Gideon v. Wainwright and Related Matters

An Armchair Discussion Between Professor Yale Kamisar† and Vice President Walter Mondale††

Professor Kamisar: As many in the audience are well aware, Vice President Walter Mondale played a major role in getting twenty-two state attorneys general to sign an amicus brief urging the U.S. Supreme Court to overrule the old *Betts v. Brady*[1] doctrine (which only provided counsel in non-capital cases when there were "special circumstances," such as an illiterate or retarded defendant). The Court did overrule *Betts* and, in the famous case of *Gideon v. Wainwright*,[2] promulgated a new rule which, when its outer limits were finally established, provided free counsel for indigent defendants who were sentenced to one or more days of jail time.[3]

As I understand it, Mr. Vice President, in order to get as many state attorneys general as possible to join the amicus brief on behalf of Mr. Gideon, you established some conditions or limitations on the new rule you were hoping the Court would adopt:

(1) The new rule would not apply retroactively. (Florida alone had thousands of people in prison who had not been provided counsel.)

(2) The new rule would only apply to felonies, not misdemeanors. Once the principle was established, the "outer limits" of the new rule could be worked out later.

(3) The right to counsel would only apply to the courtroom—the criminal trial itself—not, for example, to the police interrogation room.

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1. 316 U.S. 455 (1942).

2. 372 U.S. 335 (1963).

3. *See* Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). This became the rule regardless of whether an indigent defendant was convicted of a petty offense or a misdemeanor; everything turned on whether a defendant was sentenced to jail time.

Vice President Mondale: I agree. Sooner or later, the Supreme Court would decide how early the right to counsel began, but there was no need to do so in the *Gideon* case. (Ultimately, the Supreme Court would have a good deal to say about when the privilege against self-incrimination first applied and when the right to counsel began three years later—in a case called *Miranda v. Arizona*.[4]) I also spent time with our law enforcement leaders to urge their compliance with the *Miranda* case. I believe they did comply.

Professor Kamisar: As it turned out, the Supreme Court adopted none of the three limitations sought by the state attorneys-general.

When I recently looked at the states which then-Minnesota Attorney General Mondale had in mind when other state attorneys-general were approached and asked to join the amicus brief, I couldn't help noticing that both California and New York were missing. Were the attorneys general of those states unhappy with the Supreme Court for some reason?

Vice President Mondale: As I prepared my remarks for our law school seminar, I reviewed the list of state attorneys general who supported our brief. I was astonished to see that California and New York had abstained. For the life of me, I cannot explain it. I am sure I had talked with them. Both were progressive attorneys-general. Stanley Mosk of California and I were very good friends.

Professor Kamisar: Let me explain how I got involved with the *Gideon* case and how I got to know then-Minnesota Attorney General Walter Mondale. In the early 1960s, some Minnesota Law School professors had lunch with various law enforcement lawyers, such as the state attorney general and the Minneapolis and St. Paul prosecuting attorneys, once every three or four weeks. My colleague Jim Hetland urged me to attend these meetings, and I'm glad he did. That is how I came to know Mondale, who had become Minnesota's Attorney General only four years after he graduated from Minnesota Law School.

In 1962, I was putting the finishing touches on an article strongly criticizing the old *Betts* rule[5] when the Supreme Court

4. 384 U.S. 436 (1966).

5. *See* Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A*

announced that it was going to reconsider the whole subject of providing indigent defendants with free counsel.

The article I was working on had an important empirical component to it. At the time, thirteen states did not have laws or rules requiring the appointment of counsel in all felony cases without regard to "special circumstances."[6] I found it hard to believe that so many states did not have a flat rule requiring the appointment of counsel in all felony cases. So I decided to find out whether that approach was true in practice by writing to prosecuting attorneys and/or members of the states' attorney general offices in these thirteen states. (It turned out that I had guessed right.)

Some of the people I was corresponding with soon told me that the Attorney General of Florida (where the *Gideon* case arose) was urging them to join an amicus brief defending Florida's position—to keep things just the way they were. The next time I saw Attorney General Mondale, I asked him whether he had received a letter from the Florida Attorney General urging him to side with Florida in the *Gideon* case. As I recall, the Vice President told me that he had thrown the Florida letter into the wastebasket. Evidently he subsequently found it there. For, as I had suggested, he wound up writing back to the Florida Attorney General that (a) he couldn't believe anybody would defend the current situation in states like Florida, and (b) if anything, he was inclined to write an amicus brief *against* Florida.[7]

Vice President Mondale: That's how I remember it, except that I thought I had asked you to help me with the letter to the Florida Attorney General, which you did.

Professor Kamisar: My correspondence with lawyers from the thirteen states whose rules did not require the appointment of counsel in all felony cases led me to conclude that in most of these states, the actual practice was to provide counsel to all indigent

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Dialogue on "the Most Pervasive Right" of an Accused, 30 U. CHI. L. REV. 1 (1962).

6. See *id.* at 17–20.

7. Mondale's letter to the Florida Attorney General was reprinted in part in a *Washington Post* editorial praising Mondale for the position he took with respect to the right to counsel. *See* Editorial, *Fair Trials for Indigents*, WASH. POST, Aug. 26, 1962, at E6. This editorial may have led Massachusetts Attorney General Edward J. McCormack, Jr., to write an amicus brief on behalf of Mr. Gideon—without realizing that Mondale had decided to do the same thing. *See* Brief for the State Government Amici Curiae, Gideon v. Cochran (Gideon v. Wainwright), 372 U.S. 335 (1963) (No. 155), 1962 WL 75209.

felony defendants, at least when they so requested. The exceptions were five southern states: Alabama, Florida, Mississippi, North Carolina, and South Carolina.[8]

Vice President Mondale: This is my understanding at the time of *Gideon*. I always thought that the states in which official racial discrimination was or had been practiced were also the states most likely to have weakened procedural protections for criminal defendants.

Professor Kamisar: We are celebrating the fiftieth anniversary of *Gideon v. Wainwright* by reminding people that Vice President Mondale played an important role in getting twenty-two state attorneys general to sign an amicus brief on behalf of Clarence Earl Gideon. But we should remember that the *Gideon* case was not the first time that Mondale warmed the hearts of civil libertarians.

When the Supreme Court decided *Mapp v. Ohio*[9] in 1961, the case that held that all evidence obtained in violation of the Fourth Amendment to the U.S. Constitution is inadmissible in a state court as well, there was a good deal of grumbling about the decision in Minnesota police ranks. The reason was that Minnesota (along with about half the states) had been admitting illegally seized evidence all along.[10]

When the State Bureau of Criminal Apprehension conducted a series of police institutes in 1962 to teach law enforcement officers the law of arrest and search and seizure, there were many complaints about the *Mapp* case. The instructors seemed more interested in telling the police how to *circumvent* the Fourth Amendment than in teaching the police how to *comply* with the Amendment's requirements. This reaction disturbed the new Minnesota Attorney General, Walter F. Mondale. He decided to make the principal address at the next state police institute and when he did he engaged in some straight talk.[11]

At the next police institute, Mondale pointed out that the language of the U.S. Constitution's Fourth Amendment is identical to the search and seizure clause of the Minnesota State

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8. *See* Kamisar, *supra* note 5, at 19. *See also* Kamisar, *supra* note 5, at Appendix I, pp. 67, 68, 70, 71, 73–74.

9. 367 U.S. 643 (1961).

10. *See generally* Yale Kamisar, *Mondale on* Mapp, 3 C. L. REV., Feb./Mar. 1977, at 62.

11. *See id.*

Constitution. Consequently, the U.S. Supreme Court had not really imposed a greater restriction on the Minnesota police than the one that already existed.

Mondale emphasized that what was a legal arrest before *still* was. In short, as Mondale observed, "the *Mapp* case does not reduce lawful police powers one iota. It only reduces potential *abuses* of power."[12]

Mondale was quite unhappy about efforts to circumvent the Fourth Amendment and Minnesota's counterpart to it. He maintained that it was "contrary to our oath and destructive of a free society." He continued: "[a]s Attorney General of this state, I do not propose to permit our Constitution to be circumvented and I serve notice upon anyone so inclined."[13]

Vice President Mondale: I do remember the conference at which I urged law enforcement compliance with the *Mapp* case. There was strong editorial support for my remarks, and I believe the law enforcement leadership in our state supported my position as well.

Professor Kamisar: I couldn't resist commenting on Mondale's response to the Minnesota police's reaction to *Mapp*, but let's get back to the right to counsel.

The six Justices of the Supreme Court who affirmed Mr. Betts' conviction back in 1942 thought his case was an easy one, a simple one. At one point Justice Roberts observed for the majority:

> The defense was an alibi.... The simple issue was the veracity of the testimony for the State and that for the defendant.... [T]he accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue.[14]

So far as we can tell, none of the six Justices ever looked at the trial record. Moreover, so far as we can tell, neither did any of the three dissenting Justices (Justice Black, joined by Justices Douglas and Murphy).

How many people were in the lineup when Mr. Betts was identified as the robber? One—Mr. Betts.[15]

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12. *See id.* at 63.
13. *Id.*
14. Betts v. Brady, 316 U.S. 455, 472 (1942).
15. *See* Kamisar, *supra* note 5, at 43–48.

Did the victim of the robbery have any trouble identifying Mr. Betts as the robber—*even though* Betts was the only person in the lineup? The answer is yes. At one point, the victim admitted that he might not have been able to identify Mr. Betts if he had not been wearing the same dark gray overcoat with the bagged pockets and the same dark amber glasses and the same handkerchief around his chin that the robber was wearing on the evening of the crime.[16]

At one point, the robbery victim sounded as if he were identifying the dark gray coat, *not* Mr. Betts. In response to a question by the trial judge, the robbery victim said he identified the coat the defendant was wearing at the one-person lineup because it was dark gray and "bagged at the pockets"—just like the coat the robber was wearing on the night of the robbery.[17]

Whose coat was Mr. Betts wearing? *Whose* dark amber glasses?

No gray overcoat or dark glasses were ever offered in evidence. As best as I can tell, the victim described to the police the various items the robber was supposed to have worn the night of the robbery; the police simply went out and borrowed the items from someone else and slapped them on Mr. Betts. The robbery victim then made his identification, based largely on the items the police had put on Mr. Betts.[18]

A final word about the *Betts* case: at one point the *Betts* majority made a comment about the case that must rank as one of the ten silliest comments the Supreme Court has ever made. The Court said that the defendant "had once before been in a criminal court, pleaded guilty to larceny[,] and served a sentence and was not wholly unfamiliar with criminal procedure."[19]

Unfortunately, in my lifetime I have been in a dentist's office at least 100 times. So someone might say I am not "wholly unfamiliar" with dentistry. I assure you, however, that I still don't know how to fill a cavity, to say nothing about doing a root canal procedure.

Looking back at *Gideon* fifty years later, how has it worked out? There is widespread agreement that the typical lawyer representing an indigent defendant is badly overworked—indeed, often overwhelmed. These lawyers simply do not have anything

16. *Id.* at 48–49.
17. *Id.* at 48.
18. *Id.* at 49.
19. *Betts*, 316 U.S. at 472.

close to the time they need to represent their clients effectively.[20] *Strickland v. Washington*,[21] the Court's principal case defining the constitutional test for "ineffective assistance of counsel," has not helped much.

According to *Strickland*, in order to establish a claim of ineffective assistance of counsel, defendants must not only show that their lawyer's performance was deficient (that they fell below "an objective standard of reasonableness"),[22] they must also show that they suffered prejudice from the deficient performance.[23] This two-prong test has proved quite formidable. It does not help the defendant that a court may reject an ineffective assistance claim on the basis of *either* prong, without considering the other one.[24]

Vice President Mondale: Importantly, the *Gideon* case established a clear constitutional standard—to provide for the legal defense of indigent felony defendants in state criminal proceedings. I remember the head of the Minnesota Public Defenders Association telling an audience that *Gideon* has had a very positive impact on criminal justice in Minnesota and I believe the same could be said across the nation.

Nevertheless, many state practices and inadequacies clearly diminish and damage the *Gideon* right-to-counsel principle, such as: lack of adequate funds to support public defenders, low-fee caps and low-bid/flat-fee contracts, lack of independence, crushing case loads, excessive use by prosecutors of surprisingly high minimum sentences, and "stacking up" proposed charges in order to pressure the defendant to accept a guilty plea. As a practical matter, there is a very severe penalty for those who insist on their right to a criminal trial.

This so-called "trial penalty" may help explain the high percentage of defendants who plead guilty rather than go to trial. It is an astonishing ninety-four or ninety-five percent.[25]

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20. For an in-depth discussion on the lack of time and resources facing public defenders, see generally, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf, and KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE (2013).

21. 466 U.S. 668 (1984).

22. *Id.* at 669.

23. *See id.* at 687.

24. *See id.* at 700.

25. Recently, the Supreme Court reminded us that our system "is for the most

The ABA has issued a much-studied list of principles of a public defense system that should be our guide to achieving equal justice.[26] The federal and state courts, states and counties, lawyers and their associations should renew efforts to establish equal justice—not only because it is a constitutional obligation but also because the integrity and trust essential to our system of justice depends upon it.

Professor Kamisar: There is a great deal to what you say.

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part a system of pleas, not a system of trials," pointing out that ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Lafler v. Cooper, 132 S. Ct. 1376, 1381 (2012)). Shortly after the Mondale-Kamisar lunchtime discussion took place, the *New York Times* reported that federal judges, as well as many defense lawyers, were strongly criticizing federal prosecutors who pressure criminal defendants to plead guilty by recommending much heavier sentences for those found guilty after a trial, as opposed to those who plead guilty. According to many critics, "federal prosecutors are strong-arming defendants into pleading guilty and overpunishing those who do not—undermining the fairness and credibility of the justice system." Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, N.Y. TIMES, Dec. 6, 2013, at A19.

26. *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf. The statement of principles points out, *inter alia*, that "[c]ounsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels." *Id.* at 2.