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Criminal Procedure and the Supreme Court - Then and Now

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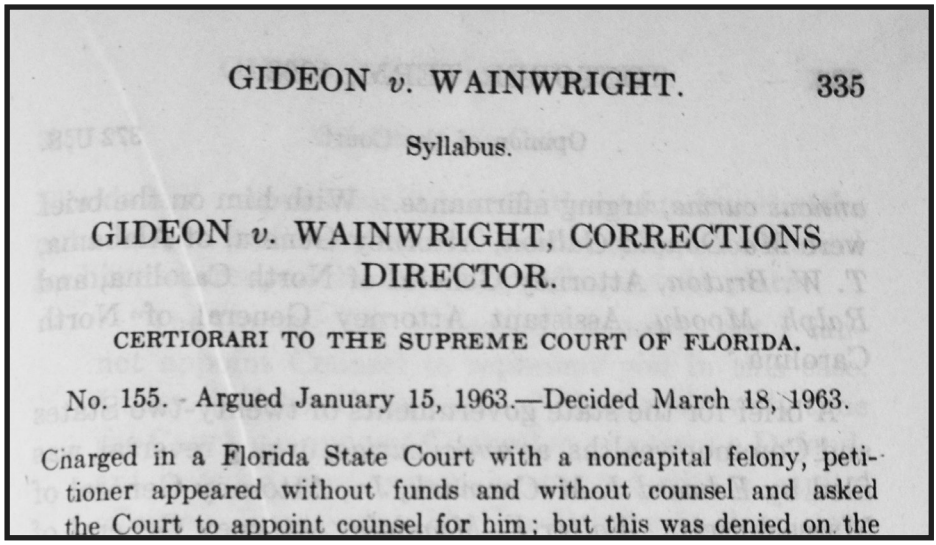

GIDEON *v.* WAINWRIGHT. 335

Syllabus.

GIDEON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 155. Argued January 15, 1963.—Decided March 18, 1963.

Charged in a Florida State Court with a noncapital felony, petitioner appeared without funds and without counsel and asked the Court to appoint counsel for him; but this was denied on the

Gideon v. Wainright *Supreme Court decision, 372 U.S. 335 (1963).*

CRIMINAL PROCEDURE AND THE SUPREME COURT: THEN AND NOW

David S. Rudstein

After examining the United States Reports containing the cases decided by the Supreme Court during its 1887–88 term, one might conclude that the United States in the late 1880s was a law-abiding country with little crime. Of the approximately 270 cases decided by the Court during that term, only seven (2.6 percent) raised issues of criminal law or procedure. In contrast, in its most recently completed term, 2011–12, the Supreme Court decided 76 cases, 22 (29 percent) of which involved issues of criminal law or procedure.

What accounts for this dramatic rise in the number (and percentage) of criminal law or procedure cases decided by the Supreme Court? No one would deny that crime in the United States has increased since 1888. But the true explanation for the increased number of criminal law and procedure cases decided by the Supreme Court is the "constitutionalization" of criminal procedure. When originally adopted in 1791, the Bill of Rights (the first eight amendments to the U.S. Constitution) placed limitations only upon the Federal Government, not upon the individual States. Consequently, none of the rights provided in those amendments—such as the protection against unreasonable searches

and seizures (Fourth Amendment), the guarantee against double jeopardy (Fifth Amendment), the privilege against self-incrimination (Fifth Amendment), the right to counsel (Sixth Amendment), the right to a jury trial (Sixth Amendment), and the right to confront hostile witnesses (Sixth Amendment)—applied in criminal prosecutions brought in state courts. Hence, an individual convicted of a crime in a state court could not challenge his or her conviction in the U.S. Supreme Court on the ground that he or she had been denied a right guaranteed in the Bill of Rights. Many states did of course have their own constitutional provisions guaranteeing various rights to those accused of crime in their own courts, but each state could interpret its own constitutional provisions, and many of these provisions turned out to be less protective of individual rights than their federal counterparts. Moreover, since these were rights guaranteed by *state* law, rather than *federal* law, their alleged violation did not raise a federal issue that could be adjudicated by the U.S. Supreme Court.

Even in 1888, after the adoption of the Fourteenth Amendment—which, among other things, prohibits a State from abridging the "privileges and immunities" of United States citizens ("Privileges and Immunities Clause") and from "depriving any person of life, liberty, or property, without due process of law" ("Due Process Clause")—the Bill of Rights still provided no protection to state criminal defendants.

Shortly after the turn of the twentieth century, the Supreme Court recognized that the Due Process Clause of the Fourteenth Amendment protected *some* individual rights from state infringement, including, perhaps, some safeguarded by the Bill of Rights against National action. Nevertheless, the Court expressly stated that if the Due Process Clause protected such latter rights, it was not because they were enumerated in the first eight amendments. It explained that the Due Process Clause protected only those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." In determining whether a particular safeguard met this standard, the Court asked whether "a civilized system could be imagined that would not accord the particular protection." Applying this test, the Supreme Court held that several of the protections contained in the Bill of Rights, including the privilege against self-incrimination and the right to a grand jury indictment, did not apply to the States. Even when the Court held that a particular right enumerated in the Bill of Rights fell within the concept of due process, it frequently concluded that the protection afforded against state infringement was less than that afforded against infringement by the Federal Government—a

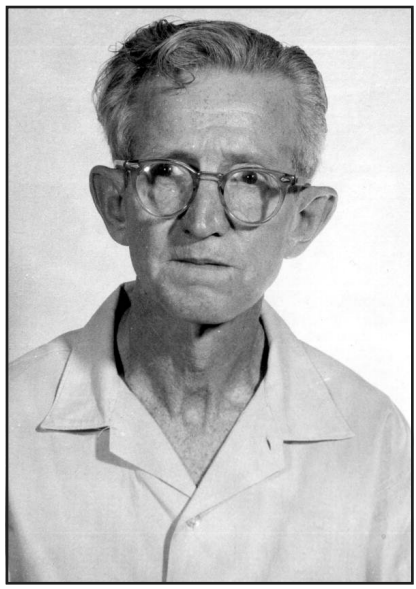

Photo of Clarence Earl Gideon, 1961(?), State Archives of Florida, Florida Memory, *RC12789.*

"watered-down" version of the right.

To illustrate, although the Fifth Amendment guarantee against double jeopardy precluded the Government in a federal criminal prosecution from appealing a jury verdict—whether a conviction or an acquittal—that protection did not apply in state court proceedings. Consequently, in the mid-1930s, after a Connecticut jury considering a charge of first-degree murder against Frank Palko convicted him of second-degree murder (thereby implicitly acquitting him of the original charge of first-degree murder), the State, acting pursuant to a state statute, sought review of the conviction. The State claimed the trial judge had erred in instructing the jury on first-degree murder and in excluding certain evidence from the prosecution's case. The Connecticut Supreme Court agreed; it reversed the conviction (and life sentence) and, despite Palko's implicit acquittal for that offense, ordered a new trial for first-degree murder. At the second trial, a jury convicted Palko of first-degree murder, and he was sentenced to death—a conviction and sentence that the Supreme Court ultimately upheld against a claim that Palko's second trial had placed him twice in jeopardy for first-degree murder.

Throughout the 1940s and 1950s, the Supreme Court consistently rejected the view, persuasively argued by Justice Hugo L. Black, that the Fourteenth Amendment had "incorporated" the entire Bill of Rights and made its provisions applicable to the States to the same extent as they applied to the Federal Government. Even as late as 1961, despite the Sixth Amendment's guarantee that an accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of Counsel for his defense," an indigent being tried in a state court for a non-capital felony had no federal constitutional right to have counsel appointed to represent him or her. Thus, when Clarence Earl Gideon, an indigent drifter being tried in a Florida state court for breaking and entering a poolroom, requested the trial court to appoint counsel to represent him, the judge could respond:

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

During the 1960s, however, under the leadership of Chief Justice Earl Warren, the Supreme Court adopted the position that the Due Process Clause of the Fourteenth Amendment "selectively incorporated" various provisions of the Bill of Rights and made them applicable to the States. Using this approach, the Court held that the Fifth Amendment privilege against self-incrimination, the Fifth Amendment guarantee against double jeopardy, the Sixth Amendment right to a jury trial, and, in overturning Clarence Earl Gideon's conviction, the Sixth Amendment right to counsel were among the rights safeguarded from infringement by the states. In 1968, the Court explained that it had reformulated its test for determining whether a particular provision of the Bill of Rights was incorporated by the Fourteenth Amendment. It stated:

> The recent cases . . . have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing virtually contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an *Anglo-American* regime of ordered liberty. [Emphasis added.]

Today, virtually all of the provisions of the Bill of Rights safeguarding the rights of a criminal defendant apply to the States (the lone exception being the right to an indictment). As a result, the Supreme Court each term receives hundreds of petitions requesting it to review a state-court conviction alleged to have been obtained in violation of the defendant's federal constitutional rights, and each year the Court decides 20 or so cases involving such issues, a large percentage of the number of cases it decides each term with written opinions. ◆

David S. Rudstein *graduated with honors from the University of Illinois at Chicago. He received his J.D.* cum laude *from Northwestern University and his LL.M. from the University of Illinois. After teaching at the University of Illinois for a year, he served as a law clerk to Justice Walter V. Schaefer of the Illinois Supreme Court. He joined the faculty of IIT Chicago-Kent in 1973, serving as Associate Dean from 1983 to 1987. He has focused his scholarship on criminal procedure.*