THE RIGHT TO COUNSEL IN DEATH PENALTY AND OTHER CRIMINAL CASES: NEGLECT OF THE MOST FUNDAMENTAL RIGHT AND WHAT WE SHOULD DO ABOUT IT

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TABLE OF CONTENTS

I. Introduction

II. The Death Penalty and the Right to Counsel

III. Gideon v. Wainwright: The Difference a Lawyer Makes

IV. Resistance to an Unfunded Mandate

V. The Inadequacy of Post-Conviction Review

VI. Maintaining the Quest for Equal Justice

I. Introduction

There is no such thing as a small case in the criminal justice system and there is no such thing as a small loss of liberty. Liberty is as precious as anything we have, whether it is for an hour, a day, a weekend, or the rest of one's life. Jacqueline Winbrone, who was arrested in New York in 2007, illustrates this point. No lawyer came to see her upon her arrest. After bail was set at $10,000, Winbrone, who was the sole caretaker of her husband, attempted to contact her

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court-appointed lawyer to seek a bail reduction in order to care for her husband, who needed transportation to dialysis treatment several times per week. She was not successful. Days later, her husband died. Ms. Winbrone tried to contact the lawyer to obtain a bail reduction or even a temporary release from jail to attend his funeral. She was not successful. Eventually, she contacted a prisoners' rights organization that secured her release on her own recognizance. Ultimately, the charge against Winbrone -- possession of a firearm found in the family car -- was dismissed.1

Obviously, the death penalty is irrevocable. Only after Todd Willingham was executed in Texas for an arson that killed his one-year-old twins and two-year-old daughter was it determined that the fire was not arson, but started accidentally.2 The court-appointed lawyers who represented Willingham at trial and in post-conviction review did not know how to handle an arson case, did not realize the testimony given at his trial was inaccurate and unreliable, and did not have the resources to challenge the dubious opinion evidence presented at his trial. Another man, Ernest Ray Willis, convicted of arson in a very similar case, had the good fortune to be represented pro bono by a New York law firm that spent “millions, on fire consultants, private investigators, forensic investigators and the like.”3 Willis was eventually set free after 17 years on death row.4 Willingham, on the other hand, had only a court-appointed lawyer who did not believe he was innocent, and by the time it was shown he was innocent, it was too late—he was dead.

Many other people have been proven innocent after years in prison because of recent advancements in DNA comparison testing.

3. Id. at 56.
4. Id. at 62.
Some people served twenty or thirty years before they were released, but for someone who has been executed it is just too late. Some people believe that DNA testing will protect the innocent, but biological evidence that can be subject to DNA testing is available in only 10 percent of all cases. The best protection against conviction of the innocent is competent representation for those accused of crimes and a properly working adversary system.

The most fundamental right of a person accused of a crime is the right to counsel. The accused relies on his or her lawyer to protect all of the rights he or she has. The accused relies upon the lawyer to investigate the facts; to research the law; to file and litigate motions; to consult with the accused throughout the process; to explain the legal system and developments in the case; to negotiate with the prosecution; to use professional skill and experience to select a jury; to contest the prosecution’s case; to present whatever evidence there is in defense of the charges; if there is a conviction, to present evidence about the life and background relevant to sentencing; and to advocate persuasively on behalf of the client throughout the process.

However, many people accused of all types of crimes are poorly represented or not represented at all. There is a crisis in legal representation for the poor throughout the country. Representation for the accused is woefully under funded. There are such immense disparities in funding between the prosecution and law enforcement, which receive millions of dollars in federal grants every year in addition to state and local funding, and indigent defense programs, that there is no real adversary system. In many jurisdictions, the workloads of lawyers defending the poor are so overwhelming, that it is impossible for them to give their clients the individual attention they require. Many court-appointed lawyers have no resources for investigation and expert assistance. As a result, the process in some jurisdictions is about as balanced as the New York Yankees playing a Little League team.

When the prosecution’s case is not subject to adversarial testing, the risk of wrongful convictions increases significantly. But as

the case of Ms. Winbrone illustrates, defense lawyers are important for far more than preventing the conviction of the innocent. They are important for seeking bail and securing release after arrest so that their clients can take care of family members and maintain employment; counseling their clients; investigating their cases; assessing the precise degree of culpability of those who are guilty; marshaling mitigating circumstances; engaging in meaningful plea bargaining based upon detailed knowledge of the facts of the crime, the background of the client, and the mitigating factors; and, if the client is convicted, for providing individualized, client-specific advocacy with regard to sentencing.

After a brief review of the death penalty, this lecture will examine the constitutional requirement to provide competent and effective counsel to poor people accused of crimes and the failure of the three branches of government, as well as the bar, to make good on this fundamental constitutional guarantee. In order for the legal system to have legitimacy and credibility, all lawyers must take responsibility to ensure poor people are effectively represented and aspire for equal justice under law.

II. THE DEATH PENALTY AND THE RIGHT TO COUNSEL

Michigan was the very first state to abolish the death penalty for murder in 1846, and has done well without it. However, 35 states still have the death penalty, although many of them rarely use it if at all. The death penalty is most frequently applied in the southern states, with Texas by far the nation’s leading executioner. Texas has


carried out over 450 executions since the Supreme Court allowed the reinstatement of the death penalty in 1976, and has over 340 people currently on death row. Virginia is the only other state to execute over 100 people between 1976 and the end of 2009. Only three other states carried out more than 50 executions during that period—Oklahoma, Florida and Missouri.

There are about 3300 people condemned to die in this country and despite California having the largest death row, most large death rows are in the South. This has been true throughout this nation’s history. Before the Civil War, the death penalty was tied to slavery—it and other harsh punishments were used to maintain control over a “captive workforce” of two million. Blacks were the majority of the population in Louisiana, Mississippi and South Carolina and a third of the population in Alabama, Florida, Georgia, North Carolina and Virginia. After the Civil War, the South used the criminal justice system to perpetuate slavery through convict leasing and to maintain white supremacy and racial segregation. Lynchings were also used, as was the death penalty. Finally, as explained by one historian,

9. Death Penalty Information Center, State by State Database, Texas, available at www.deathpenaltyinfo.org/state_by_state (last visited March 27, 2010), (showing Texas had carried out 451 executions and had 342 on its death row).

10. Death Penalty Information Center, Year End Report, supra note 7, at 3 (showing that, as of January 13, 2010, Virginia had carried out 105 executions, Oklahoma 91, Florida 68 and Missouri 67.)

11. Id. (showing California with 690 on its death row; Florida with 403; Texas with 342; Alabama with 200; North Carolina with 169; Georgia with 108; Tennessee with 92; Oklahoma with 86; Louisiana with 84; South Carolina with 63, Mississippi with 60; Missouri with 52 and Arkansas with 43. Two states outside the South have large death rows: Pennsylvania with 225 and Ohio with 176).

12. Banner, supra note 6, at 137-43.

13. Id. at 142.

Southerners . . . discovered that lynchings were untidy and created a bad press. . . . Lyncings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob's demand. Responsible officials begged would-be Lynchers to "let the law take its course," thus tacitly promising that there would be a quick trial and the death penalty. . . . Such proceedings "retained the essence of mob murder, shedding only its outward forms".  

The first major Supreme Court case on the right to counsel, Powell v. Alabama, arose out of a "legal lynching" in Scottsboro, Alabama. The "Scottsboro Boys" were nine young African Americans charged with the rape of two white women. The youths were tried in groups in three trials while mob outside the courtroom demanded the death penalty. The defendants were represented by two lawyers, who were not assigned to defend them until the morning the trials began. One of the lawyers was under the influence of alcohol and the other was senile. After a series of one day trials, all of the nine defendants, except for one, were convicted and sentenced to death.  

The Supreme Court set aside the convictions in Powell v. Alabama, holding that "in a capital case, where the defendant is unable to employ counsel . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process.


16. Id. at 20-48.


of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.”

The Court also made the important observation that “during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense,” and held they were entitled to “the guiding hand of counsel at every step in the proceedings against [them].”

For many years after Powell, the right to counsel was limited in most state courts to capital cases and cases where the penalty was severe, the issues difficult, and the defendant inexperienced. The Supreme Court recognized a poor person’s right to counsel in federal courts in 1938. The extension of this fundamental right to state proceedings starts with a wonderful story, but then takes a tragic turn.

20. Id. at 71.

21. Id. at 57.

22. Id. at 69.


25. This essay focuses on the state courts which decide the vast majority of criminal cases, jail and imprison the vast majority of the 2.3 million men, women and children incarcerated in the United States, and account for all but three of the 1192 executions carried out between 1976 and the end of 2009 and all but 66 of the 3279 people under death sentence at the end of 2009. Death Penalty Information Center, Facts About the Death Penalty, supra note 8, at 2-3. This essay addresses the many deficiencies in implementation of the right to counsel and necessarily includes generalizations in discussing systems which vary from state to state and often from jurisdiction to jurisdiction within states.
III. GIDEON V. WAINWRIGHT: THE DIFFERENCE A LAWYER MAKES

Clarence Earl Gideon was accused of breaking into a pool hall in Panama City, Florida. He demanded a lawyer at his trial, but was not given one because it was not required. So he went to trial as his own lawyer. He did not do too bad a job for a layman, but he was convicted. At the Florida State Penitentiary, he appealed his conviction and eventually wrote a five-page petition for certiorari to the Supreme Court of the United States. He wrote the petition in pencil, on lined paper that had the prison’s “Correspondence Regulations” at the top of each page. The Supreme Court granted the petition, and appointed Abe Fortas, one of the country’s leading attorneys and a future Supreme Court justice, to represent Gideon.26

Twenty-three states, led by Attorneys General Walter Mondale of Minnesota and Edward J. McCormack, Jr., of Massachusetts, filed an amicus curiae brief on behalf of Gideon’s right to counsel.27 Only two states supported Florida’s argument that Gideon was not entitled to a lawyer – North Carolina and Alabama. The Supreme Court unanimously held that the Sixth Amendment right to counsel applied to the states through the Fourteenth Amendment.28

The case was remanded for a new trial. Attorney Fred Turner represented Gideon in his new trial. Gideon was acquitted. As Anthony Lewis wrote the next day in the New York Times, “[t]he difference between [Gideon’s] two trials was that this time Mr. Gideon had a lawyer. That was the principle for which he went all the way to

26. For these and other aspects of the case see Anthony Lewis, GIDEON’S TRUMPET (1964), as well as the Court’s decision in Gideon v. Wainwright, 372 U.S. 335 (1963).

27. See Lewis, supra note 25, at 147-52.

the Supreme Court – the right of a poor man to have a lawyer defend him against criminal charges.”

In his marvelous book about the case, Anthony Lewis wrote:

It will be an enormous social task to bring to life the dream of Gideon v. Wainwright – the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.

Of course, the right to counsel was not a dream; it was a constitutional requirement established by the Supreme Court. The Court did not say that it would be commendable for the states to provide lawyers for poor people accused of crimes; it said that the Sixth Amendment, made applicable to the states through the due process clause of the Fourteenth Amendment, required the states to provide a lawyer for anyone accused of a felony. Four years later, the Court held that the states were required to provide counsel to children in delinquency proceedings, with Clarence Gideon’s lawyer, now Justice Abe Fortas, writing the opinion. In 1972, the Court held that the states were required to provide a lawyer to anyone facing any loss of liberty.

IV. RESISTANCE TO AN UNFUNDED MANDATE


30. Lewis, supra note 25, at 205.


Unfortunately, the constitutional right to counsel is an unfunded mandate. The federal government does not cover the cost of providing lawyers in the state courts, where most criminal cases are prosecuted. It falls upon local and state governments. No agency responsible for implementing the right to counsel in the states has never been created. It would be expensive if done right—although not nearly as expensive as the vast amounts spent on law enforcement and prosecution.\textsuperscript{33}

It was a new and substantial expense and governments are always resistant to new expenses, particularly ones with no public support. Robert F. Kennedy, the Attorney General of the United States at the time \textit{Gideon} was decided, pointed out the poor person accused of a crime has no lobby. There was no political reason for states to implement this new constitutional right. At the time \textit{Gideon} was decided in 1963, the southern states were engaged in massive resistance to the Supreme Court’s decision in \textit{Brown v. Board of Education} that required integration of the public schools.\textsuperscript{34}

They also resisted \textit{Gideon}, although they did not get as much attention for it. The Supreme Court did not define what “effective counsel” meant until 1984—21 years after \textit{Gideon}.\textsuperscript{35} So in a many jurisdictions, assigning anyone who was admitted to the bar to represent an accused was seen as sufficient to satisfy the right to counsel. Some states, including Georgia, Michigan and Texas, initially left the right to counsel up to each of its counties. Texas has 240 counties, Georgia 159 and Michigan 83. The wealth of the counties and their willingness to fund indigent defense varied greatly.

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\textsuperscript{34} 347 U.S. 483 (1954).

\textsuperscript{35} Strickland v. Washington, 466 U.S. 668 (1984) (establishing a two-prong test for determining ineffective assistance of counsel: whether counsel’s performance was deficient and whether there was a substantial probability that it affected the outcome).
This approach led to very inconsistent, fragmented and inefficient results.

Some states took on the responsibility of providing counsel for the accused. In May, 1963, barely two months after the *Gideon* decision, the Florida legislature adopted a statute creating public defender offices in each of the state’s judicial circuits – parallel to the State’s Attorneys offices that prosecute cases.\(^{36}\) Many of these public defender offices have been outstanding, but funding has not kept pace with the ever increasing caseloads. For example, the public defender office in Miami, long an outstanding program, filed motions to be relieved of the obligation of accepting some new cases because of its excessive workloads. One motion was granted by the trial court, but reversed on appeal.\(^{37}\)

Alaska, Colorado, Connecticut, Kentucky, Maryland, New Hampshire, Wisconsin and other states also established state-wide public defender systems. Public defender offices provide full-time lawyers who specialize in the defense of criminal cases, as well as investigators, social workers and support staff. Many have lawyers and staff who specialize in certain areas such as death penalty cases, sex crimes, juvenile cases and cases involving mentally ill clients. Good public defender programs have outstanding training programs in order to attract exceptional law school graduates and make maximum use of the programs’ limited resources. But only 22 states have state-based programs,\(^{38}\) and many of them are not adequately funded. Sixteen states still have county-funded indigent defense programs and

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the remaining 12 states use a combination of state and county funds. The benefits of a full-time public defender program are missing in jurisdictions that cannot afford them or have a hodgepodge of approaches that differ from one county to the next.

The constitutional right to counsel does not mean that all poor people accused of crimes receive representation. Samuel Moore spent 13 months in the Crisp County Jail in Cordele, Georgia, in 2002 and 2003 without seeing a lawyer or a judge – after being arrested for loitering. The charge had been dropped four months earlier, but no one bothered to tell the officials at the jail. A student intern at the Southern Center for Human Rights pointed out that there was no legal basis for holding Moore and he was released. At the time, Crisp County contracted with a single lawyer to represent poor people accused of crimes in its courts. That lawyer was not aware of Samuel Moore during the 13 months he was languishing in jail.

In 2008, Georgia’s Northern Judicial Circuit failed to renew the contracts of lawyers who represented defendants who could not be represented by the public defender office due to conflicting interests. For instance, if three people were accused of the same crime, a public defender would represent one of them and the other two would receive a contracted lawyer. With no lawyers on contract to handle the cases, the three judges in the circuit did not provide lawyers for the other two. In blatant violation of Gideon and its progeny, judges and prosecutors handled cases of people accused of felonies who were unrepresented by counsel as if the circuit had gone back in time to before 1963.

39. Id.


Some jurisdictions responded to *Gideon* by conscripting lawyers to represent defendants without compensation on the theory that representing the poor is part of a lawyer’s professional responsibility. Kentucky and Missouri employed this approach until their state supreme courts held that lawyers could no longer be compelled to defend cases without compensation.\(^{42}\) Both states then created public defender systems, but have been very stingy in funding them.\(^{43}\) A few jurisdictions continue to conscript lawyers to represent indigent defendants and may or may not provide some compensation for the lawyer’s time and expenses.\(^ {44}\)

Some jurisdictions contract with lawyers to handle all or a portion of the cases for a flat fee. For example, in a jurisdiction that does not have a large volume of criminal cases, it may contract with a lawyer to handle all of its criminal cases for a year for a fixed fee. A jurisdiction with more cases may contract with several lawyers to handle a percentage of all the cases – or all of the cases that come before a particular judge – for a fixed fee. Or a lawyer may agree to handle a certain number of cases for a fixed fee. For example, in Georgia, some lawyers have contracted with the indigent defense agency to handle 175 cases for $50,000.

These contracts usually allow the lawyers to maintain private practices. Since the lawyers will be paid the same regardless of how much time they devote to the indigent cases, they have an incentive to dispose of the cases of their indigent clients as quickly as possible so they will have more time for their private practices. In addition, most contracts provide that the flat sum paid by the jurisdiction not only

\(^{42}\) Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972); State v. Green, 470 S.W.2d 571 (Mo. 1971).

\(^{43}\) *See* State *ex rel.* Missouri Public Defender Commission v. Pratte, 298 S.W.3d 870 (Mo. 2009) (describing failure of funding to keep up with workload of public defenders).

\(^{44}\) *See, e.g.*, State v. Wigley, 624 So.2d 425 (La. 1993) (holding that requiring the uncompensated representation of indigents does not violate the constitutional rights of attorneys).
cover the services of the lawyer, but also investigators, expert witnesses and any other expenses. This creates a disincentive for the lawyers to spend money on investigations and expert assistance. Some jurisdictions use contracts to provide representation for all indigent defendants; others use contracts to provide lawyers in cases where the public defender office has a conflict of interest and cannot represent the accused.

Many states, including Alabama, Michigan and Texas, still have no real system for providing legal representation to poor people accused of crimes. Michigan still leaves representation up to its counties. Judges or administrators assign lawyers to represent individual defendants. The lawyers are paid by the case or by the hour at rates well below what lawyers are usually paid, even by the government, for their work.

The extent to which lawyers’ qualifications are examined before they are appointed to cases varies greatly from one jurisdiction to another. Some courts require that attorneys meet certain qualifications, have a certain level of experience, and attend continuing legal education programs on trial practice in order to be listed on the roster or “panel” of attorneys who are available to accept appointments. In other jurisdictions, appointments may be informal. Judges may appoint lawyers who happen to be in the courtroom when cases are called. Lawyers may put their business cards on the bench before court starts or give them to the clerk to let the judge know they are available for appointments.

In jurisdictions where lawyers are appointed by judges, lawyers may be more loyal to the judges whom they depend upon for their livelihood, than to their clients. These two factors - low compensation and loyalty to the judge - skew representation in ways that is adverse to the client. Lawyers who depend on the judge for their livelihood may be unwilling to ask for continuances when they are unprepared, challenge a prosecutor’s strike of a juror that appears to be racially motivated,45 apply for funds for experts and investigators

and make a record of the need for those funds to preserve the issues for appeal,\textsuperscript{46} or take other action that may displease the judge.

The representation provided to poor people accused of crimes in Detroit was described in a National Public Radio report in August 2009.\textsuperscript{47} It described lawyers who did not visit their jailed clients because they were only paid $50 dollars for a single visit. One lawyer, Bob Slameka, has been reprimanded for misconduct by the state Supreme Court in cases involving more than 16 clients over his 40-year career, yet he continues to be appointed to represent people in Wayne County. Slameka represented Eddie Joe Lloyd on appeal for two years, but never once met him or accepted any of his phone calls, saying he was not paid enough to do so.\textsuperscript{48}

When Lloyd complained, Slameka replied, "This is a sick individual who raped, kidnapped and strangled a young woman on her way to school. His claim of my wrongdoing is frivolous, just as is his existence, both should be terminated."\textsuperscript{49} This is a lawyer talking about his own client. Interestingly, the judge who sentenced Eddie Joe Lloyd also said that his life should be terminated and expressed frustration that Michigan did not have the death penalty.\textsuperscript{50} Eventually, Eddie Joe Lloyd was freed after 17 years in prison when DNA


\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} Jodi Wilgoren, \textit{Man Freed After DNA Clears Him of Murder}, N.Y. TIMES, Aug. 27, 2002 (at the time of sentencing in 1985 the judge had stated, "The sentence that the statute requires is inadequate. The only justifiable sentence, I would say, would be termination by extreme constriction.").
evidence proved that he was innocent of the crime. He died just two years after his release.\textsuperscript{51}

A class action suit in New York has raised deficiencies in representation provided in several counties, including lack of representation at arraignment, which often results in a high bail being set causing extended pretrial detention (as happened to Ms. Winbrone, described at the beginning of this lecture); denial of the opportunity to meet and confer with counsel in any meaningful way; the refusal of court-appointed lawyers to accept phone calls during representation; lack of independent investigation on the part of defense counsel; and failure of court-appointed lawyers to inform their clients of the full consequences of guilty pleas.\textsuperscript{52}

In many courts, those accused of crimes are not represented, but processed through the system. They are brought in to the courtroom – the vast majority of them people of color, dressed in orange jump suits and handcuffed together – and placed in the jury box and the front rows of the gallery. One or more court-appointed lawyers walk down the line consulting with them one after the other. Of course these are not confidential attorney-client conversations; the people handcuffed on either side of the person being addressed can hear, as can others. This may be the first and only encounter between lawyer and client.

After a lawyer has finished talking to each person, the proceedings begin. The judge takes the bench. When the cases of most, if not all, of the “clients” are called, the lawyer announces they

\textsuperscript{51} National Public Radio, \textit{supra} note 45.

are entering guilty pleas. The judge accepts the pleas and imposes sentences that the prosecutor offered and the defendants accepted before the judge took the bench. This is known as “meet ’em and plead ’em.” The prosecution decides the sentence to be imposed and “offers” it to the accused. There is no individual representation, no investigation, no evaluation of possible mental health issues of the defendant, no examination of witnesses, and no research.

Under this scenario, the defense lawyer has only a few menial tasks. First they convey the plea offer from the prosecutor to the accused along with the advice that he or she will be subject to a much more severe penalty if the offer is rejected and a trial is requested. Then, upon securing the defendant’s acceptance of the plea, they communicate it to the judge and prosecutor. Finally, they stand next to the defendant while the judge accepts the plea and gives the sentence. One does not need a law degree to do this. It could be done by high school or college students or anyone who can be taught to do repetitive tasks.

Some defendants insist on going to trial. Often, even in communities with very substantial minority populations, the only person of color in front of the rail in the courtroom during trial will be the defendant. The judge, the prosecutor, the court-appointed lawyer and even all of the jurors will be white. Too often, defendants receive only token representation. If convicted, they receive a more severe sentence for exercising their right to trial.

As the Supreme Court recognized in Powell v. Alabama, the most critical time in any case is “from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important . . .” 53 Yet in Georgia, a person facing the death penalty may be deprived of funds for counsel, investigation, and expert assistance for years prior to a capital trial. For example, the capital case against Khanh Dinh Phan

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has been pending since March, 2005 because there has been no funding for the case since 2008.  

Jamie Weis was accused in February, 2006 of capital murder in Pike County, Georgia. For two and a half years there was absolutely no funding for his legal defense. Weis is mentally ill, extremely depressed and anxious, is prescribed very high doses of anti-psychotic medications, and has tried to commit suicide three times. If ever there was a person desperately in need of counsel, it is Weis. Nevertheless, he was without representation during much of the critical pre-trial period because the Georgia legislature has not provided sufficient funding for the representation of people accused of crimes in capital cases. Nonetheless, the Georgia Supreme Court upheld the denial of counsel – even the removal of his original lawyers – and the denial of his motion for a speedy trial.  

Stacey Sims was arrested in 2005 and the District Attorney in Tift County, Georgia announced his intention to seek the death penalty. Two lawyers were appointed to represent Sims, but they moved to withdraw from the case a year and a half later because they had not been paid. They were allowed to withdraw and two new lawyers were assigned to represent him. A year and a half later, the replacement lawyers also moved to withdraw from Sims’ defense because they also had not been paid. The Court allowed them to withdraw as well.  

For all practical purposes, Sims has been without counsel during the first three years that he has been facing the death penalty.

54. Bill Rankin, Lack of Funds for Death-Penalty Defense Cited in Bid for Dismissal, ATLANTA J.-CONST., March 9, 2010 (the case was appealed to the Georgia Supreme Court, which heard argument in March, 2010).

55. Weis v. State, --- S.E.2d ----, 2010 WL 1077418 (Ga.). For the briefs and other documents regarding the appeal, see www.schr.org/action/resources/for_immediate_release_right_to_counsel_denied_by_georgia_supreme_court_4_3 (last visited April 29, 2010).

The pattern that has emerged in Georgia is that there is no funding for defense representation in capital cases for a substantial period of time, but as the date of trial approaches the director of the state indigent defense program comes up with some last-minute funding. Then the defense hurriedly tries to make up for months or years when nothing was (nor could be) done, and the case is forced to trial. 57 While the defense has had nothing, the State had its prosecutors, law enforcement officers, crime laboratory employees and any experts it retains throughout the pretrial period. The normal advantage that the State has in prosecuting indigent defendants is turned into an enormous one. Such trials are not and do not appear to be reliable adversarial proceedings.

Texas carries out so many executions because many of its counties provide very poor legal representation to poor people facing the death penalty at trial. Then the state provides lawyers who are just as bad or worse to handle the post-conviction proceedings.

Three people in Houston — Carl Johnson, Calvin Burdine and George McFarland — were represented by lawyers who slept during their capital trials while supposedly defending them. Johnson has been executed. 58 Calvin Burdine was granted a new trial — over the dissents of six judges — by the en banc Court of Appeals for the Fifth Circuit. 59 George McFarland’s case has twice been upheld by the

57. See, e.g., Bill Rankin & Rhonda Cook, Jury Selection in Silver Comet Case may be Delayed, ATLANTA J.-CONST., April 13, 2009 (funding issues were still being resolved during jury selection of capital trial); Julie Arrington, Funds Avert Fears of ‘Constitutional Crisis,’ www.forsythnews.com/news/archive/2631/, May 31, 2009 (last visited March 27, 2010) (reporting that director of indigent defense program informed the judge that money was available for the defense of a capital case involving a murder that occurred on March 19, 2006; the defense lawyers had not been paid since October, 2007 for their work on the case).


Texas Court of Criminal Appeals. Of course, most lawyers do not sleep during trial. But Johnson’s execution and the bitter division of a federal court of appeals over whether sleeping during a capital trial violates the Constitution demonstrates how little regard some courts have for the right to effective counsel. All too often, lawyers appointed to defend poor people facing the death penalty fail to investigate, do not know the law, and provide deficient representation.

The dismal failure to provide competent counsel since Gideon has been well documented by the American Bar Association, independent organizations, law professors, journalists and anyone else who has looked into it. The representation for poor people accused

60. McFarland v. State, 928 S.W.2d 482 (Tex. Crim. App. 1996) (en banc) (upholding conviction and sentence over dissent which argued “[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense”) Id. at 527; Ex Parte McFarland, 163 S.W.3d 743 (Tex. Crim. App. 2005) (en banc) (rejecting the claim again in post-conviction proceedings).


of crimes is so bad that in many parts of the country it is better to be rich and guilty than poor and innocent. That is not equal justice. People are sentenced to death not because they committed the worst crimes, but because they had the misfortune of being assigned the worst lawyers.\textsuperscript{64} This too is not equal justice. Nor is it a principled way to decide how the ultimate penalty is to be imposed.

V. THE INADEQUACY OF POST-CONVICTON REVIEW

In theory, the right to counsel at trial can be protected in post-conviction proceedings by another lawyer bringing a claim that the defendant received ineffective assistance of counsel at trial. These claims can be brought in the state courts under whatever post-conviction review procedure the state has and on federal habeas corpus review. But the Catch 22 for poor people is that the Supreme Court has held that they have no constitutional right to a lawyer to represent them in state post-conviction proceedings or to file a federal habeas corpus petition,\textsuperscript{65} and most states do not provide them with one.\textsuperscript{66} But even if the state provides a lawyer to raise a claim of ineffectiveness as some do, there is no guarantee that the new lawyer will be any more competent than trial counsel. In Texas, as previously noted, a person facing the death penalty may have equally bad lawyers at trial and in post-conviction proceedings.

\textsuperscript{64} See supra note 60.


\textsuperscript{66} The federal government provides lawyers in federal habeas corpus proceedings by statute. 18 U.S.C. § 3599 (a)(2) (2000). However, there is no provision for representation in the state post-conviction proceedings which usually must be exhausted before seeking federal habeas corpus review.
Even if an inmate secures representation by a competent lawyer, a court may find there was no Sixth Amendment violation under the very low standard of representation the Supreme Court has said the Constitution guarantees. As Alvin Rubin, a judge on the Fifth Circuit Court of Appeals said in upholding a death sentence, "[t]he Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel." All that is required is that a person be represented by a lawyer who is not legally ineffective under the very lax *Strickland v. Washington* standard. Even if a lawyer’s performance is grossly deficient, a court may shrug its shoulders and uphold the conviction by concluding that there is not a substantial probability that the lawyer’s performance affected the outcome.

For example, the Court of Appeals for the Sixth Circuit found that a lawyer was not ineffective under *Strickland* even though he *did not even know his client’s name*, was not aware of compelling mitigating factors and lied about his experience and qualifications to handle a capital case. His client, Jeffery Leonard, a 20-year old African American, was tried and sentenced to death in Kentucky under the name James Slaughter. His real name was contained in the prosecution’s file and in four different places in the trial court record. But the lawyer did not investigate and, as a result, never learned his client’s name or that he was brain damaged and suffered through a horrific childhood. When challenged about his representation, the lawyer testified that he had tried six capital cases and headed an organized crime unit for a New York prosecutor’s office. Neither statement was true.

The Court of Appeals, still referring to Leonard by the inaccurate name, concluded that the lawyer’s performance was


69. The lawyer was later indicted for perjury. The charges were dismissed in exchange for him resigning from the bar. Andrew Wolfson, *Lawyer Radolovich to Give Up License*, COURIER-J., Feb. 6, 2007.
deficient because his failure to investigate his client’s background “resulted from inattention, not reasoned strategic judgment.”

Nevertheless, it upheld the death sentence based upon its conclusion that the outcome would not have been different even if the lawyer had known his client’s name and presented evidence of his brain damage, childhood abuse and other mitigating factors. In dissent, Judge Cole summed up the sad state of the right to counsel:

We are uneasy about executing anyone sentenced to die by a jury who knows nearly nothing about that person. But we have allowed it. We are also uneasy about executing those who commit their crime at a young age. But we have allowed that as well. We are particularly troubled about executing someone who likely suffers brain damage. We rarely, if ever, allow that – especially when the jury is not afforded the opportunity to even consider that evidence. Jeffrey Leonard, known to the jury only as “James Slaughter,” approaches the execution chamber with all of these characteristics. Reaching this new chapter in our death-penalty history, the majority decision cannot be reconciled with established precedent. It certainly fails the Constitution.

Beyond the Strickland standard, federal habeas corpus petitioners face what Justice Harry Blackmun described as a “Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights” that are the result of the Supreme Court’s “crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims.” Congress restricted the ability of the federal courts to correct violations of the Constitution even further by adopting the


71. Slaughter v. Parker, 467 F.3d 511, 512 (6th Cir. 2006) (Cole, J., dissenting from denial of rehearing en banc).

Antiterrorism and Effective Death Penalty Act in 1996. It allows a federal court to grant habeas corpus relief only if it finds that the state court has reached a legal conclusion that was “contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States…” 73

These legal impediments are irrelevant to some inmates who are assigned lawyers so bad that there is no review in the state or federal courts of their convictions or death sentences. Six people in Texas have been executed without any habeas corpus review because their lawyers missed the statute of limitations. Attorneys have missed the statute of limitations in three other cases and those clients will be executed as well without review. 74 Habeas corpus review is critically important not only to protect the right to counsel, but to protect other rights as well. It is the first time that life tenured federal judges instead of elected state judges determine the issues in a case. It has been the stage where innocence has been established and where grievous constitutional violations have been found.

Yet six people have been executed in Texas without such review because their lawyers failed in their most basic responsibility—filing pleadings on time. Most remarkably, three people who were denied review due to failure to file on time were represented by the same lawyer, Jerome Godinich. They were three of at least 21 clients in capital cases Godinich has been appointed to represent, and among 1,638 cases involving 1,400 different defendants he has been assigned from 2006 to March, 2009. The Texas Bar and the Texas Court of Criminal Appeals took no action to protect his clients after Godinich missed the statute of limitations the first time, or the second, or even the third. 75


75. Lise Olsen, Lawyers’ Late Filings Can be Deadly for Inmates, HOUSTON CHRONICLE, March 22, 2009.
Of course, if an assistant prosecutor missed a filing deadline even once, he or she would be fired. But it is unlikely that it would happen, because prosecutors are supervised. They practice in offices that are organized to avoid such mistakes. But in Alabama, Texas and many other jurisdictions throughout this country people facing the death penalty are represented by unsupervised solo practitioners, many of whom have no idea what they are doing.

But even in many some cases where briefs for death-sentenced inmates were filed on time in the Texas Court of Criminal Appeals, they were useless. For example, a lawyer assigned to represent Robert Gene Will filed the same brief for Will that he had filed a year and a half earlier for another inmate, Angel Resendiz.\textsuperscript{76} Will was denied relief based on the brief that had nothing to do with his case. The lawyer missed the statute of limitations for filing Resendiz' federal habeas corpus petition. As a result, Resendiz was executed without any federal habeas review of his case.

The brief filed on behalf of another man condemned to die in Texas, Justin Chaz Fuller, was incoherent, repetitious, and rambling. There too, the lawyer copied from an appeal filed seven years earlier for a different client, Henry Earl Dunn.\textsuperscript{77} As a result, the brief filed for Fuller contained complaints about testing for blood on a gun used by Dunn’s co-defendant that had nothing to do with Fuller’s case. The lawyer also copied some of Fuller’s letters into the brief so that it contained unintelligible and irrelevant statements such as, “I’m just about out of carbon paper so before I run out I want to try and list everything that was added to and took from me to convict me on the next page.”\textsuperscript{78} Considering only this nonsensical brief, the Court of Criminal Appeals denied Fuller relief and he was executed.


\textsuperscript{78} Id.
There is no justification for a court accepting such briefs in any case. The briefs would not receive a passing grade in a first-year legal writing course or even a high school class. Without adequate briefing, a court cannot do its job in deciding a case. A court concerned with justice would remove the lawyers from the cases, refer them to the bar for a determination of whether their licenses to practice law should be suspended or revoked. Then the court would appoint competent lawyers to brief the issues. But the inescapable conclusion from its practice in these and many other equally egregious capital cases is that the Texas Court of Criminal Appeals is not concerned about justice. Bad lawyering is so common that it would completely disrupt the operation of the Court to require adequate briefing in every case. So instead of revoking their licenses, the lawyers are paid a flat $2,500 and continue to practice.

Finality – not justice – has become the ultimate goal of the system. Moving dockets – not competent representation – is the concern of most of the courts. Technicalities and procedural rules made up by the Supreme Court and the Congress have taken priority over the Bill of Rights.

Yet this system finds defenders. Richard Posner, a respected judge on the United States Court of Appeals for the Seventh Circuit has written:

I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented. But if we are to be hardheaded we must recognize that this may not be entirely a bad

thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system for the defense of indigent criminal defendants may be optimal.\textsuperscript{80}

The "bare-bones system" Judge Posner finds so attractive is only for poor people in criminal cases. He does not suggest a "bare-bones system" for commercial cases, tax cases or even criminal cases involving wealthy people. It is just for the poor.

Judge Posner writes that if the lawyers who represent indigent defendants were much better, some guilty people might be acquitted. He misses the most important difference that would be made if those lawyers were much better -- some innocent people, who are now being convicted, would be acquitted. That is what we should be concerned about. And if those lawyers for indigent defendants were much better, some people who are now being condemned to die and being executed would not be receiving death sentences.

\section*{VI. Maintaining the Quest for Equal Justice}

Our indigent defense system says a lot about our society we have and the kind of legal system we have. It is not about being tough or soft on crime; or being for or against the death penalty. It is about whether we have a fair and reliable system of justice. The aspiration of our legal system has been equal justice under law. Hugo Black stated for the Supreme Court over a half century ago, "[t]here can be no equal justice where the kind of trial a [person] gets depends on the amount of money he [or she] has."\textsuperscript{81} The legal system has never come


\textsuperscript{81} Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that an indigent defendant is entitled to a transcript for appeal). The Court reiterated the point in Douglas v.
close to realizing this goal, but it has aspired to it. Is that no longer the case? Is it time to sandblast "Equal Justice Under Law" off the front of the Supreme Court building? Has a decision been made to have country-club justice for the wealthy and plantation justice for the poor?

When he was Chief Justice of Georgia, Harold Clarke observed in a speech to the legislature, "[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all."82

This bare-bones system of halfway justice for the poor is the result of complete indifference to injustice on the part of some and a poverty of vision with regard to the kind of justice system we should have on the part of others. Halfway justice should be unacceptable to the legal profession and the judiciary.

You are going to be lawyers, if you are not lawyers already. As Robert Kennedy said, the poor person accused of a crime has no lobby. No one cares about the poor person accused of a crime -- but lawyers must care, and lawyers must be that lobby. Lawyers are entrusted with the legal system; it is a monopoly that lawyers have. It is not just a get rich quick scheme for lawyers; it is a justice system. Lawyers should be deeply ashamed of the quality of legal representation provided poor people accused of crimes in Michigan, in Texas and throughout the rest of the country.

Lawyers have lost their sense of shame and their sense of outrage. A culture has developed where grossly deficient representation is allowed to go on day in and day out in the criminal courts; judges accept it; prosecutors accept it; everyone accepts it.

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You must do something about it. There are several things you can do. All of you can work in the Michigan Legislature to bring about long overdue reform of the state’s antiquated approach to indigent defense. You can do that right now. You can go to the criminal courts and watch them in session. You can see for yourself whether the right to counsel is being protected in the courts.

Whatever you do as a lawyer – whether you become a successful practicing lawyer in any area, someone who is active in the bar, a legislator, a prosecutor, a judge, a businessperson, governor, president or anything else – you can be an advocate for the right to counsel and for fairness. Prosecutors can stand up for the right to counsel the same way that Attorneys General Walter Mondale and Edward J. McCormack, Jr. did when they led 23 states in filing an amicus brief for the right to counsel in Gideon v. Wainwright. Bar associations must make building first rate indigent defense programs – not merely adequate programs – their top priority, instead of ignoring it completely.

All lawyers must make it clear to their legislators that indigent defense programs must be adequately funded for the adversary system to function. Whatever you do, take an interest in the right to counsel. Visit the criminal courts. Go on arraignment days when scores of people are processed through the court. Do not let the state and municipal courts remain out of sight and out of mind. Tell other lawyers what you see. Do something about it.

Some of you can change things by representing poor people accused of crimes. You can say that – regardless of whether the courts fail, the executive branch fails, and the legislature fails in meeting the constitutional requirement of Gideon – you will not fail. You will provide your clients with the kind of representation that Anthony Lewis wrote about. You will represent your clients proudly, without resentment of the unfair burden you are taking on, and determined to obtain the resources necessary for an adequate defense and a fair trial. You will speak the truth to power and help bring about a better day.

You will join other public defenders who are working long hours with heavy caseloads and making the right to counsel a reality.
As a result of their efforts, some innocent people will avoid wrongful conviction; some troubled youths will be diverted to drug, alcohol, mental health, job training and other programs instead of going to prisons; some people will live instead of being put to death; and all of their clients will receive professional advice and zealous advocacy through what is to them the strange and foreign land of the criminal justice system. These lawyers set an example that reminds us that achieving equal justice for all is not beyond the grasp of this wealthy society. And for the defendants who are fortunate to be represented by them, the promise of Gideon v. Wainwright will be realized.

This generation of lawyers is uniquely suited to take on this challenge. It has seen what the mindless pursuit of wealth has done for hedge fund managers, investment bankers, and many law firm partners. I believe it recognizes what Elie Weisel said in accepting the Nobel Peace Prize in 1986: “Our lives no longer belong to us alone; they belong to all those who need us desperately.”83 And what Dr. Martin Luther King, Jr. said: that no matter who we are and what we do, we can all be drum majors for justice.84 This generation of lawyers can walk out of the shadows of indifference, and hostility and racism that have affected the criminal justice system throughout America’s history, and into the bright sunshine of hope, commitment, confidence, and human rights, and respond to what justice demands – providing every person accused of a crime with competent, independent counsel with the resources necessary for a defense.
