



OFFICE OF THE FEDERAL DEFENDER
Eastern District of California

801 I Street, 3rd Floor
Sacramento, CA 95814-2510
(916) 498.5700
FAX (916) 498.5710

2500 Tulare Street, Suite 330
Fresno, CA 93721-3121
(559) 487.5561
FAX (559) 487.5950

HEATHER E. WILLIAMS
Federal Defender

LINDA C. HARTER
Chief Assistant Defender

CHARLES LEE
Fresno Branch Chief

RACHELLE BARBOUR, Editor

Federal Defender Newsletter

January 2014

CJA PANEL TRAINING

Sacramento CJA Panel Training will resume on January 15th (Third Wednesday) at 5:00 p.m. in the grand jury room at the U.S. District Court, 501 I St. Federal Defender Heather Williams will present Pride and Prejudice: Elimination of Bias, which will meet the California State Bar's MCLE requirement for "Elimination of Bias in the Legal Profession."

Fresno CJA Panel Training will resume on January 21st (Third Tuesday) at 5:30 p.m. CJA Panel Attorney John Balazs will present on The Nuts and Bolts of Getting Appointed and Defending Forfeiture Actions. The training will be held in the jury room of the U.S. District Court, 2500 Tulare St. in Fresno.

CLIENT CLOTHES CLOSET

Do you need clothing for a client going to trial or for a client released from the jail? Are you interested in donating clothes to our client clothes closet or money to cover the cost of cleaning client clothing? If so, please contact Katina Whalen at 498-5700.

TOPICS FOR FUTURE TRAINING SESSIONS

Do you know a good speaker for the Federal Defender's panel training program, or would you like the office to address a particular legal topic or practice area?

Email suggestions to:

Fresno - Janet Bateman,
janet_bateman@fd.org, Ann
McGlenon, ann_mcglennon@fd.org, or
Karen Mosher, karen_mosher@fd.org,
or

Sacramento: Lexi Negin,
lexi_negin@fd.org.

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Check out [www.fd.org](http://www.fd.org) for unlimited information to help your federal practice.

### ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our website: [www.cae-fpd.org](http://www.cae-fpd.org). We will try to post training materials **before** the trainings for you to printout and bring to training for note taking. Any lawyer not on the panel, but wishing training materials should contact Lexi Negin, [lexi\\_negin@fd.org](mailto:lexi_negin@fd.org).

## ♪ NOTABLE CASES ♪

Nguyen v. Curry, No. 11-56792 (12-4-13) (Fletcher with Trott and Stein, D.J.). In an important habeas case, the Ninth Circuit extends Martinez's IAC exception for procedural default to appellate counsel. The Ninth Circuit holds that the Martinez standard for "cause" exception applies to Sixth Amendment ineffective assistance of counsel claims, both trial and appellate, that were procedurally defaulted by ineffective counsel in the initial review state court collateral proceeding. Martinez is not limited to trial. This decision conflicts with the limited approaches of the Eighth and Tenth Circuits. The Ninth Circuit also holds that the claim relates back.

United States v. DeJarnette, No. 11-10606 (12-20-13) (Tashima with Noonan). The Ninth Circuit reverses a jury conviction for failure to register under SORNA and remands for a judgment of acquittal. The issue is the application of SORNA's "initial registration" requirement to a 2001 federal sex offense. SORNA requires a sex offender to register both in the jurisdiction of conviction and the jurisdiction where he or she lives. It was enacted in 2006, long after the defendant's conviction. The retroactivity provision of SORNA did not become effective until August 1, 2008 per the Ninth Circuit in Valverde. The government alleged that defendant failed to initially register as a sex offender in the Northern District of California from August through December 2008, while he was living in Georgia. The jury was instructed that the defendant had the duty to complete an initial registration under SORNA in the district he was convicted, even if that was different than his district of residence. The Ninth Circuit held that the AG had not required sex offenders like defendant – who were convicted prior to

SORNA and subject to pre-SORNA state registration requirements – to "initially register" in their district of conviction. The jury instruction allowing conviction solely on the basis of failure to register in the jurisdiction of conviction was erroneous and not harmless.

United States v. Shorty, No. 11-10530 (12-20-13)(Reinhardt with Noonan and Watford). The Ninth Circuit reverses a conviction and remands for failure to perform an adequate colloquy for a jury waiver. A jury can be waived under Fed R Crim P 23, but it requires waiver in writing, the government's consent, court approval, and, under case law, that the waiver be knowing and intelligent. Here, the defendant had a low IQ, and was learning disabled. There was no written waiver. The colloquy was inadequate to see if the defendant really knew about his jury rights and intelligently gave them up. The Ninth Circuit reversed.

United States v. Anderson, No. 12-10344 (12-19-13)(Callahan, with Fernandez & Vance, D.J.). Anderson sold (unauthorized) copies of Adobe software online. Activation codes were hand-written on the disk in permanent marker. He sold about \$70,000 worth of the software, was discovered by Adobe, and was ultimately prosecuted for criminal copyright infringement. At trial, Anderson explained that he thought these disks were legal backup copies. The parties disputed a "willful infringement of copyright" jury instruction, and the jury later sent a note questioning the meaning of "willful." After conviction, the district court imposed \$247,144 in restitution. The Ninth Circuit held that the willfulness jury instruction was flawed (but not plain error). It also held that the restitution award should have

reflected the victim's actual loss, which consisted of the victim's lost profits on sales of authentic copies that would have taken place if not for Anderson's conduct. Rather than base restitution on the victim's losses, the district court erroneously calculated restitution by multiplying the number of copies of Adobe disks sold, by the retail value of the disks. The Ninth Circuit reminds district judges to apply a useful, rigorous application of restitution – a “back of the envelope approach simply will not do.” “Speculation and rough justice are not permitted.”

United States v. Caceres-Olla, No. 12-10132 (12-23-13) (Berzon, with Fernandez and Paez). In an illegal reentry sentencing, the Ninth Circuit looks at whether a prior felony conviction for lewd and lascivious battery from Florida qualifies as a crime of violence for Guideline purposes. The Ninth Circuit holds it does not. The opinion scrutinizes the interplay between forcible sex offenses, and those that require no force (i.e. statutory rape). Because the state statute focuses on the age (12 to 16) of the victim, without being any force, it does not have the requisite force element. The Ninth Circuit agrees with a prior holding by the Fourth Circuit. In regards to the “statutory rape” alternative under the Guidelines, the generic offense has a four year age difference. Here, the state statute does not have the generic age difference. Under Descamps, a categorical approach is employed. Because the age element is missing from the statute, the inquiry ends; there is no modified categorical approach. The government admits that all records were available at the time of sentencing, and therefore the case is remanded for sentencing on the record as is.

## ADDRESS, PHONE OR EMAIL UPDATES

We want to be sure you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the e-version of the newsletter or attachments, please call Kurt Heiser, (916) 498-5700. Or if you receive a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Calvin Peebles at the same number.

## CJA REPRESENTATIVE

Panel lawyers: Your CJA representative is Carl Faller, (559) 226-1534, [carl.faller@fallerdefense.com](mailto:carl.faller@fallerdefense.com).

## Former Federal Defender Employees Looking for Employment

Becky Darwazeh, [darwazeh1@hotmail.com](mailto:darwazeh1@hotmail.com):  
Secretarial, Legal Assistant

Yvonne Jurado, [yvonneeee@live.com](mailto:yvonneeee@live.com),  
(916)230-0483: Paralegal, Secretarial,  
Legal Assistant, CJA voucher  
preparation and filing

Karen Sanders, [kvs.legaltech@gmail.com](mailto:kvs.legaltech@gmail.com),  
(916)454-2957 (h), (916)216-3106 (cell)  
Karen has over 20 years of experience  
as the computer systems administrator  
at FDO. She'll be providing legal  
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Lupita Llanes, [lupitallanes@gmail.com](mailto:lupitallanes@gmail.com), (559)  
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## Behind the Headlines, Beyond Court – Faces Behind *Gideon v. Wainwright*

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Abraham Fortas was born June 19, 1910, in Memphis, Tennessee. Seventy-two days later and 400 miles north along the Mississippi River, in Hannibal, Missouri, Clarence Earl Gideon was born. The year after Fortas' bar mitzvah, Gideon ran away from home to California. The teenaged Gideon worked in a shoe factory, while Fortas worked in a shoe store. And when both were age 52, one was arguing before the United States Supreme Court for the other's right to a lawyer.

### Get Set – Go!

Gideon's father died when he was just 3 years old. His mother remarried when he was five, producing a half-sister and half-brother. He thought his step-father a "good man," uneducated, but they would not accept each other as family. His mother was a strict disciplinarian and she and his stepfather constantly quarreled, eventually making Gideon the "scapegoat of those quarrels." His parents followed the Baptist faith, "lived by the best moral custom." Both parents supported the family working in the local shoe factory. Gideon did fine through the 8<sup>th</sup> grade and started attending the Baptist church at age 13. The following year, Gideon ran from home to California. Unable to make it long on his own, he returned home to Hannibal a year later, only to have his mother report him to authorities. Gideon escaped from detention a day later, but the weather was so brutally cold, he was caught stealing clothes. Branded a "delinquent," he was forced to the reformatory for a year, bearing the whipping scars the rest of his life. (David Sedaris, after the recent

suicide of his sister Tiffany who, after the ninth grade, was also sent to a disciplinary institution for 2 years after running away from home, quoted his mother as to "why?": "We had other kids(.) . . . You think we could let the world stop on account of any one of you?"") Gideon's family had other kids.

The juvenile hall released Gideon and he worked in the shoe factory at age 16. Not much later, he married and they lived together until he lost his job. Desperation turned Gideon to burglary (1928, Missouri: 10 year sentence, paroled after 3 years), to drink and to travel ("drifter" has been used to describe him) into the Great Depression where he now competed with men more educated, more skilled, more experienced for what little work existed. A federal stint in Leavenworth followed for stealing from an armory and meant a 3 year sentence in 1934. There he worked in the shoe factory, sending what little he made to his parents who "had lost their home during the depersion (sic)." After his release, he didn't qualify for any of the government's assistance because of his convictions. He escaped from jail after a burglary arrest in Missouri in 1944, and, using a false draft card for "Barney Smith," got work on the Southern Pacific Railroad in Texas as a brakeman. He was captured a year later when his "Wanted" information was published in a *True Detective* magazine. Returning to Texas, he had a second brief marriage and took up gambling, when he was arrested again. By 1952, when he was released from prison for a Texas burglary, he'd spent more of his adult life in jails or prisons than out of them.

In 1953, Gideon contracted tuberculosis and spent 2 years in the hospital, forever after affecting his six foot frame. After his arrest, conviction, and prison release in

1952 and hospital release in 1954, he eschewed crime and focused on family. He first returned to mother in Hannibal where he met and married, then moved to Texas where he bought the Orange Domino Club. The marriage failed, divorce followed, but within a year, Gideon married Ruth Ada Babineux, taking as his own her 7 year old daughter and helping her to get custody of her two preteen boys. Their own sons were born in 1956 and 1957. Gideon sold the pool hall and tried to start another business, Smitty's Bar (based on his a.k.a.), while also working as either on tug boats or as a watchman.

Eventually, Gideon relocated to Bay Harbor, Florida, near Panama City in the Florida panhandle, hoping for better employment, with Ruth selling Smitty's, following him with children to Bay Harbor. Bay Harbor was a curbside town with long rectangular houses, short ends facing the road. The sky is dominated by smoke from the local paper mill, spewing from tall constant chimneys.

Though employable as an automobile electrical mechanic or journeyman electrician, he could hardly support his family and turned to gambling again when his youngest, a daughter, was born April 1959. Thus began the spiral of unfortunate events leading to his Supreme Court case. He was arrested July 1959 in nearby Springfield, Florida, and detained pending trial. Gideon believed the arrest was motivated by his besting for \$150 the local illegal poker game run by a former local judge and played by that man, the local mayor, several commissioners, the chief of police, and a night shift policeman, the latter two also providing protection for the game. It was that chief of police who arrested Gideon for the felony charge of allegedly breaking and entering the

gambling establishment to commit a misdemeanor theft inside. He asked for and was denied appointment of counsel, but the judge directed a verdict of "not guilty" at trial.

The cycle was thus: While in Gideon was jailed or out of state working, Ruth couldn't get welfare for she and their six children because of Gideon's criminal convictions. Ruth would get work in a "beer joint," drinking more heavily herself, and the local welfare agency would become involved feeling the children weren't being cared for, taking their children to foster homes. Once Gideon was released or returned home, he'd find work as an automobile electrician and try to put his family back together, attending Baptist church (despite putting "that organization in the same class as the K.K.K. Because they hate many persons and things"), hoping it would help Ruth, would teach his children some "moral respect," and would provide for his family's welfare in times of financial need. Life improved for a time until Gideon fell ill with tuberculosis again. Church welfare wasn't enough; Ruth returned to drinking and another man moved in. Gideon left the hospital, fought the man, was arrested for being drunk, returned to the hospital, then left for work on a "spud barge"<sup>iii</sup> in Louisiana before being medically released.

When his weekly checks home were returned, Gideon learned the children were again in foster care and Ruth had disappeared. In a brief visit to Florida, Gideon made arrangements with Welfare to send support for his children and gave up on Ruth, who'd been arrested for drunk driving. Returning to Louisiana, he eventually lost his job once his employers learned he left tuberculosis treatment before being medically released. Again, he returned to Bay Harbor. A few wrongful

arrests, illness, Ruth giving birth to and putting up for adoption a daughter who may or may not have been Gideon's, and divorce from Ruth followed.

Gideon then worked as best he could to try and get his children from foster care, to arrange for his children to live with his sister and mother in Missouri, but found frustration at every corner. One place Gideon found part-time work and occasionally ran a poker game was at the Bay Harbor Poolroom; he had keys to the place. A rectangular building seemingly like all the others in Bay Harbor, a long worn wooden bar follows one long wall, with 3 pool tables perpendicular to the bar.

## Fortas in the Making

A first generation American and the youngest of five children, Fortas grew up in the poor Jewish section of Memphis. His home lined the alley across from Memphis' segregated black neighborhood. His parents, Orthodox Jews, emigrated from England. Fortas' father worked various jobs to support the family – pawnbroker, jeweler, shopkeeper, and, finally, cabinetmaker. His mother was illiterate. Fortas walked long routes to shul for religious study and, despite their poverty, Fortas' father insisted Fortas follow his father's love of music and study violin. Both study and violin proved to be Fortas' keys to success.

In high school, Fortas worked nights at a shoe store, was captain of the high school debate team, and formed a jazz dance band, the Blue Melody Boys Band, where he played violin. Fiddlin' Abe worked constantly and seriously to overcome looking younger than his years and his shorter than average stature – he

graduated high school, second in his class, at age fifteen.

It was this achievement which inspired the synagogue's rabbi to award Fortas a scholarship to Memphis' local university, Southwestern, in honor of the rabbi's deceased younger brother who he'd put through law school. Majoring in English and economics, Fortas racked up an impressive college résumé: debate team, forensic society, college orchestra director, assistant editor of the school's literary magazine, and president of Southwestern's literary and philosophy societies. As the latter's president, he invited as speaker a local black minister, a first for the university; he shook the man's hand when he arrived, a first for Fortas too. That realization made him look differently at the world where he grew up and what he would do in his future.

In 1929, Fortas graduated first in his class. He applied to both Harvard and Yale and was accepted to both, though Yale took some persuading despite his stellar academic record. The \$50 more per month in scholarship offered by Yale, combined with the community's tolerance towards Jews, persuaded Fortas to attend Yale.

Fortas' study discipline caught his law professors' attentions, especially his business law professor, the future Supreme Court justice William O. Douglas. Douglas sought to groom Fortas to take over his teaching at Yale. By time Fortas graduated from Yale Law School in 1933, age 23 (second in his class, *cum laude*, elected to the Order of the Coif), Yale offered him a teaching fellowship. But he had a summer to fill (and earn money during) before his teaching position began. Another of his professors recommended

Fortas as an assistant to the General Counsel for the Agricultural Adjustment Administration, an agency tasked with, during the Depression, getting agricultural production and prices to the levels they were before World War I started. Fortas earned more than money that summer: he became an expert in the canned cling peach world, got his first taste of the lawyer's role in politics and government (so intoxicating it seduced him for decades), and met his future wife, another government worker with the Department of Agriculture.

Carolyn Eugenia Agger, the daughter of a Rutgers economics professor emeritus, earned her bachelor's and master's degrees in economics. Two years younger than Fortas, five foot, one inch tall, and not Jewish, Carol married Fortas in 1935 and moved with him to New Haven as he once again boomeranged to Yale after a summer of government work.<sup>iii</sup> Fortas encouraged Carol, who did not take Fortas' name, to attend Yale's law school, where she even took the business law course he taught. Her graduation in 1938 mirrored her husband's: *cum laude* and second in her class. With her graduation came employment with the National Labor Relations Board, then the Department of Justice's Tax Division – tax law was her specialization the rest of her life.

Carol's D.C. employment gave Fortas the opportunity to quit teaching which hadn't sated his legal interests. Douglas, now Securities and Exchange Commission (SEC) chairman, hired Fortas as assistant director of the SEC's Public Utilities Division. Douglas' nomination to the United States Supreme Court the following year also brought Fortas' appointment as Undersecretary to Harold Ickes, the Secretary of the Interior. In that role, he

soon met, and eventually became friends with the junior Texas Congressman, Lyndon Baines Johnson – LBJ.

## Pool Hall Purloined

The night had barely cooled when local police on patrol noticed the Bay Harbor Poolroom had been broken into. The bar's owner reported change, maybe \$65 worth, from a cigarette machine and jukebox missing, as well as some bottles of wine, Cola-Cola, and beer. Nearby was Henry Cook who claimed he was returning from a dance at 5:30 a.m. He explained to police he'd seen Gideon staggering from the Pool Hall, bottles of wine and beer in his arms, climbing into a taxi – it must've been Gideon.

Gideon was arrested June 3, 1961, for the felony charge of breaking and entering the Bay Harbor Poolroom to commit a misdemeanor theft inside, and was detained pending trial. Gideon believed his arrest again was gambling based, that the local sheriff was trying to prove himself after having been suspended, then reelected.

When appearing before Judge Robert L. McCrary, Jr., for trial, the judge asked Gideon if he was ready for trial. Gideon replied, no, "I have no counsel." The judge asked him why? Didn't Gideon know trial was set for that day? Gideon said, "Your Honor, I request this court to appoint counsel to represent me in this trial." The judge apologized, "I'm sorry, but I will have to deny your request to appoint counsel to defend you in this case." Gideon argued that "the Supreme Court says I'm entitled to be represented by counsel." As we discuss later, he was incorrect.

The prosecutor called but two witnesses against Gideon at his August 4, 1961 trial: the bar's owner and Henry Cook. The judge precluded Gideon from bringing out any of Cook's prior convictions when Cook denied having any, or the fact Cook may have been motivated to lie about Gideon because Gideon was responsible for stopping Cook's beating of a woman. Gideon called six witnesses, though one wonders why. The defense witness taxi driver only testified what Gideon said when picked up outside the pool hall in the early morning hours - "don't tell anyone you saw me here."

The 6 man jury took no time in finding Gideon "guilty" and, on August 27, 1961, Judge McCrary sentenced him to the maximum - 5 years prison.

From prison, still without a lawyer, looking "used-up" (as Anthony Lewis described) or *acabado* (as one would say in Spanish), Gideon filed his notice of appeal to the Florida Court of Appeals - denied, and to the Florida Supreme Court - denied. Then, on paper and with pencil supplied by the prison, sitting in what passed for the prison library in Raiford, Gideon wrote his Petition for Writ of Certiorari to the United States Supreme Court.

#### Right to Counsel is So Appealing

The Sixth Amendment's right to counsel was a drastic deviation from the English common law with its backwards holding of representation in misdemeanors, but not in serious cases, such as treason. In a case known as the Scottsboro Boys case, the Supreme Court ruled, "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether

requested or not, to assign counsel for him."<sup>iv</sup> Then, 6 years later in 1938, the Supreme Court ruled that in all federal cases, counsel would have to be appointed for defendants who were too poor to hire their own.<sup>v</sup> But, in 1942, in *Betts v. Brady*, the Court concluded the right to counsel did not extend to the state courts under the Fourteenth Amendment unless the defendant demonstrated "special circumstances" requiring the assistance of counsel.<sup>vi</sup> Justice Hugo Black wrote for the three dissenters.

Black was a native of Alabama. A 1906 law school graduate, Black became a county prosecutor in 1914, before joining the Army in World War I. In the early 1920s, he joined the Ku Klux Klan to further his political career, resigning from the organization before being elected United States Senator in 1926. President Franklin Delano Roosevelt appointed Black to the United States Supreme Court in 1937.

After *Betts*, the Court began chipping away at the decision, delineating those "special circumstances," such as requiring Illinois to prepare an appealing defendant's lower court transcript without requiring that defendant's payment.<sup>vii</sup> Black, writing *Griffin's* majority opinion, said, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." These notions of "fairness" entered the battle of federalism versus states' rights. Months before the Supreme Court decision in *Mapp v. Ohio* in 1961, Justice Brennan gave a speech, saying, "Far too many cases come from states to the Supreme Court presenting dismal pictures of official lawfulness, of illegal searches and seizures, illegal detention attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel . . ."

Gideon of course had no lawyer to represent him on appeal and he never ordered his cases' transcripts. In continuing to defend himself, "an obscure Florida convict named Clarence Earl Gideon . . . sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court, . . . one crude petition," as then-United States Attorney General Robert F. Kennedy described Gideon's efforts.<sup>viii</sup>

Gideon, pencil in hand and on a form supplied by the prison in Raiford, wrote: *The question is very simple. I requested the court to appoint me attorney and the court refused.*

After landing in the *pro se* pleadings' folder at the Supreme Court Clerk's Office, *Gideon v. Cochran* (Raiford's previous warden to Wainwright) made its way through the Supreme Court process, including needing to be refiled once for missing information. But enough information was eventually there for the Supreme Court Clerk's Office to call Fortas in late June 1962 to ask him to take on Gideon's petition. Fortas was then a partner in the D.C. law firm Arnold, Fortas and Porter.

Since we last saw Fortas in the 1940s, he continued to be a good friend and advisor to LBJ. His law firm was formed in 1946 with Thurman Arnold (former Yale law school professor, Assistant Attorney General and United States Court of Appeals Judge) and Paul Porter (former Federal Communications Commission chairman and Office of Price Administration administrator – remember Fortas and those cling peaches?). They gained a reputation as an international law firm "focusing on the intersection of business, law, and public policy."<sup>ix</sup>

In 1948, Fortas represented LBJ concerning his first campaign for United States Senator from Texas. LBJ campaigned in the August Democratic primary against the Texas governor. He won the election by 87 votes, but about 200 ballots were questionable, so the governor filed suit in United States District Court alleging fraud.<sup>x</sup> The judge, allegedly the governor's friend, invalidated the election result, took LBJ off the general election ballot, putting the governor on. Fortas came to LBJ's case on appeal to the Fifth Circuit United States Court of Appeals. Fortas argued to Judge J.C. Hutcheson who preferred to wait until later in the fall (after the general election) to have *en banc* argument. Fortas then approached the Fifth Circuit's Presiding Supreme Court Justice, Hugo Black, who would handle it expeditiously. He did and "Fortas argued . . . a federal court should not enjoin a state-run election."<sup>xi</sup> Justice Black, in late September, set aside the district court's order for lack of jurisdiction, placing LBJ back on the final ballot, and he was elected Senator.

In the 1950s, Arnold, Fortas, and Porter took on the unpopular representation of those charged with being Communists, representations which haunted Fortas later when LBJ nominated him to the Supreme Court, and again when nominated to be Chief Justice. In fact, Fortas represented Puerto Rican actor José Ferrer (who later played Fortas in the 1982 Hallmark Hall of Fame television movie *Gideon's Trumpet*) when he was called before the House Un-American Activities Committee. Fortas also gained a reputation as capable, clever, and savvy business lawyer, his best corporate client representation sometimes being at odds with his liberal, progressive beliefs. Anthony Lewis described him in *Gideon's Trumpet*:

Fortas is a smallish man with a manner that can be grave or, especially with women, charming. . . . A lawyer who ... worked with him says: "of all the men I have met, he most knows why he is doing what he does. I don't like the s.o.b, but if I were in trouble I'd want him on my side.

From his roots as a violinist, Fortas was active in supporting classical music in D.C. He eventually became friends with Pablo Casals, the famous 'cellist who left fascist Spain to live in Puerto Rico, who was his firm's client. Eventually, Fortas, along with Puerto Rico's governor Luis Muñoz-Marin, persuaded Casals to establish the Casals Festival of Puerto Rico and he served on its board. Fortas was largely responsible for Casals' concert before President John F. Kennedy at the White House. (Fortas later observed, when he was appointed Supreme Court justice, Casals was the only client he could not get rid of – that was incorrect; there were others too and they became Fortas' downfall.)

Upon accepting Gideon's appointment, Fortas enlisted another of his firm's partners, Abe Krash, as well as several summer law clerks to assist with briefing. In addition to researching the law and the state of indigent defense around the country, they strategized on how to appeal to each justice, aiming to persuade all nine.

Also, while researching Gideon's case, Fortas realized there was no appeal record, no hearing transcripts, no lower court pleadings. Once he received the trial transcripts, he noted they were the best illustration of why counsel was required and moved to have them admitted as part of the record. Florida objected. Fortas responded to Florida's Motion to Strike the transcripts, writing, "Respondent would

blind the Court to information which may be of consequence in resolving the question framed by the Court itself in granting certiorari." His eventual supplemental brief argued the Florida courts were wrong in denying Gideon counsel for five reasons, including:

1. The Fourteenth Amendment required counsel be appointed to represent every indigent criminal defendant charged with a serious crime;
2. *Betts* and its rule to appoint counsel in "special circumstances" has been a challenge for judges, not a help;
3. Reversing *Betts* wouldn't open the prison gates as each defendant would be subject to retrial;
4. The Court only will answer appointment of counsel in state felony cases; the decision regarding misdemeanor representation is left to another case.

"... (I)n a free world no man should be condemned to penal servitude without having the right to counsel to defend him. The right of counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law."

As the firm wrote the brief, congressional bills for federal public defenders and other court-appointed counsel in federal court were pending; the federal public defender office creation would not pass as part of the Criminal Justice Act (CJA) until 1970.<sup>xii</sup>

In a November 30, 1962 letter to Fortas once he filed the supplemental brief, Gideon wrote, "Everyone and myself thinks it is a very wonderful and brilliant document."

Writing for Florida was 27 year old Florida Assistant Attorney General Bruce R. Jacob. As part of his effort, he contacted other States' Attorneys General, hoping for *amicus* briefs supporting Florida's position. While he suspected many states may not have time to write but would, at least, support Florida's stance, he was surprised when some were not only opposed, but wrote *amici* supporting Gideon. Many states appointed and paid for counsel already (Ernesto Miranda's lawyer in Arizona was paid \$70 per case). Oregon wrote, by appointing counsel at trial, "it would provide greater protection of constitutional rights, and would be less expensive" than trying to correct the lack through post-conviction proceedings, a position recently echoed by Justice Stephen Breyer when testifying before Congress after Spring 2013 sequestration cuts' devastating impact on Federal Public Defender Offices through furloughs and layoffs.<sup>xiii</sup> Joining in that idea were Wisconsin's and Missouri's Attorneys General, Walter Mondale (1984's Democratic Presidential candidate) and Thomas Eagleton (1972's brief Democratic vice-presidential candidate), and twenty other States' Attorneys General.

Jacob ended up filing Florida's brief and preparing for oral argument after he'd left the Attorney General's Office for private practice. His new bride was primarily responsible for typing the brief.

## Oral Argument and Decision

Jacob described seeing Fortas, "in his early 50s, short and dapper-looking, with an unusual deep voice," first when the *Gideon* case was called for argument.<sup>xiv</sup> Because of scheduling and the arguments' length, they weren't done by noon and the Court broke for lunch. Fortas and Jacob

were led downstairs in the Court building to where lunch awaited them and they were seated together, alone but for the waiter.<sup>xv</sup> Fortas began by apologizing to Jacob – he'd sent invitations to a dinner party at his house the night before arguments for all lawyers, both sides, in the companion cases being argued along with *Gideon*; Jacob's invitation was sent to his former address at the Florida Attorney General.<sup>xvi</sup> Fortas discussed his admiration for Justice Black, and Fortas' own early days in private practice, representing LBJ.

After the break, Fortas completed his argument and Jacob began, being interrupted 92 times during his hour.<sup>xvii</sup> In the hallway afterward, Fortas apologized to Jacob's wife about the mismailed invitation and complimented Jacob on his presentation, saying, ". . . (Y)ou have a wonderful way."<sup>xviii</sup>

On March 18, 1963, the Supreme Court publicly convened to issue that day's opinions. Chief Justice Earl Warren turned to Justice Black to read that day's first decision, *Gideon v. Wainwright*. Justice Black told the crowd the Supreme Court was wrong when it issued *Betts v. Brady* 21 years earlier "and now we're finally making it right." Black's efforts over the past years to make the 14<sup>th</sup> Amendment applicable to the states regarding the right to appointed counsel were rewarded with a unanimous nine-to-zero decision.

## And, Now, for the Rest of the Story

His conviction reversed, Gideon asked Fortas' help in getting an American Civil Liberties Union lawyer to represent him on retrial. Gideon didn't like any of the lawyers they sent, but accepted the court's appointment of a local lawyer, 41 year old

W. Fred Turner to be his defense counsel.<sup>xi</sup>

Turner was native Panama City bred. He served with the Flying Tigers of the Army Air Corps, World War II, flying missions from India over the Himalayas to western China and dropping guns and ammunition to those fighting the Japanese there.<sup>xx</sup> A graduate of the University of Miami undergraduate (1946) and law (1948) schools, he was what defense counsel praise as a "true believer" – a movie of the same name with James Woods' character based upon San Francisco civil rights and criminal defense lawyer Tony Serra.<sup>xxi</sup> Turner's experience included representations for the ugliest crimes and the ultimate punishment possible, the death penalty.

Turner believed "a criminal case was won or lost the moment the lawyers chose the jury," and spent much of jury selection looking at the venire's shoes: the shinier the shoes, the less sympathetic the juror to those less fortunate.<sup>xxii</sup> In Gideon's retrial, Turner knew 4 of the 6 first called to the box and struck two of them: one was a "teetotaler" and the other "would convict his own grandmother."<sup>xxiii</sup> Turner was pleased with the resulting six, three of whom were gamblers and could appreciate Gideon's statement that the change in his pockets was gambling winnings.<sup>xxiv</sup>

Turner focused a great deal on Cook's cross-examination. Turner "had previously represented Cook and was familiar with his record."<sup>xxv</sup> Turner impeached Cook with his prior "felony conviction" for auto theft (it was actually a juvenile adjudication, not a felony or a conviction), and the fact Cook denied having it at Gideon's first trial.<sup>xxvi</sup> Turner called a witness he discovered on investigation who said Cook admitted the

next day he couldn't identify the burglar.<sup>xxvii</sup> Turner again called the taxi driver who, under Turner's questioning, explained Gideon asked him to say Gideon wasn't at the Poolroom because he didn't want his wife to know; he further testified Gideon had no bottles in his hands when he got into the cab.<sup>xxviii</sup> Gideon himself testified, denying any break-in or theft. Turner established sufficient facts to argue the break-in was Cook and his friends, and the jury acquitted Gideon, free finally after 2 years in jail and prison.<sup>xxix</sup>

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On July 18, 1965, LBJ contacted a Mr. Tolson at the F.B.I., whose report reflected:

*The President mentioned he was seriously thinking of appointing Abe Fortas to a major departmental position. He stated he knew we had investigated Fortas some time ago at his, the President's, specific instructions, however, he thought that this investigation should be brought up to date. He stated he remembered that Fortas had belonged to a number of communist front organizations back in the early 1940's, however, he placed no credence on these facts inasmuch as Fortas since had matured and was now a well trusted, loyal individual. The President stated he trusted Fortas as much as he did Lady Bird and even more so with respect to advice "regarding business and international matters."<sup>xxx</sup>*

LBJ nominated Fortas to the United States Supreme Court. Several senators, particularly Strom Thurmond, recalled Fortas' Communist affiliations, but Fortas was ultimately appointed.

While on the bench, Black and Fortas clashed. Black was known for his “no law means no law” approach to court decisions, while Fortas was more goal-oriented – ‘my goal is this decision and here’s the law to get me there.’ Fortas wrote the majority opinions in *Foster v. California*<sup>xxx</sup> (1969, finding a line-up unfair) and *Brown v. Louisiana*<sup>xxxi</sup> (1966, holding a segregated library violated due process), dissented in *Schmerber v. California*<sup>xxxii</sup> (1966, he felt the blood sample taken in a driving under the influence case violated the 5<sup>th</sup> Amendment) and *Desist v. United States*<sup>xxxiii</sup> (1969, a French Connection heroin case for a codefendant to Nebbia of the *Nebbia* hearing), and was in the majority for *In re Gault*<sup>xxxiv</sup> (1967) finding a state juvenile delinquency proceeding must comply with the 14<sup>th</sup> Amendment’s due process clause, including providing the juvenile with right to counsel.

It must have galled F.B.I. Director J. Edgar Hoover to now be tasked with protecting Associate Justice Fortas after having accumulated a thick file on his as a liberal Communist defender. As LBJ nominated Fortas to be chief justice upon Chief Justice Earl Warren’s planned retirement before the next president was elected, it came to light how Justice Fortas still acted as LBJ’s advisor: Fortas helped the President write his *State of the Union* addresses, “regularly attended White House staff meetings,” and recent release of LBJ’s recorded phone calls include many between Fortas and the President.<sup>xxxv</sup> One from 1967 has them discussing:

- LBJ asking Fortas to tell the chief justice, who was about to travel to Latin America, information concerning the region as if LBJ got the information during an intelligence briefing;

- a contract Carol was drafting for a person in New York of interest to LBJ; and
- a proposed *New York Times* article on the Warren Court through interviews with lawyers who had been on Chief Justice Warren’s staff, but the article was squelched by the *Times*, drawing a comment from LBJ that, “if it was anyone less than the chief justice, I would have already been indicted. That’s the way this operation (*The Times*) runs. Of course, everybody’s got skeletons and it happens that they pick the ones with the worst skeletons first.”<sup>xxxvii</sup>

The president withdrew Fortas’ nomination after a lengthy filibuster.

Appointment to the Supreme Court was a severe pay cut for Fortas (justices earned about \$39,500 a year), though his wife Carol was then employed at his former law firm, now called Arnold and Porter.<sup>xxxviii</sup> In 1969, investigation exposed a \$20,000 a year for life retainer agreement for “unspecified consultation” Justice Fortas entered into in 1966 for his wife’s benefit with financier Louis Wolfson.<sup>xxxix</sup> Wolfson was charged and convicted in 1967 of “19 counts of conspiracy and illegal stock sales,” and sentenced to one year prison and a \$100,000 fine.<sup>xl</sup> Though he returned the money, on May 14, 1969, Justice Fortas tendered his letter of resignation from the Supreme Court “(f)or the reasons expressed in a letter of this date which I have written to the Chief Justice,” to President Richard M. Nixon, who accepted it effective the following day.<sup>xli</sup>

Fortas’ former law firm, with Carol still employed there, would not take him back.<sup>xlii</sup> It was music and Casals which came to Fortas’ rescue. The July following

his resignation, Casals and pianist Rudolph Zerkin persuaded Fortas to attend the Marlboro, Vermont, annual music festival.<sup>xliii</sup> For a week, bringing only his suitcase and his violin, Fortas “read no newspapers and accepted few phone calls,” losing himself in chamber music and friendship.<sup>xliv</sup>

### And in the End

Justice Black died in 1971 after 34 years on the Supreme Court. Justice Lewis Powell, Jr. was appointed to his seat.

Gideon worked sporadically for years after his acquittal as a mechanic and in garages. Two television specials were produced, each enlisting Gideon to portray himself and utter the fateful words eventually gaining him (and thousands after) counsel. I had always thought Henry Fonda was too tall to portray Gideon in that 1982 Hallmark Hall of Fame production, but, in fact, Fonda was only 2 inches taller than Gideon. Gideon continued to have lung problems until cancer killed him in 1972 at age 62; his family buried him in Hannibal, Missouri. The local American Civil Liberties Union provided Gideon's headstone years later. It says, “Each era finds an improvement in law for the benefit of mankind.”

Turner, after many years performing criminal defense in private practice, became an assistant public defender in Florida in 1972. In 1979, he was elected circuit judge, reelected in 1985, and retired in 1991. Honoring Turner's memory and work are the Honorable W. Fred Turner Book Award (University of Florida, Levin College of Law) and the National Association of Federal Defenders' award established this year for those exhibiting exceptional advocacy.<sup>xlv</sup>

Fortas died April 5, 1982 of a ruptured aorta. Two weeks prior, Fortas argued *Rodriguez v. Popular Democratic Party* concerning a theme in his life - Puerto Rico.<sup>xlvi</sup> “That gentle island, which had helped Fortas make his reputation in the Interior Department as a young man, and had helped him to start his career in private legal practice as a middle-aged man, was now providing him with a ride back to glory one final time as an old man.”<sup>xlvii</sup> At his first – and last - Supreme Court appearance since resigning, under his former colleague Justice Brennan's “broad, beaming smile,” he had lost none of his lifetime oratory and made a winning argument.<sup>xlviii</sup>

Carol Agger survived her husband by 14 years. Upon her death, there being no children from their marriage, her estate was used in part to establish The Abe Fortas Memorial Fund supporting the Fortas Chamber Music Concert Series at the Kennedy Center for Performing Arts, which presents concerts to this day.<sup>xlix</sup>

Jacob crossed paths with Fortas twice more in their lives. The first time when Jacob was professor at Emory University Law School and then-Justice Fortas came to speak there.<sup>i</sup> Their final meeting was again at the Supreme Court.<sup>ii</sup> Fortas was one of the justices who ruled in *Kaufman v. United States* in Jacob's client's favor.<sup>iii</sup> Jacob was court-appointed to represent Kaufman.<sup>liii</sup>

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- Bruce Allen Murphy's *Fortas, The Rise and Ruin of a Supreme Court Justice* (Wm Morrow & Co., New York, 1988).
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## Endnotes

<sup>i</sup> David Sedaris, "Now We Are Five," *The New Yorker* (10/28/2013).

<sup>ii</sup> A barge which creates its own loading dock by employing "spuds" – heavy wooden or metal poles or pipes extended through a well at the bottom of the boat to moor it. Bureau of Transportation Statistics Transportation Dictionary.

<sup>iii</sup> Sharon Kaye, *R-MC 057, Guide to the Eugene E. Agger Papers, 1935-1956* (Rutgers University, May 2002).

<sup>iv</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>v</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>vi</sup> 316 U.S. 455.

<sup>vii</sup> *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>viii</sup> Address by Honorable Robert F. Kennedy, Attorney General Of The United States, The New England Conference On The Defense Of Indigent Persons Accused Of Crime, Parker House, Boston, Massachusetts (11/1/1963).

<sup>ix</sup> Arnold & Porter, LLC, *Firm Facts and Our History*, website, <http://www.arnoldporter.com/>.

<sup>x</sup> *Lyndon B. Johnson v. Coke Stevenson*, U.S.S.Ct. unnumbered.

<sup>xi</sup> Bruce R. Jacob, "Remembering Gideon's Lawyers," *The Champion* (June 2012), p.16.

<sup>xii</sup> 18 U.S.C. § 3006A, [Pub. L. 91-447](#), § 1, Oct. 14, 1970, [84 Stat. 916](#).

<sup>xiii</sup> Alanna Byrne, "Supreme Court Justices Warn Congress About Sequestration Effects," *Inside Counsel* (3/15/2013), <http://www.insidecounsel.com/2013/03/15/supreme-court-justices-warn-congress-about-sequest>.

<sup>xiv</sup> Jacob *supra*.

<sup>xv</sup> Jacob *supra*.

<sup>xvi</sup> *Id.*

<sup>xvii</sup> Oral argument at [http://www.oyez.org/cases/1960-1969/1962/1962\\_155](http://www.oyez.org/cases/1960-1969/1962/1962_155).

<sup>xviii</sup> Jacob *supra*.

<sup>xix</sup> Wolfgang Saxon, "W. Fred Turner, 81: Defended Indigent in Key Trial," *The New York Times* (11/26/2003).

<sup>xx</sup> Jacob *supra*.

<sup>xxi</sup> Pier 5 Law website, <http://pier5law.com/j-tony-serra.html>.

<sup>xxii</sup> Jacob *supra*.

<sup>xxiii</sup> *Id.*

<sup>xxiv</sup> *Id.*

<sup>xxv</sup> *Id.*

<sup>xxvi</sup> *Id.*

<sup>xxvii</sup> "Gideon Happy After Acquittal in Famed Case," *St. Petersburg Times* (8/4/1963).

<sup>xxviii</sup> Jacob *supra*.

<sup>xxix</sup> *Id.*

<sup>xxx</sup> F.B.I. Records: The Vault – Abe Fortas, <http://vault.fbi.gov/abe-fortas>.

<sup>xxxi</sup> 394 U.S. 440 (1969).

<sup>xxxii</sup> 383 U.S. 131 (1966).

<sup>xxxiii</sup> 384 U.S. 757 (1966).

<sup>xxxiv</sup> 394 U.S. 244 (1969).

xxxv 387 U.S. 1 (1967).

xxxvi "Filibuster Derails Supreme Court Appointment" (10/1/1968), United States Senate: Art & History.  
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<http://www.youtube.com/watch?v=r4lN95jwaL4>.

xxxviii Wolfgang Saxon, "Carolyn Agger, 87, Lawyer and Widow of Justice Fortas," *The New York Times* (11/9/1996).

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xl *Id.*

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xliii *Id.*

xliv *Id.*

xlv Saxon "Turner" *supra*; "Peggy Cross-Goldenberg named first winner of the W. Fred Turner Award by the National Association of Federal Defenders" (7/23/2013),  
<http://federaldefendersny.org/news/named-first-winner-of-the-w.-fred-turner-award-by-the-national-association-of-federal-defenders.html>.

xlvi 457 U.S. 1 (1982).

xlvii Murphy, *Fortas supra*, p.588.

xlviii *Id.*, citing Jim Mann, "The Court Hears One of Its Own," *American Lawyer* (6/1982), p.46.

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i Jacob *supra*.

ii 394 U.S. 217 (1969).

iii Jacob *supra*.

iiii *Id.*