

25. *Id.*

26. *Id.* at 68-69.

27. Criminal Registration Form, Panama City Police Department (Aug. 4, 1961) (provided to me by Fred Turner); *see also* Greg May, *Clarence Gideon: A Lasting Mark on the Law*, THE NEWS HERALD, Mar. 18, 1988, at 1A.

28. LEWIS, *supra* note 7, at 69.

Later in 1955, in Texas, he married his fourth wife, Ruth Ada Carpenter Babineaux.²⁹ She was his spouse at the time of the Bay Harbor break-in.³⁰ She already had three children of her own, and she and Gideon soon had another two.³¹ In 1957, the couple and their five children moved to Panama City. Their sixth child was born in 1959.³² In December 1959, Gideon entered the W.T. Edwards Tuberculosis Hospital in Tallahassee, and spent about eight months there receiving further treatment for his illness.³³

In August or September 1960, Gideon became a cook on a barge for Delta Construction Company, of Baton Rouge, Louisiana.³⁴ However, he was laid off in January 1961 when the Health Department learned that he had tuberculosis.³⁵ After being laid off, Gideon returned to Panama City and attempted to make a living by “running” gambling games.³⁶ However, during 1961, Gideon was often unemployed.³⁷ Gideon was unable to support his wife and children,³⁸ and his wife sued him for divorce and child support.³⁹

Throughout the majority of Gideon’s adult life, he was in jail or prison, in a hospital, or unemployed, and therefore unable to support a family.⁴⁰ By the summer of 1961, he had spent one year in a juvenile correctional institution and approximately eighteen years in adult prisons. When Gideon was not in prison, he was often out on parole, and had spent about two-and-a-half years in hospitals for treatment of tuberculosis. Gideon rarely saw his children. In August 2003, Fred Turner and two of Gideon’s sons met at a ceremony in Panama City commemorating the *Gideon* decision, held at the Bay County Court House. They said to Turner, “We hardly knew our father, he was at one time known [by us] as ‘Uncle Earl’ and we were raised in foster homes.”⁴¹

At the time of the break-in, Gideon was about five feet, eleven inches tall and weighed 140 pounds, with gray hair and false teeth.⁴² He was an

29. Pre-Sentence Investigation Report, *supra* note 16, at 3.

30. *Id.*

31. *Id.*

32. LEWIS, *supra* note 7, at 70.

33. See Pre-Sentence Investigation Report, *supra* note 16, at 4; Second Trial Transcript, *supra* note 4, at 118.

34. Second Trial Transcript, *supra* note 4, at 117–18, 122.

35. See *id.* at 122.

36. LEWIS, *supra* note 7, at 74–75; Second Trial Transcript, *supra* note 4, at 120.

37. Interview with W. Fred Turner, in St. Petersburg, Fla. (Apr. 20, 2001).

38. Pre-Sentence Investigation Report, *supra* note 16, at 4–5.

39. Interviews with W. Fred Turner, *supra* note 17; see also May, *supra* note 27; Pre-Sentence Investigation Report, *supra* note 16, at 3.

40. *Id.*

41. Letter from W. Fred Turner to author (Aug. 11, 2003) (on file with author).

42. May, *supra* note 27.

alcoholic.⁴³ In the 1980 movie, *Gideon's Trumpet*, “Henry Fonda played Gideon as a crotchety recluse,” but those who knew Gideon said that he actually was the opposite.⁴⁴ Fred Turner said, “He would talk your ear off. He was very personable, very outgoing and loquacious.”⁴⁵ He was “likeable, friendly, and talkative, unlike the quiet loner portrayed by Fonda,” according to prosecutor William Harris.⁴⁶

C. JUDGE MCCRARY

At the time of Gideon’s first trial, Judge McCrary was forty-five years old.⁴⁷ He was a heavysset man of average height. Those who knew him said that when McCrary was on the bench “he was all business.”⁴⁸ He “followed the law.”⁴⁹ He was a “very good judge, calm and thoughtful.”⁵⁰ He was slow to anger, but kept order and did not tolerate any disturbances in his courtroom.⁵¹ McCrary never took it personally if a witness, lawyer, or spectator misbehaved.⁵² Fred Turner was not as complimentary as others in describing McCrary. He told me that McCrary had been a Lieutenant Colonel in the Field Artillery who “looked straight ahead, with blinders.”⁵³

When he was off the bench, McCrary was a “people person.”⁵⁴ He was a good friend, jovial, and good-natured. Everyone agreed that he was kind.⁵⁵ He would make a point to speak with everyone in the courthouse, including secretaries and janitors.⁵⁶ Judge McCrary was a “fine person,” a “class act,” according to a secretary at the Bay County Courthouse who knew him for many years.⁵⁷ He was well-respected.⁵⁸ If he told you something, “you could count on his word.”⁵⁹

43. Interview with W. Fred Turner, *supra* note 37; see also Pre-Sentence Investigation Report, *supra* note 16, at 4–5.

44. May, *supra* note 27, at 2A.

45. *Id.*

46. *Gideon Brought New Order to Court*, ORLANDO SENTINEL, Mar. 21, 1988, at B3 [hereinafter ORLANDO SENTINEL].

47. May, *supra* note 27, at 1A.

48. Telephone Interview with Jackie Wise, former Secretary to Virgil Mayo, first Pub. Defender for the Fourteenth Circuit of Fla. (Mar. 25, 2013).

49. *Id.*

50. Telephone Interview with Franklin Harrison, Attorney, in Panama City, Fla. (June 3, 2013).

51. Telephone Interview with Jackie Wise, *supra* note 48.

52. *Id.*

53. Interview with the Honorable W. Fred Turner, Circuit Court Judge, Fourteenth Jud. Court of Fla., in St. Petersburg, Fla. (Apr. 17, 2001). Though I can only speculate as to what Turner meant by this expression, he likely meant that military officers have to make quick decisions and are not likely to second guess their choices. Military officers “with blinders” are not likely to deviate from those decisions, once made.

54. Telephone Interview with Jackie Wise, *supra* note 48.

55. Interview with W. Fred Turner, *supra* note 17.

56. Telephone Interview with Jackie Wise, *supra* note 48.

57. *Id.*

D. WILLIAM HARRIS

William Harris was the Assistant State Attorney who prosecuted in both Gideon trials. Harris was a tall, large, muscular-looking man.⁶⁰ He was a very capable trial lawyer,⁶¹ and had a “presence” in the courtroom.⁶² Lawyers who worked with or otherwise knew Mr. Harris described him as “quick,” and said he could be “funny” in court.⁶³ Mr. Harris’s colleagues considered him “old school, rough, tough, a fine lawyer.”⁶⁴ He was extremely “plain spoken,”⁶⁵ and always spoke his mind. He has been described as “gruff on the outside,” but “with a heart of gold” and a “great sense of fairness.”⁶⁶ “Everyone liked him,” according to a fellow lawyer.⁶⁷

II. DENIAL OF COUNSEL: GIDEON’S FIRST TRIAL

Gideon’s first trial was scheduled for August 4, 1961. At the outset of that trial, the following colloquy took place:

The Court: The next case on the Docket is the case of the State of Florida, Plaintiff vs. Clarence Earl Gideon, Defendant. What says the State, are you ready to go to trial?

Mr. Harris: The State is ready, your honor.

The Court: What says the Defendant? Are you ready to go to trial in this case?

The Defendant: I am not ready, your honor. . . .

The Court: Why aren’t you ready?

The Defendant: I have no Counsel.

The Court: Why do you not have Counsel? Did you not know that your case was set for trial today?

The Defendant: Yes, sir. I knew that it was set for trial today.

The Court: Why, then, did you not secure Counsel and be prepared to go to trial? . . .

The Defendant: Your Honor, I said: I request this Court to appoint Counsel to represent me in this trial.

The Court: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the law of the State of Florida, the only time the Court can appoint counsel to represent a

58. *Id.*

59. *Id.*

60. Telephone interview with Franklin Harrison, *supra* note 50.

61. Telephone interview with James White, Attorney, in Panama City, Fla. (June 3, 2013).

62. Telephone Interview with Franklin Harrison, *supra* note 50.

63. Telephone interview with James White, *supra* note 61.

64. *Id.*

65. *Id.*

66. Telephone Interview with Franklin Harrison, *supra* note 50.

67. *Id.*

Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel.

The Court: (Addressing the Reporter) Let the record show that the Defendant has asked the Court to appoint Counsel to represent him in this trial and the Court denied the request, and informed the Defendant that the only time the Court could appoint Counsel to represent a Defendant was in cases where the Defendant was charged with a capital offense. The Defendant stated to the Court that the United States Supreme Court said he was entitled to it. (Addressing the Defendant) Are you now ready to go to trial?

The Defendant: Yes, sir.⁶⁸

A. *FLAWS DEMONSTRATED IN THE OPENING COLLOQUY*

Gideon's request for a lawyer was not the first time a court had addressed whether indigent criminal defendants were entitled to counsel. The decision in *Betts v. Brady*, which was the law of the land in 1961, was that the Constitution did not require the appointment of counsel in every state non-capital felony case involving an indigent defendant.⁶⁹ *Betts* did provide, however, that counsel should be appointed whenever one or more special circumstances were present which would make it difficult for a defendant to receive a fair trial without the assistance of counsel.⁷⁰ "Specialized circumstances" included such factors as the seriousness or complexity of the case,⁷¹ extreme youth or lack of experience,⁷² lack of education,⁷³ unfamiliarity with court procedure,⁷⁴ or inability to understand the English language.⁷⁵

The rule was different in federal courts. In 1938, the United States Supreme Court in *Johnson v. Zerbst* held that the Sixth Amendment, which applied in federal but not state courts, imposed a flat rule that counsel must be appointed for indigent defendants in federal criminal proceedings.⁷⁶ In the colloquy with Judge McCrary, Gideon seemed certain that he was

68. Transcript of Record at 8–10; *Florida v. Gibson*, 135 So. 2d 746 (1962) (No. 155).

69. *Betts v. Brady*, 316 U.S. 455, 473 (1942).

70. *Id.* at 462, 471–72.

71. *See, e.g.*, *Chewing v. Cunningham*, 368 U.S. 443, 445, 447 (1962).

72. *See, e.g.*, *Uveges v. Pennsylvania*, 335 U.S. 437, 441–43 (1948).

73. *See, e.g., id.* at 441.

74. *See, e.g.*, *McNeal v. Culver*, 365 U.S. 109, 114 (1961); *Wade v. Mayo*, 334 U.S. 672, 683 (1948).

75. *See, e.g.*, *Marino v. Ragen*, 332 U.S. 561, 564 (1947).

76. *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

entitled to counsel.⁷⁷ However, he was wrong. *Brady* governed in state courts; there was no automatic right to counsel for an indigent defendant in a state non-capital criminal case.⁷⁸

Why did Gideon misunderstand this? One reason might be that, because he had previously been convicted in federal court and served time in federal prison, he was likely familiar with the decision in *Johnson v. Zerbst*. He may have thought that the *Zerbst* decision and the federal court practice of appointing counsel applied in all courts—state as well as federal. Furthermore, he previously had been tried and convicted in a Missouri state court, and unlike Florida, the Missouri statute required appointment of counsel in felony cases.⁷⁹

Gideon was not the only person to state the law incorrectly. In his comments during the colloquy, Judge McCrary was also wrong. Judge McCrary said that a defendant was entitled to appointment of counsel only in a capital case.⁸⁰ It is true that counsel was required in capital cases, but *Betts v. Brady* also required a state judge to appoint counsel in a non-capital felony case if one or more special circumstances were present in the case.⁸¹ To comply with *Betts*, McCrary should have conducted an inquiry to determine whether one or more special circumstances were present in Gideon's case. If the judge had held such an inquiry, he would have learned that, while Gideon was fifty years old, had previous experience in the criminal courts, and seemed to be of at least average intelligence, Gideon was an unemployed alcoholic who did not have the ability to care for himself or his family. This, arguably, could have been considered a special circumstance entitling Gideon to counsel under *Betts*. The court minutes show that at arraignment “[Gideon] was questioned by the Court concerning his understanding of the charge filed against him and of his rights under the law.”⁸² Was this the kind of inquiry required by *Betts*? Probably not, because Judge McCrary routinely did not conduct an inquiry specifically to determine whether special circumstances existed in involving unrepresented defendants.⁸³ One of the criminal trial lawyers in the circuit at the time thought that McCrary may have asked questions to determine Gideon's competence. Even if Judge McCrary had questioned Gideon in an effort to determine whether Gideon was intellectually capable of trying the case, that

77. Transcript of Record, *supra* note 68, at 9.

78. See *Betts v. Brady*, 316 U.S. 455, 461–62 (1942).

79. MO. ANN. STAT. § 545.820 (West 1987).

80. Transcript of Record at 9, *Florida v. Gideon*, 135 So. 2d 746 (1962) (No. 155).

81. *Betts*, 316 U.S. at 462.

82. Sup. Ct. Record, *supra* note 6, at 3.

83. Interview with W. Fred Turner, *supra* note 17. Also, I spoke with Turner and Virgil Q. Mayo, two trial lawyers who practiced before McCrary at that time, on September 14 and 15, 2000, while I was in Panama City for a dinner meeting of the St. Andrew Bay American Inn of Court. Mayo became the Public Defender for that Circuit in 1963.

questioning would not have fulfilled *Betts's* requirements. Another area lawyer said flatly that no *Betts*-type inquiry took place.⁸⁴

Every judge has the inherent power to appoint counsel in any case in his or her court, and members of the bar are required to accept those appointments, without compensation, as part of the privilege of practicing law.⁸⁵ McCrary therefore had the authority to appoint counsel even in the absence of any special circumstance. Why didn't McCrary appoint counsel for Gideon? Probably because there were only two experienced criminal trial lawyers in that circuit: Fred Turner and Virgil Mayo.⁸⁶ They rode the circuit, along with circuit judges, trying virtually all of the felonies in which defendants had demanded trials.⁸⁷ If Judge McCrary or either of the other circuit judges in the Fourteenth Circuit had attempted to provide free legal help, they practically had only these two experienced trial lawyers to choose from, and no funds to pay a lawyer they might appoint, except in capital cases.⁸⁸ There were very few lawyers who would have been available for appointment in 1961 in Bay County, a county with a population of 67,131 people and an estimated annual number of felonies at about 1652.⁸⁹ As many as ninety percent of criminal defendants are indigent.⁹⁰ With this volume of crime and few lawyers available for appointment, circuit judges working in Bay County would have had difficulty fulfilling the requirements of *Betts*.

84. Mayo was the first of these two lawyers mentioned and Turner was the second. I had conversations with each of them on September 14, 2000. Also, conversations with Turner on September 15, 2000, and April 17, 2001, in which we discussed this question. Turner didn't think McCrary knew about *Betts*, or if he did, he said, in the April 17, 2001, conversation, it was a "vague idea somewhere in the back of his mind." Mayo, on September 14, 2000, was not sure whether McCrary knew about the *Betts* decision and doubted that he conducted a *Betts*-type inquiry. However, in a telephone conversation with Mayo on December 9, 2002, he thought that McCrary might have asked questions of Gideon to determine whether he was competent.

85. WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 29–30 (1955).

86. Letter from Virgil Q. Mayo, Retired Pub. Defender for the Fourteenth Judicial Circuit of Fla., to Paula Saunders, Chair of the Gideon 50th Anniversary Seminar Planning Comm., Fla. Ass'n of Criminal Def. Lawyers.

87. Telephone Interview with Jackie Wise, *supra* note 48.

88. At that time, lawyers appointed for a defendant in a capital case were paid only \$100. In non-capital cases there was no fee. Telephone Interview with Virgil Q. Mayo (Dec. 9, 2002).

89. The population figures as taken from the 1960 census. U.S. BUREAU OF THE CENSUS, *FLORIDA POPULATION OF COUNTIES BY DECENNIAL CENSUS: 1900 TO 1990* (Richard L. Forstall ed., 1995). In 1961, the number of violent and property crimes per 100,000 people was 2461.13, or about 1652 for an area with a population of 67,131. *Florida Crime Rates 1960-2012*, FED. BUREAU OF INVESTIGATION, www.disastercenter.com/crime/flcrime.htm (last visited May 25, 2014).

90. See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 *LAW & CONTEMP. PROBS.* 31, 31 (1995).

B. JURY SELECTION AND OPENING STATEMENTS

After Harris had examined the prospective jurors, he accepted the panel. Judge McCrary then said to the jurors, “Gentlemen, since this Defendant is not represented by Counsel, I want to ask you some questions on his behalf.”⁹¹ McCrary asked the following:

Q. . . . Will you give [Gideon] the same fair trial, and consideration, since he is not represented by Counsel, that you would if he were represented by Counsel?”

A. Yes, sir.

Q. . . . I presume you have no bias for or prejudice against him?

A. No, sir.

Q. Will each of you pay close attention to the testimony as you hear it from that witness stand and, if, after you have heard all of the testimony, there is a doubt in your mind that this Defendant is not guilty of the crime . . . will you give him the benefit of that doubt and acquit him?

A. Yes, sir.

Q. You will be fair to him as well as fair to the State in rendering your verdict in this case?

A. Yes, sir.

The Court: That’s all the questions I have. Now, Mr. Gideon, look these six Gentleman over and if you don’t want them to sit as a Jury to try your case, just point out the one, or more, all six of them if you want to, and the Court will excuse them and we will call another, or some others, to try your case. You don’t have to have a reason, just look them over and if you don’t like their looks that’s all it takes to get them excused, just point out any one, two, three, four, five or all six of them if you want to and the Court will excuse them.

The Defendant: They suit me alright, your Honor.

The Court: You are willing for these six men to try your case?

The Defendant: Yes, sir.⁹²

The defendant was not told that if he wished, he also could ask questions.⁹³ Gideon did not ask any questions of the prospective jurors.

Next came the State’s opening statement. Judge McCrary then provided Gideon the opportunity to make an opening statement:

The Court: Mr. Gideon, would you like to tell the Jury what you expect the evidence in your behalf to show?

The Defendant: Yes, your Honor, I would like to.

91. Sup. Ct. Record, *supra* note 6, at 10.

92. *Id.* at 10–11.

93. *Id.*

The Court: Alright, you may do so at this time. Just walk right around there . . . and tell them what you expect the evidence to show in your favor

At this point the Defendant walked around the Counsel Table and stood facing the Jury and told them what he expected the evidence on his behalf to show.⁹⁴

The opening statements and closing arguments were not recorded by the court reporter. It was the practice at that time for the court reporter to not record opening or closing arguments unless specifically requested to do so by the attorneys. Gideon must not have been aware of this.⁹⁵

C. IRA STRICKLAND'S TESTIMONY

The first of the State's two witnesses was Ira Strickland, Jr., the proprietor of the Bay Harbor Poolroom. He testified that the poolroom had been locked the evening before the break-in.⁹⁶ The next morning, when he arrived at 8:00 A.M., the police showed him that someone had entered through the broken window in the back of the building. The cigarette machine and "juke" box had been broken into and coins taken from each, although there was no way of determining exactly how much had been stolen. The intruder had also drunk some beer and some wine was missing.⁹⁷

Gideon conducted a cross examination of Strickland. However, the answers to some of Gideon's cross-examination questions were more helpful to the prosecution than to the defense. He asked Strickland how the rear window was broken, even though Strickland did not testify on direct examination that the rear window had been broken.⁹⁸ Gideon asked whether the window had been "broken from the inside or the outside," to which the witness answered, "I assume that it was broken from the outside."⁹⁹

Gideon also asked whether Strickland ever left the building unlocked. Strickland answered "yes." Gideon then asked whether Strickland ever left it unlocked "over night." Strickland answered "no."¹⁰⁰ Gideon continued by

94. *Id.* at 11.

95. In a letter from Fred Turner, he said, "[A]rgument of counsel (or in this case, Gideon, himself) were not taken or transcribed unless specifically requested and a \$10 fee was assessed for transcription. Defense counsel usually requested argument to be taken and transcribed when they anticipated inflammatory argument from the prosecution." Letter from Fred Turner, Gideon's Attorney at his Second Trial, to author (Oct. 15, 2002) (on file with author).

96. Transcript of Record, *supra* note 67, at 12.

97. *Id.* at 12-13. Strickland also testified at the second trial on what was missing. Second Trial Transcript, *supra* note 4, at 68, 75-77.

98. Transcript of Record, *supra* note 67, at 14.

99. *Id.* at 15.

100. *Id.*

asking whether the building was ever left open. At this point, Judge McCrary interrupted, saying “I don’t think that has any bearing on this case. The testimony here is that the building was securely locked on the night of this entrance”¹⁰¹ This ended the questioning on the subject.

Gideon then elicited the following testimony regarding Strickland’s knowledge of what had been taken from the poolroom:

Q. Do you know positively what merchandise was removed from the building?

A. No, sir, I don’t. I do know there was some Wine and Beer taken out, but I can’t tell you exactly how much

Q. I wish you would tell this Court and Jury just what this person took out of the building.

A. I can’t tell them exactly what was taken out. I don’t know.¹⁰²

Here the defendant showed some anger. He asked, “What do you mean by ‘I don’t know,’ you have said that certain things were taken out, or removed from the building. Now, will you tell the Court and Jury just exactly what was taken out, how much of each item was taken”

Judge McCrary then cut off further questioning along those lines:

The Court: This witness has testified that he did not know how much Wine or Beer was taken. He has also stated that he had no way of knowing how much money was in the “Juke” Box and Cigarette Machine, because they were both automatic machines and he had no way of knowing. Do you want to ask him any more questions?

The Defendant: No, sir, that’s all.¹⁰³

Ira Strickland was then dismissed and the state called its next witness, Henry Cook.

D. HENRY COOK’S TESTIMONY

The second and final state witness was Henry Cook. He testified that at approximately 5:30 A.M. the morning of the crime, he arrived in Bay Harbor after having been at an all-night dance in Apalachicola.¹⁰⁴ Mr. Cook’s friends dropped him off near the Bay Harbor Poolroom. From the sidewalk in front of the poolroom, he recognized Clarence Gideon¹⁰⁵ inside the darkened poolroom standing by the cigarette machine.¹⁰⁶ He testified

101. *Id.*

102. *Id.* at 16.

103. *Id.* at 16. At the second trial, Strickland said he did not know how much money had been taken but that some had been taken. Second Trial Transcript, *supra* note 4, at 27, 74. He thought that four bottles of wine were missing. *Id.* at 77.

104. Sup. Ct. Record, *supra* note 6, at 17, 19.

105. *Id.* at 17.

106. *Id.*

that he could see Gideon walk toward the rear of the poolroom, leave through the back door, and walk north up the alley to the phone booth at the “corner.”¹⁰⁷ Cook walked north along the sidewalk, watching Gideon walk up the alley through gaps in the buildings. Gideon had a bottle of wine.¹⁰⁸ Gideon acted “kinder drunk,” based on the way he walked.¹⁰⁹ Gideon’s pockets “bulged.”¹¹⁰ Cook, now at the corner, saw Gideon make a phone call from a telephone booth.¹¹¹ A few minutes later, Cook watched as a taxi arrived and Gideon got into the cab.¹¹²

Cook returned to the poolroom. He saw that the cigarette machine was “open” and “stuff” was on the pool table.¹¹³ Cook testified on direct:

A. . . . I seen ‘stuff’ laying on the pool table there, stuff that he had pulled out of the machine, I suppose, the money box was laying on the pool table and the Cigarette Machine was all torn up, the face and all was lying there on the table with the money box.¹¹⁴

Gideon’s cross examination merely reinforced Cook’s direct examination testimony. For example:

Q. Was it dark or daylight?

A. It was dark enough that I had to put my head up to the window to see you—but I seen you.¹¹⁵

Here is another example:

Q. When was the next time you seen me?

A. When I saw you walk up and get in the Cab.

Q. Didn’t you just get through saying you saw me come out the back door of the Pool Room?

A. You said the ‘next time’—I first saw you through the window, in the Pool Room, standing up by the Cigarette Machine—the next time I saw you then was when you come out the back door and walked up to the corner and called a Cab—and the next time I saw you was when you walked up and got in the Cab.¹¹⁶

...

Q. You said I was carrying something—what was I carrying?

A. A pint of Wine

...

107. *Id.* at 17, 20.

108. *Id.* at 17.

109. *Id.* at 21.

110. *Id.* at 18.

111. *Id.* at 17.

112. *Id.* at 18.

113. *Id.*

114. *Id.*

115. *Id.* at 19–20.

116. *Id.* at 20.

Q. Do you know positively that I was carrying a pint of wine?

A. Yes, I know you was.

Q. How do you know that?

A. Because I seen it in your hand.¹¹⁷

After Cook's testimony, the state rested and Gideon began his defense.

E. DEFENSE EVIDENCE

Gideon then had the opportunity to call witnesses for his defense. Gideon first called the cab driver, Preston Bray. Gideon asked him:

Q. Was it anything out of the ordinary for me to call you [early in the morning]?

A. No, sir, you called me all the time.

Q. That morning did I have any Wine, Beer, Whiskey or any other intoxicating drinks on me, or with me?

A. No, sir, not that I could see.¹¹⁸

...

Q. Would you say I was intoxicated that morning?

A. No, sir, I wouldn't.¹¹⁹

On cross examination, Harris asked Bray what kind of money he had used to pay the cab fare and the tip, and Bray responded that Gideon paid the fare (\$1.00) and the tip (\$0.50) in quarters.¹²⁰ Other evidence showed that, when arrested, Gideon had been drinking at a bar in Panama City where he had paid for all his drinks in change and still had the \$25.28 in change with him.

Gideon also called Irene Rhodes, who was a better witness for the State than for Gideon. She testified that she was sitting on the front porch of the boarding house where she lived across the street from the telephone booth.¹²¹ Gideon asked her:

Q. When you first saw me where was I?

A. When you came out of the Alley and walked over to call a taxi.¹²²

...

Q. All you saw me do was emerge from the Alley, go to the Telephone Booth and call a Cab and go away, right?

A. [S]hortly after you went in the Telephone Booth a Cab came and you got in it and left¹²³

117. *Id.*

118. *Id.* at 26.

119. *Id.* at 27.

120. *Id.*

121. *Id.* at 29.

122. *Id.* at 30.

On cross examination, Harris asked Rhodes whether she had gone across the street to the phone booth. She responded that she had.¹²⁴ Here are questions by Harris and Rhodes's answers:

Q. Mrs. Rhodes, did you go over to the Telephone Booth . . . ?

...

A. Yes.

...

Q. He had put that Wine down there and you went over there and got it didn't you?

A. Yes.

Q. You saw him when he put it there didn't you?

A. It was there, I saw it there, and I picked it up.

Q. You knew he put it there and you went over there and got it?

A. Yes, I went over there and got it.¹²⁵

Gideon, in further questioning, asked her whether she had gotten any wine from the booth. She said that she had.¹²⁶ Then,

Q. Was it inside or outside the booth?

A. Outside.

Q. Was it a bottle of Wine?

A. Yes (measuring on finger), there was about this much in the bottle. [The bottle was only partly full.]

...

Q. Would you say that was my Wine?

A. I don't know whose it was.¹²⁷

With this testimony, Rhodes contradicted her earlier response to Harris that she had seen Gideon set the wine down by the phone booth.

Mr. Harris questioned her a final time:

Q. You didn't see this man put the Wine down there?

A. No, I didn't.

Q. Had you seen it there before he got to the phone booth?

A. I had no reason to go down to the phone booth, truthfully. I went down there to ask him if the Bar¹²⁸ was open, truthfully . . .

123. *Id.* at 31.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 32. Her last response contradicted her earlier testimony that Gideon had put the wine bottle down at the booth after he emerged from the alley. She was now obviously trying to help Gideon.

128. *Id.* It is not clear whether the "Bar" she refers to was the Bay Harbor Bar, next door to the Bay Harbor Poolroom, or the Bay Harbor Poolroom, both of which served alcoholic beverages.

and my Landlord . . . was sick and I saw this bottle of wine . . . and I picked it up and carried it and gave it [to] him.¹²⁹

In this line of questioning, Rhodes was avoiding having to say that Gideon brought the wine bottle with him as he walked to the telephone booth.

Early in his questioning of Ms. Rhodes, Gideon had asked her:

Q. The night before this crime was committed, early the next morning you and I had been drinking hadn't we?

A. Well, now, I don't know about that. I might have been in the Bar.

Q. Did you, or did you not, buy me Beer that night?

A. A drink?

Q. Yes.

A. I probably did, if you needed one.¹³⁰

The fact that she and Gideon had been drinking together earlier that evening helps explain her comment above that she had gone to the phone booth "to ask . . . if the Bar was open . . ." ¹³¹ She probably meant that she saw Gideon with the wine bottle, saw him set it down and get into the phone booth, and then crossed the street to ask him if the Bay Harbor Bar, next to the poolroom, was open. While she was crossing the street, though, the taxi came and drove off with Gideon in it, before she could ask the question.

In response to Gideon's questioning, Rhodes also said that Henry Cook had walked up to her porch. Gideon then elicited the following:

Q. Walked up to your porch?

A. Yes.

Q. Did he leave down there before I left the Telephone Booth?

A. Yes. He left and called the "Cops."¹³²

The defense also called Mrs. Velva Estelle Morris. Ms. Morris owned the Bay Harbor Hotel, the rooming house across the street from the poolroom where Gideon was living at the time. She testified that he had gone to bed on the night in question, and that Gideon sometimes used the public telephone across the street on the corner to make phone calls so as not to wake those sleeping at the hotel.¹³³

Ms. Morris also testified about Gideon's drinking habits, saying:

129. *Id.* Fred Turner told me in a conversation that she drank the remaining wine herself. Interviews with W. Fred Turner, *supra* note 17. She did not take it to her sick landlord. Henry Cook testified that she drank the remaining wine. Second Trial Transcript, *supra* note 4, at 46.

130. Sup. Ct. Record, *supra* note 6, at 29.

131. *Id.* at 32.

132. *Id.* at 30.

133. *Id.* at 39.

Q. Mrs. Morris, during the time I lived at the hotel did you ever know of me being out drunk?

A. No.

...

Q. Did you ever hear of me getting drunk?

A. No.¹³⁴

Gideon's contention, based on his questions, appeared to be that he had walked to the phone booth directly from his rooming house, not from the poolroom, and that he had not been carrying the wine bottle.

Judge McCrary explained to Gideon that he could testify on his own behalf if he wished, but that he was not required to take the stand. Gideon decided not to testify. This ended the testimony in Gideon's first trial.

Judge McCrary then advised him that he could argue his case to the jury and Gideon did so. The court reporter noted that he spoke for approximately eleven minutes. Then Mr. Harris argued his side of the case for nine minutes. Judge McCrary did not provide Gideon an opportunity to rebut the State's closing argument.

Following closing arguments, Judge McCrary read instructions to the jury. They included standard instructions such as those on reasonable doubt, the presumption of innocence, and the fact that the decision by the defendant to not testify on his own behalf should not be held against him. The judge did not instruct them that they could find Gideon guilty of any lesser offense.¹³⁵ Gideon was not told that he could request instructions.¹³⁶

Shortly after they began deliberations, the jurors reached a verdict of guilty. The court set sentencing for a later date.

III. ANALYSIS OF ERRORS AND OMISSIONS AT GIDEON'S FIRST TRIAL

Various players in Gideon's first trial made errors that potentially affected the outcome of Gideon's trial. Gideon himself and Judge McCrary made the most notable errors.

A. MISTAKES AND OMISSIONS BY GIDEON ACTING AS HIS OWN LAWYER

Gideon made a variety of mistakes that a trained lawyer would have avoided. Gideon's witnesses should have been state witnesses. In fact, originally, the State had listed them as state witnesses on the charging instrument. All of his witnesses, except Ms. Velva Morris, his landlady, were more helpful to the prosecution than to Gideon—and she sounded like a friend who was oblivious to his drinking problem and was merely saying what he wanted her to say.

134. *Id.* at 40.

135. *Id.* at 140–41.

136. LEWIS, *supra* note 7, at 62.

Gideon tried to show, through cross-examination of Henry Cook and direct examination of the taxi driver, that he had not been carrying a wine bottle as he emerged from the alley. However, he called Irene Rhodes, who verified on cross examination, though reluctantly, that Gideon was carrying a half-empty wine bottle as he emerged from the alley behind the poolroom and got into the phone booth. Rhodes corroborated Henry Cook's testimony that Gideon had the bottle of wine. She later contradicted that testimony, but she did corroborate Cook's testimony that Gideon emerged from the alley, and that there was a wine bottle next to the phone booth at the time Gideon phoned the taxi. Overall, Rhodes's testimony was more helpful to the State than it was to the defense.

In addition to asking questions that harmed his case, Gideon asked many questions that accomplished little other than to reinforce and strengthen the State's case against him. For instance, he elicited a response from Henry Cook that summarized and reinforced the whole theory of the case for the State.¹³⁷

Because he was not legally trained, Gideon would not have known that Florida allowed intoxication as a defense to specific intent crimes.¹³⁸ Breaking and entering with intent to commit petit larceny is such a crime, in that intent beyond the intent to break and enter is required to establish guilt. The requirement that an offender have the intent to commit petit larceny in addition to the intent to break and enter makes the crime a specific intent offense. A trained lawyer could have used this defense to show that Gideon was intoxicated, and although he may have been capable of forming the general intent to break and to enter, he was not capable of forming the specific intent to commit the crime of petit larceny once inside the poolroom.

B. ACTIONS JUDGE MCCRARY COULD HAVE TAKEN TO INSURE A FAIR TRIAL

In the days before *Gideon*, when an indigent defendant went to trial without counsel, the prevailing presumption, as far as members of the legal profession were concerned, was that the judge would bend over backwards to help the defendant.¹³⁹ Of course, looking back, we, as a profession, realize that for a trial judge to engage in such measures to protect a defendant was wholly inconsistent with the concept of an adversary system. For our system to function properly, judges must be neutral arbiters between competing parties. Before *Gideon*, we, as a profession, were deluding ourselves in thinking that the trial judge "looked out for the defendant's

137. See *supra* text accompanying notes 102–05.

138. The Florida Legislature has abolished this defense, but it was available the years before 1999. See *Travaglia v. State*, 864 So. 2d 1221, 1223 (Fla. Dist. Ct. App. 2004).

139. See Judge McCrary's remarks in Bently Orrick, *Gideon Wanted Lawyer and High Court Agreed: Court Ordered States to Provide Counsel 25 Years Ago*, TAMPA TRIB., Mar. 18, 1988, at 10A.

interests,”¹⁴⁰ and that therefore, a defendant could receive fair treatment even if he had no counsel.

Judge McCrary was aware of this unwritten assumption. Twenty-five years later, a newspaper reporter who interviewed McCrary said this: “[McCrary] thought the justice system had worked just fine before Gideon won his [Supreme Court] case. ‘They kind of had the judge for their lawyer, looking out for them, and it mostly worked out the same [as it would if they had counsel],’ McCrary said.”¹⁴¹ However, McCrary largely failed to follow this practice in Clarence Gideon’s first trial.

McCrary himself asked a few questions of the prospective jurors.¹⁴² However, he did not ask Gideon if he wished to question them, and Gideon, therefore, was denied that important right. McCrary cut off Gideon’s questioning on two occasions.¹⁴³ The first was when Gideon began asking Ira Strickland if the poolroom was ever left unlocked at night.¹⁴⁴ One of Gideon’s defenses was that he had walked through an “open” (he may have meant “unlocked”) door into the poolroom, and therefore could not be guilty of “breaking,” which was more serious than merely “entering without breaking” or committing petit larceny.¹⁴⁵ However, the judge terminated this line of inquiry by saying “I don’t think that this has any bearing on this case.”¹⁴⁶ However, it did have a bearing on one of Gideon’s defenses. McCrary’s blundering put an end to that inquiry, and therefore that defense. Of course, even if the door had been unlocked, if Gideon had pushed the door open to permit entry that would have been sufficient to constitute a “breaking.”¹⁴⁷ The damage McCrary caused by preventing Gideon from questioning witnesses on relevant information increased when McCrary then neglected to allow Gideon to offer a rebuttal closing argument.¹⁴⁸

140. This is my own opinion. I think that those of us in the legal profession were deluding ourselves.

141. Orrick, *supra* note 139, at 10A.

142. Sup. Ct. Record, *supra* note 6, at 10.

143. *Id.* at 15, 41–42.

144. *Id.* at 15.

145. Breaking and entering of a building other than a dwelling carried a possible penalty of fifteen years in prison. FLA. STAT. § 810.02 (1963). Entering without breaking carried a possible maximum penalty of five years. *Id.* at § 810.03. Petty Larceny was punishable “by imprisonment in the county jail not exceeding [six] months.” *Id.* at § 811.021(3). Petty Larceny was the taking of property valued at less than \$100. *Id.* In those days, judges had a great deal of flexibility in deciding what sentence to impose, and, based upon my experience as an Assistant Attorney General, in the Criminal Appeals Section of the Florida Attorney General’s Office from 1960 to 1962, judges imposed lighter sentences if a “breaking” was not involved. A breaking made the offense more serious.

146. Sup. Ct. Record, *supra* note 6, at 15.

147. See *Capetta v. State*, 162 So. 2d 309 (1964).

148. Sup. Ct. Record, *supra* note 6, at 41–42 (moving directly from State’s closing argument to jury instructions).

Furthermore, McCrary, who was legally trained and must have realized that intoxication was a defense under Florida law, should have instructed the jury regarding that defense. He should have told the jurors that if they found that Gideon broke into and entered the poolroom but was intoxicated at the time, they could find that he was not guilty as charged, but possibly was guilty of a lesser offense, and described those possible lesser included offenses.¹⁴⁹

From this transcript, it is clear that Judge McCrary did not make a sufficient effort to insure that Clarence Gideon, an unrepresented defendant, would receive the same fair trial as a defendant represented by an effective lawyer. If McCrary's conduct during the trial is representative of the kind of treatment being provided by trial judges on behalf of unrepresented defendants in the thirteen states that were not automatically providing counsel to all indigent defendants in non-capital felony cases in 1961, the assumption by members of the legal profession that judges would bend over backwards on behalf of an unrepresented defendant was more myth than reality.

IV. THE ROAD TO THE SUPREME COURT

Following Gideon's first trial, his case progressed through several stages as it made its way up to the Supreme Court.

A. THE PRE-SENTENCE REPORT

Following Gideon's conviction, Perry Wells, a Probation and Parole Supervisor in Bay County,¹⁵⁰ conducted a pre-sentence investigation report to assist Judge McCrary in deciding what sentence to impose. Fred Turner, Gideon's lawyer at the second trial, later became a Circuit Judge in Bay County. He had access to court records and during the three-year period while the two of us often discussed the Gideon case, he sent me a copy of the "Pre-Sentence Investigation" report. There is a lot of information in the report, and the most interesting part reads as follows:

The Defendant admits taking the items from the poolroom after finding the back door open, which he claims the operator, Mr. Strickland, does quite frequently after becoming intoxicated himself. The Defendant claims that he has been framed with the breaking and entering charge with a penalty of five years when actually he is only guilty of a misdemeanor, that being petit larceny.¹⁵¹

149. One lesser included offense would have been entering without breaking. FLA. STAT. § 810.03 (1961). Another would have been petit larceny.

150. Letter from Fred Turner to author (Sept. 29, 2003) (on file with author).

151. Pre-Sentence Investigation Report, *supra* note 16, at 1. In Anthony Lewis' book, *Gideon's Trumpet*, the reader draws the conclusion that Gideon was not involved in this crime,

The authors of the report also said: “[D]efendant admits being under the influence of intoxicants at the time of the offense. . . . [T]he man had been drinking practically all day and was in all probability in an intoxicated condition.”¹⁵²

Judge McCrary had this report when he sentenced Gideon on August 25, 1961. The report included Gideon’s past criminal history. McCrary imposed the maximum sentence—five years.

B. POST-CONVICTION PROCEEDINGS

Gideon was committed to the Florida State Prison at Raiford.¹⁵³ He did not pursue a direct appeal. From 1960 to 1962, I worked as an Assistant Attorney General of Florida, handling criminal appeals and post-conviction cases for the State of Florida. In my experience, before *Douglas v. California*,¹⁵⁴ a convicted indigent defendant had no right to appointed counsel for a direct appeal from a conviction, so most defendants did not take direct appeals. Instead, in Florida, the convicted defendant would file a habeas corpus petition either in the circuit where the prison was located or directly in the Florida Supreme Court. Gideon filed a petition in the Florida Supreme Court, and it was summarily denied.¹⁵⁵ Although he claimed that he had not been provided the right to counsel, he failed to allege the presence of one or more special circumstances, as required by *Betts v. Brady*.¹⁵⁶

Gideon then filed a petition for writ of certiorari in the United States Supreme Court, and the petition was granted. The Supreme Court directed the lawyers in the case, among the other issues, to brief and argue the question of whether *Betts v. Brady* should be “reconsidered.”¹⁵⁷ Gideon won in the landmark case of *Gideon v. Wainwright*, decided on March 18, 1963, in which the Supreme Court overruled *Betts v. Brady* and held that every indigent defendant in a non-capital felony case is entitled to the appointment of counsel for his defense.¹⁵⁸ The case was remanded to Florida, for further proceedings.¹⁵⁹

but based on the two trial transcripts and this Pre-Sentence Investigation report, without doubt he did commit the crime even though he was found not guilty at the second trial. There is nothing in *Gideon’s Trumpet* that suggests that Lewis had access to the report.

152. *Id.*

153. Males convicted of felonies in Florida in 1961 were committed to the Florida State Prison at Raiford, near Starke, Florida. That is where Gideon was confined following his conviction.

154. *Douglas v. California*, 372 U.S. 353 (1963).

155. *Gideon v. Cochran*, 135 So. 2d 746 (Fla. 1961).

156. *See generally* *Betts v. Brady*, 316 U.S. 455 (1942). This is likely why the Florida Supreme Court denied the petition. *Gideon v. Cochran*, 135 So. 2d 746 (Fla. 1961).

157. *Gideon v. Cochran*, 370 U.S. 908 (1962).

158. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

159. *Id.* at 345.

V. GIDEON'S SECOND TRIAL

Soon after the Supreme Court decision, Abe Fortas, who had been appointed counsel for Gideon at the Supreme Court, wrote Gideon, letting him know that he should obtain a Florida lawyer to represent him in further Florida court proceedings.¹⁶⁰ Gideon wrote to the Florida Civil Liberties Union on April 9, asking for representation.¹⁶¹ Tobias Simon of Miami responded on April 15, informing Gideon that the Florida Civil Liberties Union would represent him. Gideon wrote back, thanking Simon, on April 29.¹⁶²

In early May, Tobias Simon visited Clarence Gideon in prison. He talked with Gideon for an hour and a half. Gideon said he should not be retried because a second trial would constitute double jeopardy.¹⁶³ Of course he was wrong. Like many constitutional rights, a person can waive the protection against double jeopardy, and by seeking to set aside his conviction through a petition for habeas corpus in the Florida Supreme Court and a petition for certiorari in the Supreme Court of the United States, Gideon waived this constitutional protection.¹⁶⁴

Approximately 1200 prisoners in Florida were set free as a result of *Gideon* because witnesses had died or moved away, but this was not true with respect to Gideon himself because the witnesses in his case were available to testify.¹⁶⁵ On June 13, Gideon was transferred to the Bay County Jail, and McCrary set the second trial for July 5.¹⁶⁶

On July 4, 1963, Tobias Simon and Irwin J. Block, also a Miami attorney, traveled to Panama City. They interviewed witnesses and saw Gideon at the jail, but Gideon refused to proceed with Simon and Block as counsel. He insisted that the court had no power to try him.¹⁶⁷

160. LEWIS, *supra* note 7, at 223.

161. *Id.* at 224.

162. *Id.* at 224-25. While housed in prison and jail waiting for the new trial, "he kept screaming, 'Double jeopardy! Double jeopardy! They can't try me twice for the same crime.'" *See May, supra* note 27, at 2A. Tobias Simon, now deceased, was one of the truly great civil rights lawyers in the history of Florida. Why Gideon did not want him as his attorney is difficult to understand. I can only speculate but what may have happened is that Simon told him during their meeting at Raiford that double jeopardy was not available as a defense and this frankness by Simon alienated Gideon.

163. *May, supra* note 27, at 2A; *see also* LEWIS, *supra* note 7, at 225.

164. Many rights under the Constitution may be waived. *Singer v. United States*, 380 U.S. 24, 24-26 (1965). Where a defendant appeals from the conviction and obtains a reversal of a conviction based upon the trial court's error, the Double Jeopardy Clause does not bar a retrial, as long as the reversal was not based on insufficiency of the evidence. *Boyd v. Meachum*, 77 F.3d 60, 63 (2d Cir. 1996); *People v. Gargani*, 863 N.E.2d 762, 769-70 (Ill. App. Ct. 2007).

165. Letter from the Honorable W. Fred Turner, Circuit Judge, Fourteenth Judicial Circuit of Fla., to Keith Bjornson (Mar. 19, 1984) (Turner gave me a copy).

166. LEWIS, *supra* note 7, at 225.

167. *May, supra* note 27, at 2A; LEWIS, *supra* note 7, at 224.

The next day, Simon, Block, Gideon, and the prosecutors met in Judge McCrary's office. Judge McCrary stated that Simon had signed papers and was defense counsel in the case. Gideon responded, "I didn't authorize Mr. Simon to sign anything for me . . . I'll do my own signing. I do not want him to represent me."¹⁶⁸ Gideon asked for a postponement of the trial.¹⁶⁹ McCrary asked him who he wanted to be his lawyer and Gideon asked for Fred Turner. He may have heard Turner's name from other inmates at the state penitentiary at Raiford,¹⁷⁰ and Turner had an excellent reputation in Bay County as a trial lawyer.¹⁷¹ Also, Turner had represented Gideon's wife, so Gideon knew first hand that Turner was a good lawyer. McCrary agreed to appoint Turner.¹⁷²

Judge McCrary told Gideon to ask Turner to file any motions Gideon might wish to have considered. Gideon replied, "I want to file my own motions."¹⁷³ He pulled out typewritten single-spaced motions based on two grounds: one was that a retrial would violate the Constitution's guarantee against Double Jeopardy, and the other was that the two-year statute of limitation had passed.¹⁷⁴ Both arguments were meritless. The Double Jeopardy argument was not available, for the reason already given, and the statute of limitation only requires that the charges against a defendant be filed within the statutory period, not that a defendant must be *tried* within that time period. McCrary, however, granted Gideon's request to have his motion considered,¹⁷⁵ saying he later would rule on that motion. He set the trial date for August 5, and set bail at \$1000, which was more than Gideon could raise.¹⁷⁶

After this meeting, Judge McCrary walked into the hallway and "crooked a finger" at Fred Turner, who was there to handle a divorce.¹⁷⁷ Here is Turner's description of what next took place:

I said, "what can I do for you?" He said, "I just appointed you to represent Gideon." I said, "The hell you say." I didn't even know he was there.¹⁷⁸

168. LEWIS, *supra* note 7, at 225.

169. *Id.*

170. May, *supra* note 27, at 2A.

171. Virgil Q. Mayo was the other. Mayo told me that Turner had the reputation of being the best criminal defense lawyer in Bay County. Mayo was being modest. Telephone Interview with Virgil Mayo, *supra* note 88. He also was considered to be an excellent criminal defense attorney.

172. May, *supra* note 27, at 2A.

173. LEWIS, *supra* note 7, at 226.

174. *Id.* at 227.

175. Woody Wisner, *Clarence Gideon Acquitted in "Defense Appeal" Trial*, PANAMA CITY NEWS, Aug. 6, 1963, at 1.

176. LEWIS, *supra* note 7, at 227.

177. Interview with W. Fred Turner, *supra* note 17; Interview with W. Fred Turner, *supra* note 37.

A. W. FRED TURNER

I met Fred Turner at an Inn of Court meeting at Panama City Beach in 2000.¹⁷⁹ He was six feet tall, slender, weighing about 162 pounds and, in appearance, reminded me of the famous dancer and movie star, Fred Astaire. I said this to Fred Gerde, the lawyer sitting next to me, and he replied, “It’s strange that you say that because he’s a dancer.” What he meant was that, in court, Turner literally “danced,” while moving around the courtroom. A newspaper photo of him trying a case before a jury showed him whirling around with his coattails flapping behind him.¹⁸⁰

Winton Frederick Turner, Jr. was born in 1922 in Millville, Florida, a working class community adjacent to and on the west side of the community of Bay Harbor. He graduated from Bay High School in 1940, and enlisted in the Army Air Corps. He was commissioned in 1942, and was a staff officer in the 308th Bomber Group (H) from 1942–45. He was stationed from 1943–45 in Kunming, China.¹⁸¹

Turner took great pride in the period he spent in the United States Army Air Corps during the Second World War. He was an officer with the legendary “Flying Tigers,”¹⁸² flying on planes between India and China over the Himalaya Mountains, or the “Hump,” to provide supplies to the Chinese who had retreated to the western part of China in their war against the Japanese. Had he been shot down by the Japanese and captured, he probably would have been executed. He met his wife, Helen Jetlone Wood, in Chambria, India, in 1945, when she was working as an Army nurse.

After the war, Turner attended the University of Florida and received his J.D. from the University of Florida Law School in 1948. Turner was an outstanding criminal defense lawyer for years before being elected Circuit Judge in 1979. He was reelected in 1985 and retired in 1991.¹⁸³ When I knew him, he was a retired Circuit Judge and was approximately eighty years old. Here is what he said regarding his appointment to represent Clarence Gideon:

I realized that I would not be paid for representing Mr. Gideon, of course, but as an officer of the Court, I had learned in law school that lawyers are sometimes called upon by Judges to represent clients who have no money to hire their own lawyer. I had been

178. May, *supra* note 27, at 1A.

179. Interview with W. Fred Turner, *supra* note 37.

180. LEWIS, *supra* note 7, at 229 (noting Turner’s resemblance Fred Astaire).

181. Letter from the Honorable W. Fred Turner, Circuit Judge, Fourteenth Jud. Circuit of Fla. (Apr. 14, 2001) (on file with author).

182. Turner was on the Board of Governors of the “Flying Tigers” of the 14th Air Force Association, Inc. See Letter from the Honorable Fred Turner, Circuit Judge, Fourteenth Jud. Circuit of Fla., to the Honorable Judith Kaye, Assoc. Judge, New York Court of Appeals (Oct. 3, 1990) (on file with author).

183. Letter from the Honorable W. Fred Turner, *supra* note 181.

appointed by both State and Federal Judges to represent clients before.¹⁸⁴

Gideon had not been supporting his family. By the time of the second trial, his divorce was final.¹⁸⁵ When Turner was appointed to represent Gideon, one of the first things Turner did was make sure that Gideon really wanted him as his lawyer in light of Turner's representation of Gideon's wife and children in the divorce and support action against Gideon. Gideon readily agreed.¹⁸⁶ Turner extracted a promise from Gideon that, if acquitted, he would get a job and begin providing financial support to his family.¹⁸⁷

B. PREPARATION FOR TRIAL

Turner recalled that during his early meetings in the jail with Gideon, Gideon was angry and upset that he had to be retried. He told Turner that when the Supreme Court ruled in his favor, he thought that he would immediately be released from custody, not that he would be retried.¹⁸⁸ He also told Turner that he was tired of prison and just "could not do more time."¹⁸⁹ Turner said: "Clarence Earl Gideon just wanted out of prison, pure and simple. He was not motivated by being an historical figure . . . He was tired of prison and he wanted to get out."¹⁹⁰ Gideon wanted a change of venue. He said he could not get a fair trial in Bay County, and wanted the case moved to Tallahassee or Pensacola.¹⁹¹ Turner said that he had grown up in Panama City and knew almost everyone in that entire area. He said, "Do you really want me to try the case in Tallahassee, or Pensacola, before a jury none of whom knows me, or before a jury where three out of four know me and I will know them?"¹⁹² Gideon withdrew his request.

Gideon had with him a "valise" of motions that he wanted to be filed in the case.¹⁹³ Turner told him, "I'll only represent you if you stop trying to be the lawyer."¹⁹⁴ Gideon agreed to put away his proposed motions. However, on July 30, Turner filed a motion to quash, which raised several issues including Gideon's double jeopardy argument. William Harris filed a

184. Letter from the Honorable W. Fred Turner to Keith Bjornson, *supra* note 165.

185. *See* May, *supra* note 27, at 2A.

186. Interview with W. Fred Turner, *supra* note 17.

187. *Id.*

188. *Id.*

189. *Id.*

190. May, *supra* note 27, at 1A.

191. Interview with W. Fred Turner, *supra* note 37.

192. Interview with W. Fred Turner, *supra* note 17; Interview with W. Fred Turner, *supra* note 53.

193. Interview with W. Fred Turner, *supra* note 17.

194. Interview with W. Fred Turner, *supra* note 53.

response on August 1, and the motion was denied that same day without oral argument.¹⁹⁵

The key witness against Gideon was, again, Henry Cook. Turner had represented Cook in a past criminal case, in a criminal case that was eventually nolle prossed.¹⁹⁶ Turner asked Gideon if the fact that Turner had represented the key witness against Gideon bothered him and Gideon said no.¹⁹⁷ In a large city with many criminal defense lawyers available, perhaps Turner would have been required to refuse the case due to a conflict of interest. Perhaps Turner should have gotten permission from Cook before taking Gideon as his client. However, McCrary only had two highly qualified criminal trial lawyers to choose from, and Gideon had asked for Turner. The relevant Florida ethics rule at the time stated:

6. Adverse Influence and Conflicting Interests.—

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.¹⁹⁸

I doubt that there was any violation of this rule when Turner remained in this case despite his having represented Cook in the past. First, Cook was no longer his client. Also, Turner was not arguing, under the language of the above ethics rule, “for that which duty to another client require[d] him to oppose.”¹⁹⁹ Cook was not a party in Gideon’s case. I believe that the rule contemplates conflicting financial, property, or other tangible interests that need protection. It is doubtful that protecting a former client from embarrassment is the kind of interest the rule was designed to protect.

Even if Turner had asked to withdraw after having been appointed by the court, it is unlikely that McCrary would have granted that request. The facts that the Supreme Court required the court to appoint counsel, that Gideon requested Turner, and that the number of possible experienced criminal trial attorneys in that circuit to choose from was so limited would have led McCrary to deny such a request.

195. The other grounds for the motion were failure to state a crime and violation of due process. Circuit Court File, *supra* note 5, at 61–71.

196. Interview with W. Fred Turner, *supra* note 17.

197. *Id.*

198. FLA. CODE OF ETHICS R. B(6) (1992).

199. *Id.*

Turner conducted a thorough investigation. He spoke with the witnesses from the first trial. One was J.D. Henderson, the owner of the grocery store where the phone booth was located.²⁰⁰ He also “picked pears with [Henry] Cook’s mother” in her backyard, in an effort to learn more about the State’s key witness.²⁰¹

He also spoke with Irene Rhodes.²⁰² Rhodes told Turner that she did not know that Gideon had the wine bottle with him and had set it down on the ground next to the telephone booth.²⁰³ Turner thought Rhodes was lying.²⁰⁴ He also realized that she was lying when she testified at the earlier trial that she had picked up the bottle at the phone booth and given it to her landlord.²⁰⁵ She was an alcoholic and said that her husband would divorce her if he knew that she drank that wine.²⁰⁶ She asked Turner to not call her as a witness because she did not want her husband to know that she had been “off the wagon.” Though Turner said he needed someone to testify that Gideon did not have beer, wine, or Cokes with him that morning, he decided to not call her.²⁰⁷

William Harris offered a plea bargain offering a sentence of time served in exchange for Gideon’s guilty plea. Turner advised his client to take the proposed deal, but Gideon insisted on going to trial.²⁰⁸

Turner wrote to Judge McCrary on July 12, asking to postpone the trial until August 26, 1963. On July 18, by letter, McCrary denied the request because he had a large number of cases on his docket.

Judge McCrary then demonstrated that he had no real understanding of the Supreme Court’s decision in *Gideon v Wainwright*, saying: “I believe it would be best to try this case as planned. At the time this case was set for trial, your [c]lient, Clarence Earl Gideon, stated that this date was agreeable to him.”²⁰⁹ The Supreme Court noted that a defendant needs “the guiding hand of counsel at every” stage of a proceeding, and that indigent defendants should not be bound by decisions they make before the

200. In 1964, in a program called “Gideon’s Trumpet: The Poor Man and the Law,” as part of the *CBS Reports* television series, Fred Turner was shown interviewing J.D. Henderson, as part of the reenactment of his investigation of the case.

201. LEWIS, *supra* note 7, at 238.

202. Interview with W. Fred Turner, *supra* note 17.

203. *Id.*

204. *Id.*

205. *Id.*

206. Second Trial Transcript, *supra* note 4, at 114, 120–21, 123.

207. Interviews with W. Fred Turner, *supra* note 17.

208. ORLANDO SENTINEL, *supra* note 46.

209. Letter from Robert L. McCrary, Jr., Judge, Fourteenth Jud. Circuit of Fla., to the Honorable W. Fred Turner, Circuit Judge, Fourteenth Jud. Circuit of Fla. (July 18, 1963) (on file with author).

appointment of counsel.²¹⁰ McCrary gave Turner less than a month to prepare.

This trial took place as scheduled on August 5, 1963, almost exactly two years after the first trial. This time, the State Attorney Frank Adams was present. However, the prosecution was almost entirely in the hands of Assistant State Attorney William Harris. The second trial took longer than the first, lasting a full day.²¹¹ The transcript of the second trial covers 141 pages, while the transcript of the first is only fifty-nine pages in length.

The court reporter did not record the jury selection process. However, we know that Fred Turner used peremptory challenges to exclude two of the final prospective jurors. One of these jurors was a “teetotaler” who would have been unsympathetic to a drinker like Gideon. The other, Turner told me, “would convict his own grandmother.”²¹² His attitude, according to Turner, was that Gideon wouldn’t have been arrested if he wasn’t guilty.²¹³ Turner accepted the two replacements, both of whom he knew. Turner said that of the final six jurors, three were gamblers.²¹⁴ This was helpful because testimony would show that Gideon was a gambler,²¹⁵ and Turner would argue that the coins Gideon had when arrested were derived from gambling.

Turner waived opening statement.²¹⁶ One reason Turner declined to give an opening statement may be that he was not sure how his theory of the case would develop until all the evidence was in and he could tie together all the elements of his case in closing argument. By keeping his theory a secret, Turner outsmarted the prosecution. He did not disclose his theory until closing argument, when it was too late for the State to offer rebuttal testimony.

The testimony in the second trial was similar to the testimony during the earlier trial. However, it was more detailed and thorough, because lawyers represented both parties.

C. HENRY COOK’S TESTIMONY

The State’s main witness was again Henry Cook. He again testified that he had been at a dance in Apalachicola with friends, traveling there and back in an “old model Chevrolet.”²¹⁷ His friends dropped him across the street from the Bay Harbor Pool Room at about 6:00 A.M. He testified that he did not want to go home because he was afraid that his parents would

210. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

211. Second Trial Transcript, *supra* note 4.

212. Interview with W. Fred Turner, *supra* note 53.

213. *Id.*

214. *Id.*

215. Second Trial Transcript, *supra* note 4, at 114, 120–23.

216. *Id.* at 2.

217. *Id.* at 13–14.

“get on” him about coming home after drinking.²¹⁸ The poolroom opened at 7:00 A.M., and Cook decided to “hang around” until then.²¹⁹

While on the sidewalk in front of the poolroom, he looked through the window and saw Clarence Gideon, who he had known for about six months, through the glass.²²⁰ Gideon was about eight feet away, standing by the cigarette machine.²²¹ Cook saw that the front of the cigarette machine had been removed.²²² Gideon walked toward the rear of the poolroom and left through the back door.²²³ Cook then walked along the sidewalk in front of the poolroom, watching Gideon through gaps between buildings as Gideon walked through the alley towards the telephone booth at the north corner of the half block.²²⁴ Gideon’s pants “bulged out,” presumably from the stolen coins.²²⁵ Gideon was carrying a pint bottle of wine.²²⁶ Gideon set the wine bottle down when he arrived at the telephone booth.²²⁷ After the taxi picked up Gideon, Cook went across the street toward the porch where Irene Rhodes had been sitting. She had walked across the street to pick up Gideon’s half-empty wine bottle. Cook waited for her to return and spoke with her.²²⁸ He confirmed that they had in fact seen Clarence Gideon.²²⁹ Cook did not phone the police.²³⁰ Instead, he returned to the poolroom. He again looked through the front window and saw the cigarette machine with its front removed and empty beer cans on the counter.²³¹ He saw money bags on a pool table.²³² Within ten minutes, police arrived and Cook spoke with them in front of the poolroom,²³³ telling them what he had seen.²³⁴ It is possible that no one had notified the police, and that the police just arrived on regular patrol.²³⁵ Fred Turner told me, forty years later, that he did not think Cook was a credible witness. Turner thought Cook was lying when he

218. *Id.* at 13.

219. *Id.* at 16.

220. *Id.* at 2–3, 10.

221. *Id.* at 18, 45.

222. *Id.* at 27.

223. *Id.* at 9.

224. *Id.* at 34.

225. *Id.* at 25.

226. *Id.* at 34, 115; Sup. Ct. Record, *supra* note 6, at 17–18, 20.

227. Second Trial Transcript, *supra* note 4, at 34, 56.

228. *Id.* at 46.

229. *Id.* at 31. Rhodes testified at the first trial that she had been drinking with Gideon the evening before. She obviously knew Gideon.

230. *Id.* at 31.

231. *Id.* at 34–35. Ira Strickland also testified that there were empty beer cans in the poolroom. *Id.* at 79.

232. *Id.* at 4–5, 27–29; Sup. Ct. Record, *supra* note 6, at 18.

233. Interviews with W. Fred Turner, *supra* note 17.

234. Second Trial Transcript, *supra* note 4, at 31–32.

235. Interviews with W. Fred Turner, *supra* note 17.

said he could see Gideon leaving the poolroom by the back door.²³⁶ Turner alleged that Cook's line of sight was such that he could not have seen the back door through the window from his position on the sidewalk.²³⁷

On cross examination, Turner poked holes in Cook's testimony. He questioned whether Cook could see through the window of the poolroom well enough to correctly identify Gideon inside. At 6:00 A.M. it must still have been dark. There were signs in the window that would have blocked Cook's view to some extent, and the bottom part of the window was painted, leaving only a small window area through which Cook could have recognized Gideon.²³⁸ Cook was sure it was Gideon,²³⁹ but Turner's questioning may have raised doubt in the minds of the jurors.

D. THE IMPEACHMENT OF COOK

Turner's impeachment of Henry Cook was a dramatic and significant accomplishment. Cook's testimony was most critical to the State's case, but Turner impeached and discredited him, leaving jurors free to disbelieve and disregard his testimony.

Turner knew that Cook had pled guilty to and been convicted of joyriding, before he had been Turner's client. Turner apparently thought that this conviction was for an adult felony. However, as it turned out, it was for a juvenile offense. Joyriding is a felony if committed by an adult.²⁴⁰ But, if the charge and conviction are for juvenile delinquency, the offense is not a felony, and is in fact not even a crime; it is a civil offense.²⁴¹

The impeachment began with this question by Turner and answer from Cook:

Q. Have you ever been convicted of a felony?

A. I stoled [sic] a car one time and got put on probation for it.

Q. . . . The last time you testified in this case you denied that didn't you?²⁴²

At the first trial, when Gideon cross-examined Cook, the following exchange took place:

236. *Id.*; Second Trial Transcript, *supra* note 4, at 5, 7–9, 21.

237. Interview with W. Fred Turner, *supra* note 17; Second Trial Transcript, *supra* note 4, at 18–19, 89.

238. Second Trial Transcript, *supra* note 4, at 18.

239. *Id.* at 32.

240. FLA. STAT. §§ 811.20, 811.21 (1961).

241. *See, e.g., In re Gault*, 387 U.S. 1, 23 (1967); *In re Poff*, 135 F. Supp. 224 (D.C. Cir. 1955); *People v. Anthony R. (In re Anthony R.)*, 201 Cal. Rptr. 299 (Cal. Ct. App. 1984); *Ex parte Jones*, 93 P.2d 185 (Cal. Dist. Ct. App. 1939); *State ex rel. Cook*, 145 So. 2d 627 (La. Ct. App. 1962); *Ex parte Brown*, 233 P. 1098 (Okla. Crim. App. 1925); *Commonwealth v. Lash*, 30 A.2d 609 (Pa. Super. Ct. 1943); *State ex rel. Hinkle v. Skeen*, 75 S.E.2d 223 (W. Va. 1953); *Ogden v. State*, 156 N.W. 476 (Wis. 1916).

242. Second Trial Transcript, *supra* note 4, at 35–36.

Q: Have you ever been convicted of a felony?

A: No, sir, never have.²⁴³

This answer during the first trial was accurate. He had been convicted of juvenile delinquency, not a felony. His answer at the second trial was incorrect, for the same reason. Turner attempted to further pursue the line of questioning.²⁴⁴ Argument between counsel took place and McCrary ordered the jurors out of the room.

If he had known his witness's background, Harris could have argued to the court that Cook had not been convicted of a felony, and that therefore, the court should allow Cook to change his answer. However, Harris instead argued that, to impeach Cook, Turner needed to have a certified copy of the conviction.²⁴⁵ Harris argued, in addition, that the questioning on this issue should end with Turner's question and Cook's affirmative answer.²⁴⁶

Another of the State's arguments, this time by State Attorney Frank Adams, was that Cook had not lied because Cook had pled guilty and been placed on probation, and this did not amount to a "conviction."²⁴⁷ This obviously was wrong, and Turner pointed this out by saying that a conviction is a conviction whether based on a jury verdict or a plea of guilty.²⁴⁸

The debate was largely about the distinction between impeaching a witness based upon a prior conviction and impeachment based on a prior inconsistent statement. If the former, a certified copy of the conviction might be required and questioning might be limited. But if the latter, Turner argued, the inconsistency affected the witness's credibility and Turner should be allowed to continue the line of questioning without producing evidence of the prior conviction. Turner merely wanted to be allowed to ask further questions in order to show the jury that Cook was not credible.²⁴⁹ Turner said:

How far I can go in proving his criminal record is absolutely true, but I am abandoning trying to prove any further criminality on the part of this witness, but I am simply attacking his credibility because he testified under oath at a prior trial contrary to what he is testifying to here today, and I think the Jury has got a right to know that, its [sic] testing his credibility, it goes purely to that.²⁵⁰

243. Sup. Ct. Record, *supra* note 6, at 19.

244. Second Trial Transcript, *supra* note 4, at 36-37.

245. *Id.* at 38.

246. *Id.* at 40.

247. *Id.* at 40-41.

248. *Id.* at 41.

249. *Id.*

250. *Id.*

After more debate, Judge McCrary said to Turner, “I think you can proceed, if you will proceed properly to show a prior inconsistent statement.”²⁵¹

The jury was brought back into the courtroom. Turner asked:

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.

Q. Where, and when, was that done?

Mr. HARRIS: Now, if the Court please, I object to any further questioning along that line.

THE COURT: I think he can go further. Go ahead and ask the question, Mr. Turner.

BY MR. TURNER:

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

A. Right here, the last time he was tried, two years ago.

Q. By “he” you said “the last time he was tried, [“] you mean the last time this Defendant, Clarence Earl Gideon was tried?

A. That’s right.²⁵²

Turner impeached and discredited Cook on the basis of his prior inconsistent statement, even though Cook was not lying or knowingly being inconsistent. Cook’s testimony at the first trial was accurate. As a layperson, he could not be expected to know that being convicted of juvenile delinquency is not the same thing as being convicted of a felony.

Later, while Cook was still on the stand, Harris tried to minimize the damage caused by Turner’s impeachment:

BY MR. HARRIS:

Q. What did you mean when you said you had not been convicted of a felony, and yet, you say you plead guilty to stealing an automobile?

A. Well, I didn’t quite understand what a felony was then.

MR. TURNER: I object to this, and move to strike it.

THE COURT: Motion will be denied.²⁵³

Turner asked for argument on the motion. The jurors were removed from the courtroom. Turner argued, essentially, that ignorance of the law is no excuse—that Cook was charged with knowing the law and should not be allowed to now qualify his earlier answer by saying that he didn’t understand what a “felony” was.²⁵⁴ McCrary ruled against Turner on his motion.²⁵⁵

251. *Id.* at 42.

252. *Id.* at 43–44.

253. *Id.* at 48–49.

254. *Id.* at 49–54.

The jurors were brought back into the courtroom. Harris was allowed to continue:

Q. Mr. Cook, at the prior trial, when you were asked that question you didn't know what a felony was?

....

A. That's right.

Q. Do you mean by that answer, "that's right," that you did not know what a felony was?

A. No, I didn't know what it was.

Q. Do you now know what it is?

....

A. Yes, sir.²⁵⁶

This did not end the matter. In further questioning, Turner asked Cook how old he was when he pled guilty to the "felony." Cook answered, "Seventeen."²⁵⁷ Turner pressed for information on whether there were co-defendants and whether he had counsel.²⁵⁸ Turner asked Cook whether the judge in the joyriding case had explained Cook's rights to him before he pled guilty.²⁵⁹ This exchange followed:

A. I don't remember whether he did all that or not.

Q. Was that Judge E. Clay Lewis, Jr., Circuit Judge?

A. No, sir.

Q. Which Judge was it?

A. The Juvenile Judge.

Q. Pardon?

A. The Juvenile Judge.

Q. The Juvenile Judge?

A. Yes, sir.²⁶⁰

This showed that Fred Turner had been unaware that he had just impeached Cook for giving inconsistent statements, in effect lying regarding the "felony," even though it had not been a felony. If Turner had known the incident was juvenile delinquency but had deliberately asked Cook if he had been convicted of a felony, Turner would have engaged in unethical conduct.²⁶¹ Based on his lack of knowledge, however, he would not be guilty of violating the rules of professional responsibility. Even so, the wrangling

255. *Id.* at 54-55.

256. *Id.* at 55-56.

257. *Id.* at 56.

258. *Id.* at 57.

259. *Id.* at 58.

260. *Id.* at 58-59.

261. Participating in presenting false testimony in court has long been an ethical violation under the rules of ethical behavior for lawyers in every jurisdiction.

over whether Cook had lied had to have caused the jury to question Cook's veracity.

Harris finally conducted a re-direct examination of Cook, asking whether Bert Davenport, the local juvenile judge, had presided over the joyriding case. Cook reaffirmed that the case had been handled in juvenile court.²⁶² Mr. Harris then asked, "Don't you know, Mr. Cook, that you can't be convicted, or plead guilty, to a felony in Juvenile Court?"²⁶³ By this time, many in the courtroom knew that Cook had not been convicted of a felony and had not lied or given inconsistent statements. Turner, however, objected to the question and Judge McCrary, instead of straightening out the confusion that had been created by the wrongful assumption that the joyriding had been an adult offense, and by the two attorneys not knowing the juvenile history of this witness, sustained the objection.²⁶⁴

The State did not call Irene Rhodes as a witness. She had been a witness for Gideon in the first trial, but her testimony was more favorable to the State than to Gideon. The State's failure to use her as a witness was probably a mistake. She was available, according to Fred Turner, and in my discussions with him, he was as puzzled by the State's failure to use her as I was.²⁶⁵

E. J.D. HENDERSON AND PRESTON BRAY

Turner called J.D. Henderson, the operator of Henderson's Grocery, where the telephone booth was located. Henderson testified that shortly after the break-in, Cook had been in the store and had told Henderson what had happened at the Bay Harbor Poolroom. Henderson recalled what Cook told him: "He said 'it looked like . . . Mr. Gideon,' he said 'to his opinion, it looked like him.'"²⁶⁶ The implication was that Cook, shortly after the crime, was not positive that it was Gideon he had seen inside the poolroom.

The State then called Preston Bray, the taxi driver. When Turner cross-examined Bray, Turner asked Bray if Gideon's pockets bulged when he entered the cab. Bray said no.²⁶⁷ The State asked Bray whether Gideon had said, "If anybody asks you if you have seen me, tell them that you haven't."²⁶⁸ Harris, for the State, was attempting to show a guilty state of mind on the part of Gideon.²⁶⁹ However, Turner brought out on cross-examination that Gideon had said the same thing on previous taxi rides, and that Bray thought that Gideon's request was on account of the troubles Gideon had

262. Second Trial Transcript, *supra* note 4, at 59.

263. *Id.* at 60.

264. *Id.*

265. Interview with W. Fred Turner, *supra* note 37.

266. Second Trial Transcript, *supra* note 4, at 106.

267. *Id.* at 97.

268. *Id.* at 125.

269. *See id.*

been having with his wife.²⁷⁰ Gideon did not want his estranged wife to know his whereabouts or what he was doing.²⁷¹ Thus, the State's attempt to show a guilty mind on Gideon's part backfired.

F. IRENE RHODES'S MISSING TESTIMONY

Turner argued that Gideon left his rooming house and, even though the shortest route to the phone booth would have been to cross the street and walk directly to the phone booth, Gideon instead crossed the street and continued west until he reached the alley. Then he walked north, out of the alley, to the phone booth. Gideon claimed that he was not carrying a bottle of wine. The routes taken, or alleged to have been taken, by Gideon, Cook, and Rhodes are shown on the diagram below.

It seems strange that Gideon did not take the shorter route. His reason, he testified, was that the sidewalk was bad—that there was a “drop off” on the sidewalk. Gideon claimed that walking the direct route was difficult.²⁷² Another possible reason Gideon testified that the route he took was partially through the alley is that Irene Rhodes testified in the first trial that Gideon emerged from the alley. Gideon knew she had seen this, and that she might be called as a rebuttal witness by the State. To be consistent with her testimony at the first trial, he had to say that he reached the phone booth from the alley—not directly from his rooming house. A significant piece of evidence was that he was carrying the wine bottle as he emerged from the alley. Cook saw the wine bottle,²⁷³ but as we have seen, he was discredited to a large extent by his “impeachment.”²⁷⁴ That left Irene Rhodes to testify as to this fact, and the State failed to call her. Gideon himself realized how important the issue of whether he was carrying the wine bottle was, as evidenced by the fact that he testified on his own behalf that he did not drink wine.²⁷⁵ That testimony was false, but it shows how critical he thought it was for him to convince the jurors that he was not carrying the bottle of wine. If Gideon was carrying the partly empty wine bottle, it was much more likely that Gideon got the wine from the poolroom rather than his boarding house. However, if he had emerged from the alley behind the poolroom carrying a half-empty bottle, the odds were great that he had just obtained that bottle during the poolroom break-in.

270. *Id.* at 131.

271. *Id.* at 131–32.

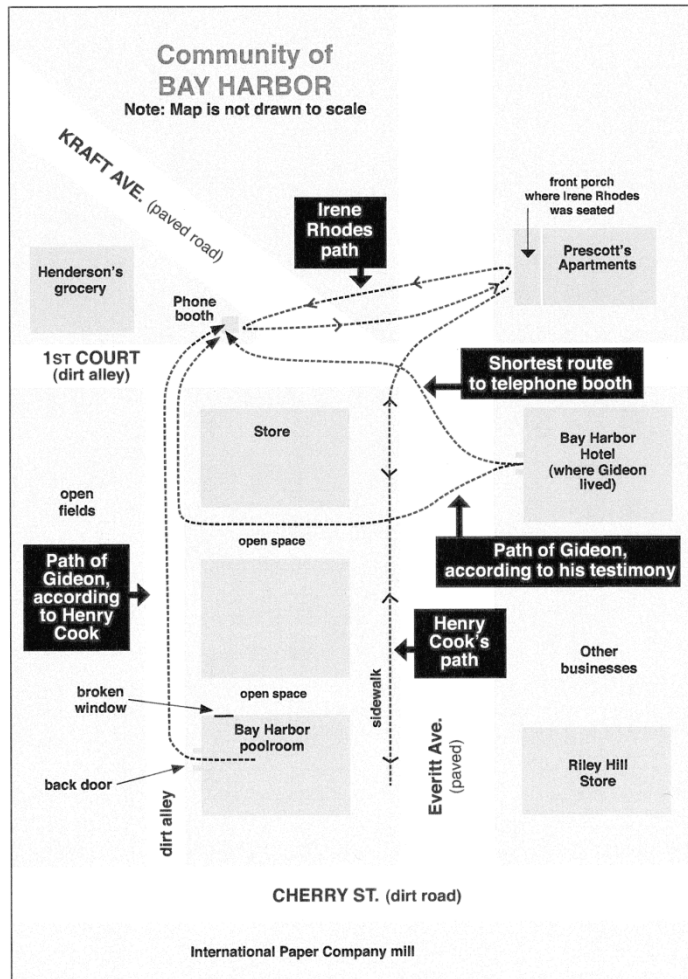
272. Second Trial Transcript, *supra* note 4, at 126–27.

273. *Id.* at 6.

274. *See supra* notes 208–35 and accompanying text.

275. *See supra* note 267 and accompanying text.

The lawyers for the State did not fully understand their own case. They needed to show that Gideon was carrying the bottle of wine as he emerged from the alley, but they neglected to call one of the witnesses who could establish this fact. Rhodes knew Gideon. She had been drinking with him a few hours earlier. She saw him come from the alley with the wine bottle. She walked across the street to ask him whether the Bay Harbor Bar was open. Gideon left in the taxi before she could reach him, but she picked up the half-empty pint, and then, as she claimed, gave it to her landlord, who was ill,²⁷⁶ or, according to Henry Cook, who had waited for her to talk to her about the break-in, she drank the remainder of the bottle.²⁷⁷



276. Sup. Ct. Record, *supra* note 6, at 32.

277. Second Trial Transcript, *supra* note 4, at 46. Fred Turner was convinced that she drank it, instead of giving it to her landlord.

Rhodes and Gideon obviously were friends, and in the first trial, she had given contradictory testimony about whether Gideon had with him the half-empty wine bottle. However, she had confirmed Cook's testimony that Gideon emerged from the alley that ran north and south behind the poolroom and that there was a half-empty bottle of wine by the phone booth. Thus, her testimony at the second trial, if she had been called by the State, would have strengthened Cook's version of events.

G. GIDEON TESTIFIES

In his second trial, Gideon decided to testify in his own behalf. Turner's direct examination and Harris's cross-examination both demonstrated that Gideon was basically unemployed at the time of the poolroom break-in.²⁷⁸ He painted some of the rooms in the rooming house where he stayed to earn his rent.²⁷⁹ He did odd jobs. For example, he did odd jobs at the Bay Harbor Poolroom, but was never on the regular payroll there.²⁸⁰

In order to explain why he had so much change with him when he was arrested, Gideon testified that he "ran" gambling games.²⁸¹ He said he had run a game five days before the break-in, and that is where he earned the change he had with him when arrested.²⁸² He claimed that he always carried large amounts of change.²⁸³

While my wife, Ann, and I were having lunch with Fred Turner on March 18, 2003, in Miami, we discussed the second Gideon trial. Turner said that while conducting direct examination of his client, he was surprised when Gideon lied. Here is the exchange he was referring to:

Q. Did you have any beer, wine or whiskey about your person [when Gideon walked across the street and called the taxi to go to the bar in Panama City]?

A. No, sir. I don't drink wine, if I had a bottle of wine I threw it away.²⁸⁴

Turner told us that Gideon's answer was untrue—that Turner knew Gideon to be a wine drinker. Turner did not call this lie to the attention of the court, and he told me that this had bothered him ever since. He asked whether I thought he should have done something to rectify this false testimony. I told him that I did not think this lie affected the outcome of the case—that the jurors probably recognized that Gideon was an alcoholic, and alcoholics sometimes cannot admit, even to themselves, that they have a

278. *Id.* at 117.

279. *Id.* at 119, 128.

280. *Id.* at 62, 118.

281. *Id.* at 114–15, 123.

282. *Id.* at 122–23.

283. *Id.* at 123–25.

284. *Id.* at 115 (brackets added by the author).

drinking problem. I thought that it was probably not necessary for Turner to correct the statement.

In retrospect, I am not sure I was right. The defense's theory was that Gideon walked from his rooming house to the telephone booth. By denying that he drank wine, Gideon contradicted Cook's testimony. Because his client had given false testimony,²⁸⁵ Turner probably should have asked for a recess and told Gideon that he was going to ask more questions which would allow Gideon to modify his answer, or taken other remedial steps to correct his client's false testimony.²⁸⁶

Invariably, criminal cases contain ethical questions that the lawyers on both sides must confront. As we have seen, this case included such questions. A lawyer may not present false testimony. If a surprise lie by the lawyer's client is not material to the case, the lawyer probably does not need to correct that false statement.²⁸⁷ In this case, the false statement was arguably material and Turner probably should have corrected it. We do not know how Turner knew that Gideon was a wine drinker. If Turner had learned this from Gideon in confidence, Turner would not have been required to correct the lie, because of the rule of professional responsibility that requires confidentiality for such communications.²⁸⁸ However, I believe that the fact that Gideon drank wine was common knowledge among those who knew Gideon. Therefore, Turner likely should have corrected this error.

H. THE ISSUE OF THE MISSING COKES

At the second trial, one of the investigating officers, Officer Duell Pitts, testified that not only were beer and wine drunk or taken during the break-in, but twelve bottles of "Cokes" also went missing.²⁸⁹ This was the first time there had been any mention of Cokes being stolen. While other witnesses testified that coins from the jukebox and cigarette machine and some beers and wine were missing, only Pitts asserted that Cokes were unaccounted for.

285. Florida rules of ethics at the time provided in part that "[t]he office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery." FLA. CODE OF ETHICS R. B.I.15 (1962). Also, the rules provided that a lawyer shall not "[k]nowingly or willfully make any false representations of fact to any judge, court, or jury to induce a favorable action or ruling by either." *Id.* at B.II.24.

286. The rules provided that "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities." *Id.* at B.I.29.

287. If the lie has no effect on the case, it would not seem necessary to interrupt the trial by calling this to the attention of the court. For example, if a witness, for reasons of personal vanity, gives her age as thirty-nine instead of her actual age of forty-four, and her age is entirely irrelevant to the issues in the case, it would not seem necessary to correct this false testimony. To do so probably would incur the wrath of the judge, for interrupting the trial and wasting the time of the court.

288. FLA. RULES OF PROF'L CONDUCT R. 4-1.6 (2008).

289. Second Trial Transcript, *supra* note 4, at 88.

No mention had been made of Cokes at the first trial, and Ira Strickland, the proprietor, did not maintain in his testimony in either trial that any Cokes had been taken.²⁹⁰ Undoubtedly, Pitts' inclusion of Cokes in the list of stolen items was a mistake. But, this mistake was useful to Fred Turner, who made the most of the testimony. He asked Pitts whether Gideon had beer, wine, or Cokes with him when he was arrested.²⁹¹ He asked Preston Bray whether Gideon had beer, wine, or Cokes with him when he got into the taxi.²⁹² He asked Gideon on direct examination if he had beer, wine, or Cokes with him that morning.²⁹³ The witnesses answered that Gideon had none of these items with him.

To the jury, it must have seemed unlikely that a fifty-year-old unemployed drifter and alcoholic like Gideon would have wanted Cokes. However, young men in their early twenties would have been more likely to take Cokes. This gave Turner his theory of the case: Gideon had not been in the poolroom that morning. He had walked from his rooming house to the phone booth without a bottle of wine. Instead, it was Henry Cook and his friends returning from Apalachicola who had broken into the poolroom, drank beer, and taken the missing items, including the Cokes.

The court reporter did not record the closing argument, but fortunately Anthony Lewis, later the author of *Gideon's Trumpet*, was at the second trial and took notes of the closing arguments. According to Lewis, Turner began by talking about Henry Cook:

"This probationer," he said scornfully, "has been out at a dance drinking beer. . . . He does a peculiar thing [when he supposedly sees Gideon inside the poolroom]. He doesn't call the police, he doesn't notify the owner, he just walks to the corner and walks back [as Cook had testified]. . . . What happened to the beer and the wine and the Cokes? I'll tell you—it left there in that old model Chevrolet. The beer ran out at midnight in Apalachicola. . . . Why was Cook walking back and forth? I'll give you the explanation: He was the lookout."²⁹⁴

So, Turner pointed the finger at his own former client. This turn of events again raises the question whether Turner should have refused to take the case in the first place or asked to withdraw at an early stage. He might not then have known that he would end up accusing his former client of the crime. However, he did know from an early point in the case that Cook would be the key witness for the State. The answer to the ethical question likely remains the same: with only two experienced criminal trial lawyers in

290. *Id.* at 67–68, 74–77.

291. *Id.* at 89.

292. *Id.* at 96–97.

293. *Id.* at 115.

294. LEWIS, *supra* note 7, at 236–37.

the circuit, it was proper for Turner to accept the appointment to the case, even though he knew that a former client of his would be a key witness. Moreover, if he had tried to refuse appointment or withdraw on ethical grounds, it is highly unlikely that Judge McCrary would have granted the motion.

Several years after the trial, Cook phoned and spoke with Turner's wife. He asked her to tell Fred to "stop telling people I'm a crook."²⁹⁵ Obviously, Cook did not like being portrayed as the person who broke into the poolroom. He and his friends were not prosecuted—in fact, no one else was ever prosecuted for the June 1961 break-in at the Bay Harbor Poolroom. Of course, even if the prosecutor believed Turner's argument during the second trial in 1963 that Cook and his friends had committed the break-in, the two-year statute of limitations had already run, and the State could not prosecute Cook and his friends.

VI. CONCLUSION

The jury found Gideon not guilty at the close of the second trial. It took the jurors less than an hour to reach a verdict.²⁹⁶ After the acquittal, Gideon was released from custody. On the steps of the courthouse as he was leaving, William Harris, Fred Turner, and Anthony Lewis asked Gideon whether there was anything he wanted. He said he would like a McDonald's cheeseburger. Turner and Harris each handed him \$20 bills.²⁹⁷ Lewis had a cameo role in the movie *Gideon's Trumpet*, handing money to Henry Fonda, who played Clarence Gideon, on the courthouse steps following the acquittal.²⁹⁸

Gideon died less than ten years after the second trial, on January 18, 1972, in Ft. Lauderdale, Florida. He was sixty-one years old, and he died as a result of cancer or complications from tuberculosis.²⁹⁹ At the time of his death, he was employed at a marina, pumping gas.³⁰⁰

In September 2000, when Fred Turner took my wife and me to the scene of the crime, the poolroom, the rooming house where Gideon lived,

295. Interview with W. Fred Turner, *supra* note 53.

296. Ed Tracey, *Top Comments: "Gideon vs. Wainwright" Ed.*, DAILY KOS (Mar. 3, 2011), <http://www.dailykos.com/story/2011/03/03/951891/-Top-Comments-Gideon-vs-Wainwright-edition#>.

297. David Angier, *Site of Gideon Trial, Courthouse, to Receive Historic Marker*, THE PANAMA CITY NEWS HERALD, August 5, 2003, at 1.

298. Interview with the Honorable W. Fred Turner, *supra* note 53. Turner told me that Anthony Lewis set up a trust for Gideon's children and funded it with the royalties from the sale of the book, *Gideon's Trumpet*. See also Letter from the Honorable W. Fred Turner, Circuit Court Judge, Fourteenth Jud. Court of Fla., to Judith S. Kaye, Judge, N.Y. Court of Appeals (Oct. 27, 1988) (on file with author).

299. May, *supra* note 27.

300. Letter from the Honorable W. Fred Turner, Circuit Court Judge, Fourteenth Jud. Court of Fla., to Judy Waterbury, Jay Pub. Sch. Teacher (May 30, 1989) (on file with author).

the rooming house where Irene Rhodes lived, Henderson's Store, and all the other buildings in the area had been demolished. All that was left were the streets, alleys, and the foundations of the buildings. The phone booth was gone.³⁰¹

The lawyers for the State lost the second trial for several reasons. They did not know the juvenile court history of Henry Cook, their critical witness in the case. The prosecutors should have realized how important it was to establish that Gideon was carrying the half-empty bottle of wine as he emerged from the alley. Irene Rhodes could have buttressed Cook's testimony establishing that fact, even though she had been a somewhat reluctant witness and an obvious friend of Gideon in her statements at the first trial. She would have affirmed that he had emerged from the alley behind the poolroom and also that there was the wine bottle next to the phone booth. But the State failed to call her as a witness.

Turner won the case for several reasons. First, his client had wisely chosen a local lawyer, who was familiar with the area and knew many of the prospective jurors, which allowed him to pick a favorable jury. Tobias Simon was an outstanding lawyer, but whether he could have won the case in Bay County, a geographical and cultural area unfamiliar to him is debatable. The State's failure to call Irene Rhodes also benefitted Turner. He told me that he could not understand why she was not used.³⁰² The impeachment and discrediting of Henry Cook further helped Turner win the trial. Also, Turner's providing the jurors with an alternative scenario in closing argument was masterful. Turner was able to convince the jurors that there was reasonable doubt of whether his client was guilty. He won because he was a highly skilled defense trial attorney, and the case certainly proves that having an effective lawyer makes a huge difference.

Although Gideon was acquitted, was he the person Henry Cook saw inside the poolroom that morning? Fred Turner never disclosed to me whether Gideon admitted to him that he had committed the crime, and Turner did not tell me whether Gideon was the person Cook saw in the poolroom. However, Turner did say that Gideon had such a propensity to steal that he "would steal a hot stove with his bare hands. He was a thief."³⁰³ A person interviewed for the Pre-Sentence Investigation report following the first trial said that Gideon had "boasted that he made his living by stealing."³⁰⁴ Gideon admitted being inside the poolroom and admitted taking the items he was charged with taking, but said the offense should be petit larceny.³⁰⁵

301. ORLANDO SENTINEL, *supra* note 46.

302. Interviews with W. Fred Turner, *supra* note 17.

303. Sally Beckman-Kestin, *Judge Describes Role in Gideon Case*, SARASOTA HERALD-TRIB., Nov. 11, 1988, at 1B.

304. Pre-Sentence Investigation Report, *supra* note 16, at 4.

305. *Id.* at 1.

Turner told me in a letter:

Gideon did not have the safeguards available to him had he not been convicted on the first trial when he talked to Perry Wells, Probation and Parole Supervisor when he was interviewed after the first trial. I therefore did not believe that McCrary would let any admissions, made to a P.S.I. interviewer, into evidence in the second trial. And sure enough, the subject never came up. I was as lucky as a dog with two noses.³⁰⁶

Turner tried to convince Gideon to accept the plea bargain presented by the State, and Gideon refused.³⁰⁷ No lawyer worth his salt would suggest to an innocent client that he should plead guilty. This indicates that Turner believed Gideon was the intruder in the poolroom that early morning in June, 1961. It is quite likely that Gideon committed the crime, and that he was acquitted because of the skill of Fred Turner.

At common law, there was a right to retained counsel in misdemeanors, but no right to counsel in felony cases. The theory apparently was that the more serious the charge, the less chance there should be that a guilty person would go free through the skill of a lawyer.³⁰⁸ Of course, today we feel much differently about the need for counsel. Even if Gideon broke into the poolroom, in our system it is better that ten guilty men go free than one innocent man be convicted. Our adversary system is the best there is for insuring that no innocent person is convicted of a crime he did not commit. Whether Gideon was innocent or guilty, the important point is that he was entitled to representation by counsel, and in our adversary system, counsel is just as necessary for the guilty defendant as for the innocent. The main lesson of *Gideon*, from the first trial through review by the Supreme Court and the second trial, is that no matter how poor or downtrodden a person is, our system of justice guarantees him fair treatment, including a constitutional right to counsel.

306. Letter from W. Fred Turner to author (Sept. 29, 2003) (on file with author).

307. See *supra* note 192 and accompanying text.

308. Jacob, *supra* note 2, at 186 (citing WILLIAM BLACKSTONE, COMMENTARIES *355; LEWIS, *supra* note 7).