

June 2012

## Transcript: The Intersection of Race and Poverty in Criminal Justice

Stephen Bright

Follow this and additional works at: <https://trace.tennessee.edu/tjlp>



Part of the [Law Commons](#)

---

### Recommended Citation

Bright, Stephen (2012) "Transcript: The Intersection of Race and Poverty in Criminal Justice," *Tennessee Journal of Law and Policy*. Vol. 8 : Iss. 1 , Article 7.

Available at: <https://trace.tennessee.edu/tjlp/vol8/iss1/7>

This Special Feature is brought to you for free and open access by Volunteer, Open Access, Library Journals (VOL Journals), published in partnership with The University of Tennessee (UT) University Libraries. This article has been accepted for inclusion in Tennessee Journal of Law and Policy by an authorized editor. For more information, please visit <https://trace.tennessee.edu/tjlp>.

TRANSCRIPT

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW  
SUMMERS-WYATT LECTURE  
SEPTEMBER 27, 2010

**THE INTERSECTION OF RACE AND POVERTY  
IN CRIMINAL JUSTICE**

*Stephen B. Bright*

PENNY WHITE: Well, welcome. We are grateful that you have joined us today for the Summers-Wyatt Lecture, sponsored by the Center for Advocacy & Dispute Resolution. As is our tradition, our guest speaker will be introduced by a student in the Advocacy Concentration.

The introducer today is Sarah Graham-McGee, who is one of the two Summers-Wyatt Trial Advocacy Scholars. She is also a student in the Innocence Clinic, and for the past two summers has worked as the clinical assistant to the Innocence Clinic project. She is also a student member of the Tennessee Association of Criminal Defense Lawyers (TACDL) and a founder of the UT chapter of TACDL. So, Sarah, if you would.

SARAH MCGEE: There is an old adage that says, "Let your life speak." Professor Stephen Bright has dedicated his life to standing up for people, who either could not speak up for themselves or whose voices were not being heard. For over thirty years, Professor Bright has fought a system that is content with injustice, where budgets speak louder than guarantees to life and liberty, and where politics are favored over due process. But he does not do it for the money or for the acclaim. Since 1979, he has been speaking up for indigent people facing the death penalty at the trial, appeal, and post-conviction stages of the capital process.

Much of his time has been spent at the Southern Center for Human Rights, a public interest legal program that provides representation to people facing the death penalty, but he also represents prisoners in challenges to cruel and unusual conditions of confinement, advocates implementation of the constitutional rights of counsel, and encourages judicial independence and alternatives to incarceration. Professor Bright served as the Director of the Southern Center from 1982 to 2011, and he currently serves as its President and Senior Counsel. Before his career at the Southern Center, Professor Bright earned a bachelor's degree from the University of Kentucky, majoring in political science, and went on from there to earn his law degree from that state institution in 1976.

In fact, Professor Bright was born on a little farm and raised in Kentucky, and he got his first job out of law school at the Appalachian Research & Defense Fund in Lexington where he fought for livable jail conditions and the welfare and rights of the indigent. From there, Professor Bright spent several years as a trial attorney at the Public Defender Service in Washington, DC. A few years later, his career path led him to capital work. Professor Bright has twice argued and won cases before the United States Supreme Court, including *Snyder v. Louisiana*<sup>1</sup> and *Amadeo v. Zant*.<sup>2</sup> Both cases involved racial discrimination in the composition of the juries. Both clients' convictions and death sentences were reversed.<sup>3</sup>

And even as we sit here this afternoon, the current justices of the United States Supreme Court are considering whether they will hear Professor Bright's next case<sup>4</sup>, that of Jamie Weis, who faces charges of a capital crime in

---

<sup>1</sup> *Snyder v. Louisiana*, 552 U.S. 472 (2008).

<sup>2</sup> *Amadeo v. Zant*, 486 U.S. 214 (1988).

<sup>3</sup> See generally *Snyder*, 552 U.S. 472; *Amadeo*, 486 U.S. 214.

<sup>4</sup> *Weis v. State*, 694 S.E.2d 350 (Ga. 2010), *petition for cert. filed* (U.S. May 2010) (No. 09- 715), *cert. denied*, 131 S. Ct. 100 (2010).

Georgia, yet sat in jail for more than two years without any lawyers to defend him.

This continued dedication shows that Professor Bright's life continues to speak. He speaks for those in unenviable positions, for the mentally ill, for the innocent, and for the guilty. His words breathe life into the constitutional promises we are familiar with, not the least of which is the right to counsel.

I could probably spend the next forty-five minutes continuing to list accomplishments and accolades from a career that has spoken for justice, but no introduction would be complete without mentioning a few of the many awards he has received for his service to others. In addition to the ACLU's Roger Baldwin Medal of Liberty and the American Bar Association's Thurgood Marshall Award, he's received honorary doctorates from six universities, the Lifetime Achievement Award from the National Association of Criminal Defense Lawyers, and the Kutak-Dodds Prize presented by the National Legal Aid & Defender Association.

Last but not least, Professor Bright has written a number of law review articles, given testimony before legislative committees at the highest levels on numerous occasions, serves on countless advisory boards, and teaches at prestigious universities like Harvard, Yale, Georgetown, Emory, and now at the University of Tennessee's College of Law, where we are so fortunate to have him co-teach the Innocence & Wrongful Convictions Clinic.

In closing, and perhaps most amazing to me, we're also talking about a teacher and a mentor who is truly humble. On our very first day of class in the Innocence Clinic this semester, this legend of indigent capital defense walked into class, shook everyone's hand, looked every one of us in the eye, and told us what a privilege it was for him to be here. You will not find a person whose life speaks with more dedication, brilliance, and humility, so please join me in welcoming the University Of Tennessee College

Of Law's first advocate in residence, Professor Stephen Bright. (Applause.)

STEPHEN BRIGHT: Thank you, Sarah. Sarah McGee is going to be a great public defender. Sarah, thank you very much.

It has been a great honor for me to teach at this law school, and it has been a great honor to have Sarah and her other students in my class. I am a product of a very similar law school a little north of here—it does not have quite as good a football team—but I benefited from it as many of you have from this law school. Although back in those days, it was a little better than it is today. My law school tuition was \$250 a semester. I understand it has gone up a little since then.

The purpose of the land-grant colleges (most of which became universities) was to make education broadly available by giving federally-controlled land to the states to develop or sell to raise funds for colleges. It provided opportunities for people in states like Kentucky and Tennessee to go to college and learn about agriculture, science, engineering, law, and other subjects. One could get an education and go out in the world and strike a lick or two for justice. It was a wonderful thing. I am grateful for them. It is unfortunate that education has become so expensive and graduates at saddled with enormous debt.

I have had a great relationship with this law school and many people who are part of it. Dean Blaze had me here years ago to celebrate the anniversary of the clinics. I know what great work Jerry Black and other people do in the clinics. I started practice at the Appalachian Research and Defense Fund, a legal services program that serves the coalfields of Appalachian Eastern Kentucky. Next door to me in my office was Dean Hill Rivkin, who taught me so much, who prevented the Army Corps of Engineers from damming the Red River Gorge, and who stood up for poor people in Eastern Kentucky in so many different ways, and

who continues today with Brenda McGee, his wife, to stand up for children.

I was with the Dean yesterday. He picked me up, and we had to stop by the housing projects so that he could meet with a client whose case was in court today. It is marvelous that students here are involved in representing children in truancy cases, representing children who are being thrown out of school and protecting the rights of children.

I recently was told about a child in Clarksville, Tennessee, who is being held in the jail there and whose family can only visit him by closed-circuit television. His mother cannot touch her fifteen-year-old child. He is not receiving any education. If the parents were doing to this child what that jail is doing to him, they would be guilty of child abuse or neglect. And yet that is what this public institution, the jail, is doing. Which is why the work on behalf of children by Dean Rivkin, Brenda McGee, and students here is so important.

And also, of course, my great, wonderful friend here, is Justice Penny White. I wrote about Justice White after her retention election when she was on the Tennessee Supreme Court, because I was interested in the pressures on elected judges with regard to enforcing the Constitution.<sup>5</sup> I have learned from knowing her over many years and having her speak to my classes at Harvard and Yale that regardless of what the voters may have been tricked into doing on that August day when only a few people showed up to vote, the words “Justice” and “White” always go together. You are extraordinarily fortunate to have her as well as so many other great faculty members.

---

<sup>5</sup> See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 N.Y.U. L. REV. 308 (1997) (describing the campaign against Justice White which led to her defeat in a retention election and including some of the mailings attacking her).

I do not really co-teach a class at the law school. I just visit occasionally Dwight Aarons's class on wrongful convictions. I am honored to be able to do so and make a small contribution to Professor Aarons's class.

Many good friends are part of your legal community. Steve Johnson, who was a student here and an outstanding intern at the Southern Center for Human Rights, is a great lawyer in Knoxville. Mark Stephens, the public defender, is a national leader in the representation of poor people accused of crimes. The Community Law Office of Knoxville is a model for the whole country.

The legal community and all of Knox County should be proud that Mark Stephens is running the public defender office. He will stand up for his clients, even if it means filing a lawsuit and saying the office does not have the resources it needs or the lawyers to do the job. Some public defenders around the country are doing that and some are not. Some are acquiescing to overwhelming caseloads and a lack of resources that deny their clients their constitutional right to counsel. But that is not happening here because Mark Stephens stands up for his clients and for the Constitution.

I admire the public defenders and other lawyers that represent poor people accused of crimes. They face an overwhelming task, as do the criminal courts. In the 1970s, there were about 200,000 people in prisons and jails in the United States.<sup>6</sup> That number had held, relative to the population, pretty steady throughout our history.<sup>7</sup> Then over the next forty years there was an increase of 800 percent,<sup>8</sup> so that today there are 2.3 million men, women,

---

<sup>6</sup> Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 17 (2009).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

and children in our prisons and jails.<sup>9</sup> The United States now has the highest incarceration rate of any country in the world.<sup>10</sup>

The United States is one of a handful of countries that carries out ninety percent of all the executions in the world along with China, Iran, North Korea, and Yemen.<sup>11</sup> The United States has become extraordinarily punitive. There has been a tremendous increase in the number of people coming through the courts and being sent to prison. The courts are also taking on the enormous – and probably impossible – task of deciding who should live and who should die. It has put a tremendous, crushing load on all of the criminal courts.

Most of these people going to prisons and death rows come through the state courts.<sup>12</sup> Many state courts have failed in their responsibility under the Sixth Amendment to provide capable lawyers and fair and reliable trials. The legislatures have failed to adequately fund these programs. There is a great imbalance between the resources for prosecutors and those for the defense of

---

<sup>9</sup> *Rough Justice*, ECONOMIST, July 22, 2010, [www.economist.com/node/16640389](http://www.economist.com/node/16640389); The Pew Ctr. on the States, ONE IN 100: BEHIND BARS IN AMERICA 2008 at 5 (2008) (reporting that, at the start of 2008, American prisons and jails held more than 2.3 million adults, while China had 1.5 million inmates and Russia had 890,000).

<sup>10</sup> *Too Many Laws, Too Many Prisoners*, ECONOMIST, July 22, 2010, [www.economist.com/node/16636027](http://www.economist.com/node/16636027) (reporting that one in every 100 adults in America is in prison, which, as a proportion of total population, is five times more than in Britain, nine times more than in Germany, and twelve times more than in Japan).

<sup>11</sup> See Amnesty International, DEATH SENTENCES AND EXECUTIONS 2010 (2011).

<sup>12</sup> See Paul Guerino, Paige M. Harrison, & William J. Sabol, PRISONERS IN 2010 (December 2011) (a publication of the Bureau of Justice Statistics of the U.S. Department of Justice) (reporting that state correctional authorities had jurisdiction over 1,395,356 prisoners at the end of 2010, while the federal prison population was 209,771. There are additional prisoners in jails).



the accused. The federal government has contributed to this by providing millions and millions of dollars to state law enforcement agencies, prosecution offices, crime laboratories, and other state crime control agencies while providing, with only a few exceptions, nothing for the defense of those accused of crimes.

The right to a lawyer is the most fundamental right a person has. The people who are making that a reality are public defenders. They are working long hours, taking on huge responsibilities – the life of another human being – carrying caseloads that make them say every now and then that surely this cup can be passed. And yet, they go on. They keep going to work. They mentor young lawyers. They work nights and weekends. I want to express my appreciation to public defenders for the work that they do. I know how incredibly difficult it is.

*The New Yorker* carried a cartoon which showed a lawyer sitting across from his client and saying, “You’ve got a pretty good case . . . . How much justice can you afford?”<sup>13</sup> Of course, a poor person accused of a crime cannot afford any justice at all. And so the question is how much justice is society going to give that person? Tennessee can afford it. There is no question that every government – state or federal – can afford to provide representation. The question is whether they will provide what the Constitution requires.

Robert Kennedy, the Attorney General of the United States in the early 1960s, once said that the poor person accused of a crime has no lobby.<sup>14</sup> Legislators respond to moneyed interests. The U.S. Supreme Court, as the President has pointed out, has only made that worse with its decision in *Citizens United v. Federal Election Commission*.<sup>15</sup> The faint voices of the poor are seldom

---

<sup>13</sup> J.B. Handelsman, Cartoon, *THE NEW YORKER*, Dec. 24, 1973.

<sup>14</sup> Anthony Lewis, *GIDEON’S TRUMPET* 211 (1964).

<sup>15</sup> 130 S. Ct. 876 (2010).

heard in legislative bodies seeking to please the rich and powerful. Beyond that, governments that are trying to deprive people of their liberty or even their lives are not enthusiastic about providing lawyers for the poor who may to defeat those purposes.

The states and localities are generous in giving money to prosecute cases, but not to defend them. State and local governments give money to law enforcement. The federal government gives huge grants to law enforcement and prosecutors' offices for all sorts of things from drug task forces to dealing with domestic violence. And that means more money for police, more money for prosecution, more people being arrested, and more people being charged with crimes. But the state and local governments are very stingy when it comes to funding the defense of those accused. And the federal government seldom makes grants for the defense of the accused.

The Supreme Court said the states were required to provide counsel in the case of Clarence Gideon, who was convicted of breaking into a pool hall in Florida, denied a lawyer at his trial, and then wrote a five-page petition to the Court saying he had been denied his right to a lawyer.<sup>16</sup> And, of course, the rest is history. *Gideon v. Wainwright* said that every person accused of a felony has a right to a lawyer.<sup>17</sup> A few years later, the Court extended the right to counsel to children in delinquency proceedings<sup>18</sup> and to any person facing a loss of liberty.<sup>19</sup>

Anthony Lewis wrote a wonderful book about Clarence Earl Gideon's case, *Gideon's Trumpet*. In it, he says:

---

<sup>16</sup> See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>17</sup> *Id.* at 342.

<sup>18</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>19</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 37-38 (1972).

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.<sup>20</sup>

Of course, *Gideon v. Wainwright* is not a dream. It is a constitutional requirement. The Supreme Court did not say in *Gideon* that it would be a good idea to give people lawyers. It said states were constitutionally required to give people lawyers. It said the “guiding hand of counsel” is required at every stage of the process.<sup>21</sup> But *Gideon* is an unfunded mandate. No federal agency was established and no federal dollars were allocated implement *Gideon* in all of the states. Many state and local governments were unwilling or reluctant to provide funds to implement *Gideon*. It would be enormously costly if done right.

The Florida governor and legislature responded promptly to *Gideon*. Within two months of the decision, the Florida legislature created a public defender system in every judicial circuit. Colorado created a state-wide program in 1970. Missouri established its public defender system in 1972 and had 14 public defender offices in the state of the following year. Connecticut’s legislature created its public defender program in 1975. Tennessee did not establish a public defender system until 1989.<sup>22</sup> Other

---

<sup>20</sup> Lewis, *GIDEON’S TRUMPET*, supra note 14, at 205.

<sup>21</sup> *Gideon*, 372 U.S. at 342 (quoting Justice Sutherland in *Powell v. Alabama*, 287 U.S. 45 (1932)).

<sup>22</sup> The Tennessee General Assembly created the statewide system of public defenders in 1989. See District Public Defenders Conference,

states took even longer. Georgia created a public defender system in 2003 that became operative in 2005. Montana established a public defender system in 2006.

Some states, such as Alabama, Michigan and Texas have not created public defender offices to this day. In some states, judges appoint lawyers. A judge in Houston has claimed that he has a great system – four lawyers who represent all the people accused of crimes that come before his court. But who are the four lawyers loyal to? Their responsibility to zealously represent their clients may take a back seat to the need to please the judge in order to keep their jobs.

The availability and quality of lawyers for poor people accused of crimes varies from state to state and even from county to county within a state. While there is good, even exemplary representation in some places, most states and counties are more concerned with limiting costs than providing quality representation and insuring fairness in their courts.

At the Southern Center for Human Rights, we decided in the 1990s that the representation provided to the poor in Georgia was so bad, we would just keep pointing it out and challenging it in court and see if anything changed. People had been sentenced to death in Georgia in cases in which their lawyers were parking their cars and then cross-examining witnesses even though they missed the prosecutor's direct examination. Three lawyers referred to their clients in capital cases with a racial slur. One lawyer did not even know there was a Fourth Amendment to the Constitution of the United States. He missed that day in criminal procedure, and he never made up for it while he was in practice.

In another case, it was discovered on the third day of trial that the person sitting at counsel table next to the

---

*available at* <http://www.state.tn.us/sos/bluebook/07-08/36-District%20Public%20Defenders%20Conference.pdf>.

court-appointed lawyer was not the defendant whose case was being tried. The court-appointed lawyer said, “Well, he kept saying it's not me, it's not me. I thought he meant he was not guilty.” He did not even realize that the man sitting next to him was not his client. We documented what was happening and issued reports.<sup>23</sup> We filed lawsuits challenging the deficiencies in representation in different counties and judicial circuits.

The chief justice of the Georgia Supreme Court appointed a commission to investigate how bad it was and what could be done about it. The commission did not have much of a problem with the first part: determining how bad it was. The District Attorney in Atlanta, Paul Howard, told the commission that when he was in private practice after graduating from law school, he learned right away how to avoid being appointed to cases by the judges. He found that if he did a good job for his client, the judges would not bother him again about taking a court-appointed case.

The commission also heard from a lawyer who contracted to take all the indigent cases in several courts. He was known for meeting his clients and entering guilty pleas a few minutes later. He told the commission that he presumed that all his clients were guilty. Clients, mothers, and others who had either been accused or their loved ones had been accused also testified before the Commission. It recommended the creation of a public defender system.

---

<sup>23</sup> See Southern Center For Human Rights, “IF YOU CANNOT AFFORD A LAWYER . . .” (2003), available at [www.schr.org/files/resources/indigent\\_rpt.pdf](http://www.schr.org/files/resources/indigent_rpt.pdf) (last visited Feb. 5, 2012); Southern Center for Human Rights, PROMISES TO KEEP: ACHIEVING FAIRNESS AND EQUAL JUSTICE FOR THE POOR IN CRIMINAL CASES (2000) available at [www.schr.org/files/resources/indigent\\_rpt.pdf](http://www.schr.org/files/resources/indigent_rpt.pdf) (last visited Feb. 5, 2012). See also Stephen B. Bright & Lauren Sudeall Lucas, OVERCOMING DEFIANCE OF THE CONSTITUTION: THE NEED FOR A FEDERAL ROLE IN PROTECTING THE RIGHT TO COUNSEL IN GEORGIA (American Constitution Society Issue Brief, September 2010) available at [www.acslaw.org/files/Bright%20and%20Lucas%20-%20Right%20to%20Counsel.pdf](http://www.acslaw.org/files/Bright%20and%20Lucas%20-%20Right%20to%20Counsel.pdf) (last visited Feb. 5, 2010).

The criminal courts are a foreign land, and people accused of crimes need lawyers from the moment they are arrested to guide them, answer their questions, explain their choices to them, investigate their cases and give them advice about the decisions they must make.

No case in the criminal justice system is a small case. A woman was arrested in New York in 2007, and bail was set at \$10,000.<sup>24</sup> No lawyer represented her at the bail hearing, and the woman, who was the sole caretaker of her husband, could not reach her 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.<sup>25</sup> Days later, her husband died.<sup>26</sup> She was also unsuccessful in trying to reach the lawyer to obtain a bail reduction or even a temporary release from jail to attend his funeral.

Eventually, she contacted a prisoners' rights organization that secured her release on her own recognizance.<sup>27</sup> Ultimately, the charge against her – possession of a firearm found in the family car – was dismissed.<sup>28</sup> As this case illustrates, the process of arrest and pre-trial incarceration may be a severe punishment, regardless of guilt or innocence. A person who stays in jail for two weeks after being arrested may lose his or her job and home as a result. People may go from being right on the margins of making it in society to being homeless.

Atteeyah Hollie, who is now a lawyer with the Southern Center for Human Rights, was an intern from Dartmouth College when she found a man, Samuel Moore, who had been in a jail in Georgia for thirteen months. He

---

<sup>24</sup> *Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 360 n.3 (N.Y. App. Div. 2009) (Peters, J., dissenting), *aff'd as modified*, 930 N.E.2d 217 (N.Y. 2010).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

had never seen a lawyer, never seen a judge. He had been arrested for loitering—just standing around. Atteeyah checked and it turned out the charges against Mr. Moore had been dismissed four months earlier. There was no legal basis for the jail holding him, but no one had bothered to call the jail and tell the people there that they had to release him. He had just been lost. He was just a throwaway person who was lost in the jail. A student intern from Dartmouth got him out by letting the clerk's office know that he was still in jail four months after the charges had been dismissed.

Several of us have launched a website called Second Class Justice.<sup>29</sup> We collect on the site information regarding the lawyers provided to poor people accused of crimes, racial discrimination in the criminal courts and other information regarding the plight of the poor accused of crimes. It includes historical developments like the case of the Scottsboro Boys in Alabama which established the right to counsel in capital cases<sup>30</sup> and Clarence Earl Gideon's case that established the right to counsel.<sup>31</sup>

It also includes examples of the racial discrimination that takes place today in the criminal courts, which is the part of our society that has been least affected by the Civil Rights Movement. Outside of the courts, there have been some significant changes: African Americans are no longer denied the vote or barred from public schools, lunch counters and public accommodations as they were before the Civil Rights Acts of the 1960s. Nevertheless, many people continue, consciously or unconsciously, to have a bias against racial minorities. The decision-makers in the criminal courts – predominantly white men – may be

---

<sup>29</sup> Second Class Justice, [www.secondclassjustice.com](http://www.secondclassjustice.com) (last visited Feb. 5, 2012).

<sup>30</sup> See *Powell v. Alabama*, 287 U.S. 45 (1932); Dan Carter, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (LSU Press, revised edition, 2007)

<sup>31</sup> *Gideon*, 372 U.S. 335.

affected by those biases in areas such as charging, bail decisions, plea bargaining, and the severity of sentence.

Even in communities with substantial African American and Hispanic populations, things often look no different than they did in the 1940s and 1950s. The prosecutor is white, the judge is white, the court-appointed defense lawyers are white, and the clerks and court reporters are white. When the defendants are brought in, the overwhelming majority are African American men wearing orange jumpsuits handcuffed together. It looks like a slave ship has docked outside the courthouse.

On the few occasions when trials are conducted, the jury may also be all-white, even in communities with very substantial African American or Hispanic populations. They may be underrepresented in the jury pools. Some may not receive jury summons. The ones that are notified and appear in court may be struck for any number of reasons, but if they survive the strikes for cause – the inability to be fair and impartial – the prosecutor may exclude them from service with peremptory strikes despite the Supreme Court’s decision in *Batson v. Kentucky*,<sup>32</sup> which purportedly prevents such discrimination. As one observer noted, “Even as segregationist barriers to equal opportunity and achievement have crumbled in the free world, we have fortified the racial divide in criminal justice. Denied a place in society at large, Jim Crow has moved behind bars.”<sup>33</sup>

Our website includes an important article about how state and federal prosecutors decide where to prosecute cases in order to minimize the number of racial minorities on juries. For example, if the death penalty is sought for a murder in New Orleans which has any kind of federal

---

<sup>32</sup> 476 U.S. 79 (1986).

<sup>33</sup> Robert Perkinson, *TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE* 9 (2010). *Id.* at 366 (“Although the ghosts of the Confederacy have been, to a considerable extent, chased out of schools, lunch counters and city buses, they continue to prowl Texas’s cell blocks with relentless fury.”).



connection, the prosecution will probably not be in the state court in Orleans Parish, which is 62% African American. Instead, the United States Attorney there has prosecuted 10 black and Hispanic men in the Eastern District of Louisiana, where the venire is only 31.4% African American.<sup>34</sup> But if same crime occurs in neighboring Jefferson Parish, which is 23% African American or other Parishes where there are even fewer blacks,<sup>35</sup> it will be prosecuted in the state courts.

The same is true in Richmond, St. Louis, and Prince George's County, Maryland, where African Americans make up the majority of the population in the state jury pools.<sup>36</sup> As a result, more death sentences have been imposed in the U.S. District Courts for the Eastern District of Louisiana, the Eastern District of Virginia, the Eastern District of Missouri and the District of Maryland than in federal districts that include New York, Chicago, California, and Florida, where far more murders occur.<sup>37</sup>

The website includes summaries of the cases of people who because of their poverty are not getting the justice that is promised by what is etched over the entrance to the Supreme Court Building, "equal justice under law." As Hugo Black said in *Griffin v. Illinois*, "there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has."<sup>38</sup>

---

<sup>34</sup> G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 Wash. L. Rev. 425, 445-49 (2010), also available at [www.secondclassjustice.com/?p=57](http://www.secondclassjustice.com/?p=57) (last visited Feb. 5, 2012).

<sup>35</sup> African Americans made up 22.9% of the population of Jefferson Parish in 2000. See U.S. Census Bureau, State & County Quick Facts Alabama, available at <http://QuickFacts.census.gov> (last visited December 30, 2011) [hereinafter "Census Bureau"]; see also Cohen & Smith, *supra* note 34, at 443-45.

<sup>36</sup> Cohen & Smith, *supra* note 34, at 450-61.

<sup>37</sup> *Id.* at 436-37.

<sup>38</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

That is certainly true, but we know that the kind of justice one gets depends very much on the amount of money one has. For example, Jamie Ryan Weis was charged with capital murder, and was assigned two lawyers.<sup>39</sup> Six months later, the lawyers were told that the state indigent defense agency could not fund the case.<sup>40</sup> There was no money for an investigator or any expert witnesses. Jamie Weis suffers from schizophrenia; he is delusional.<sup>41</sup>

The jail, to save money, took Weis off his prescribed medication and put him on Thorazine, because it is cheaper. The next day, he slit his wrists and hung himself and almost died.<sup>42</sup> It was his third suicide attempt.<sup>43</sup> A lawyer representing someone like that needs mental health experts. But the lawyers were unable to investigate, to consult with experts, and to develop any evidence in mitigation of punishment. Eventually, there was not enough money even to pay the lawyers.

The lawyers filed a motion for a continuance on the grounds that they did not have funds to prepare for trial. Jamie Weis is from West Virginia and to do an adequate job preparing for the penalty phase of his trial, where a jury was going to decide if he will live or die, the lawyers needed to go to West Virginia and interview his parents, other family members, school teachers, and others.<sup>44</sup>

---

<sup>39</sup> *Weis v. State*, 694 S.E.2d 350, 353 (Ga. 2010), *cert. denied*, *Weis v. Georgia*, 131 S. Ct. 100 (2010).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 358.

<sup>42</sup> Brief for Petitioner at 16, *Weis v. State*, 694 S.E.2d 350 (Ga. 2010).

<sup>43</sup> *Weis*, 694 S.E.2d at 362.

<sup>44</sup> *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that anything about the life and background of the offender may be considered in mitigation); *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (recognizing experts as one of the “the basic tools of an adequate defense” and holding that states must fund experts for indigent defense with regard to any issue that is a significant factor at trial).

## 8.1 Tennessee Journal of Law and Policy 183

At a hearing, the defense lawyers introduced evidence to show they had no funds to defend the case. The prosecutor responded not to the motion for a continuance, but by making his own motion – with no notice to Jamie Weis or to his lawyers – to replace the lawyers appoint the local public defenders.<sup>45</sup> He did not tell Weis, the defense lawyers or the local public defenders he was going to do this.

Jamie Weis and his lawyers were caught completely by surprise. This illustrates the importance of the notice requirement of the due process clause. It is essential to fairness to know before a hearing what issues are to be addressed at it. In a fair system that provides due process of law, opposing counsel is not allowed to spring something like this on a defendant and his lawyers. It denies them a meaningful opportunity to be heard – for example, to find the cases that say that once there is an attorney-client relationship, it cannot be casually tossed aside by a judge and new lawyers substituted.<sup>46</sup> The Tennessee Supreme Court, like many other state supreme courts that have addressed the question, has recognized the right to continuity of counsel in a case where a judge removed an appointed lawyer.<sup>47</sup>

---

<sup>45</sup> *Weis*, 694 S.E.2d at 359.

<sup>46</sup> There were a number of such cases in Georgia. *See Grant v. State*, 607 S.E.2d 586 (Ga. 2005) (reversing where trial judge removed counsel who was familiar with the case and had an established attorney-client relationship with the defendant); *Williams v. State*, 611 S.E.2d 51 (Ga. 2005) (same); *Roberts v. State*, 438 S.E.2d 905 (Ga. 1994) (same); *Davis v. State*, 403 S.E.2d 800 (Ga. 1991) (same); and *Amadeo v. State*, 384 S.E.2d 181 (Ga. 1989) (same).

<sup>47</sup> *State v. Huskey*, 82 S.W.3d 297 (Tenn. 2002) (holding that “any meaningful distinction between indigent and non-indigent defendants’ right to representation by counsel ends once a valid appointment of counsel has been made”). *See also, e.g., Smith v. Superior Court of Los Angeles County*, 440 P.2d 65, 74 (Cal. 1968) (holding that “once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into

But the trial judge granted the motion as soon as it was made. It was apparent that he knew it was coming. In orally ruling on the motion, he cited cases, even giving the volume and page number of the reporters in which they appeared. It turned out it had all been rigged.

One of the public defenders appointed to represent Weis was not certified to handle capital cases, was lead counsel in 103 felony cases, and part of a defense team in over 400 cases.<sup>48</sup> The other was the administrator of a four-county circuit public defender office and represented clients in 91 felony cases.<sup>49</sup> They filed three motions to withdraw, describing their workloads and lack of resources and stating, “counsel cannot, *under the current state of affairs, perform adequately in representing the Defendant, no matter how good our intentions or diligent our efforts.*”<sup>50</sup> Because of their workloads, the public defenders were ethically prohibited from taking Weis’s case.<sup>51</sup>

---

an attorney-client relationship which is no less inviolable than if counsel had been retained”); *McKinnon v. State*, 526 P.2d 18, 22-23 (Aka. 1974) (same); *State v. Madrid*; 468 P.2d 561, 563 (Ariz. 1970) (same); *Clements v. State*, 817 S.W.2d 194, 200 (Ark. 1991) (reversing removal of counsel in interlocutory pretrial appeal); *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. App. 1978) (reversing conviction because of substitution of counsel over defendant’s objection); *People v. Davis*, 449 N.E.2d 237, 241 (Ill. 1983) (finding that defense counsel was improperly removed and holding “for purposes of removal by the trial court, a court-appointed attorney may not be treated differently than privately retained counsel”).

<sup>48</sup> Motion for Reconsideration [filed by public defenders] at 22, *Weis v. State*, 694 S.E.2d 350 (Ga. 2010).

<sup>49</sup> *Id.* at 25.

<sup>50</sup> Supplement to Renewed Motion to Withdraw at 3, *Weis v. State*, No. 06R-097 (Pike County Super. Ct. Jan. 8, 2008) (emphasis added).

<sup>51</sup> See GA. RULES OF PROF’L CONDUCT R. 1.1 (2001) (prohibiting lawyers from handling a matter unless they can do so competently), available at [http://gabar.org/handbook/part\\_iv\\_after\\_january\\_1\\_2001\\_georgia\\_rules\\_of\\_professional\\_conduct/rule\\_11\\_competence](http://gabar.org/handbook/part_iv_after_january_1_2001_georgia_rules_of_professional_conduct/rule_11_competence). Rule 6.2 states that “[f]or good cause a lawyer may seek to avoid appointment by a tribunal to represent a person.” *Id.* at R. 6.2. The

Nevertheless, the first motion was promptly denied,<sup>52</sup> and the trial judge never ruled on the second and supplemental motions.

This was going to be a legal lynching. The judge was giving Weis a couple of public defenders who would do their best, but they could not possibly represent Weis competently with their caseloads and without resources for investigation and expert witnesses. This did not matter to the judge or perhaps it was the point – to give Weis a perfunctory trial at which he would be sentenced to death, check off the box that said he had a lawyer, and send him to death row.

Weis moved to dismiss the indictment based on denial of his rights to counsel and a speedy trial.<sup>53</sup> The trial judge summarily denied the motions.<sup>54</sup> Weis appealed. His argument was straightforward: If the State is going to seek the death penalty, it must meet its constitutional obligations to provide counsel and resources necessary for a fair trial.<sup>55</sup> If the State lacks the resources to do this, then it should not be allowed to seek the death penalty.

The Georgia Supreme Court affirmed by a vote of 4-3.<sup>56</sup> The four justices in the majority said the delay in the case was the fault of Weis and his lawyers because they did not “cooperate” with the appointment of the public defenders, the same public defenders who protested their

---

comment to the rule clarifies that “[g]ood cause exists if the lawyer could not handle the matter competently.” *Id.* at R. 6.2 cmt. 2 (2001).

<sup>52</sup> Transcript of Hearing at 25-27, *State v. Weis*, No. 2006R-097 (Pike County Super. Ct. Dec. 7, 2007) (trial judge states to public defenders: “the two of you are going to represent him until I get told differently by somebody” and notes the objection of the public defenders).

<sup>53</sup> *Weis*, 694 S.E.2d at 354.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 358.

appointment and asserted that it was impossible for them to represent Weis.<sup>57</sup>

However, the Georgia Supreme Court majority found their ethical responsibility was not to reject the case because they could not handle it competently, but to do the best they could.<sup>58</sup> In short, Weis was penalized for asserting his right to counsel and refusing to go along with lawyers who admitted they could not represent him competently. As a result of a mandamus action that Weis filed against the judge he was ultimately able to get his original lawyers back, assisted by counsel from the Southern Center for Human Rights. At a trial in July 2011, he was sentenced to life imprisonment without possibility of parole.<sup>59</sup>

A couple of Louisiana cases illustrate how judges can influence the outcome of cases by their appointment of lawyers to defend the poor. The first is described in a remarkable book, *In the Place of Justice: A Story of Punishment and Deliverance* (2010), by Wilbert Rideau, who spent 44 years at the Louisiana State Penitentiary, usually called Angola. Rideau was sentenced to death three times. His first conviction was reversed in an important Supreme Court case for failure to grant a change of venue.<sup>60</sup> But he was sentenced to death a second and third time. He was not executed only because of the Supreme Court's decision in *Furman v. Georgia*,<sup>61</sup> which prevented the execution of all of those under death sentence at the time. Rideau was the publisher of the prison's award-winning magazine, *The Angolite*, which was allowed to publish without censorship for many years.

---

<sup>57</sup> *Id.* at 356.

<sup>58</sup> *Weis*, 694 S.E.2d at 357 (citing GA. RULES OF PROF'L CONDUCT R. 1.3 for the proposition that the public defenders should have acted with "reasonable diligence" even though they never represented Weis).

<sup>59</sup> Bill Rankin, *Life Without Parole for Killer Who Had Been Denied Counsel*, ATLANTA JOURNAL-CONSTITUTION, July 14, 2011.

<sup>60</sup> *Rideau v. Louisiana*, 373 U.S. 723 (1963).

<sup>61</sup> 408 U.S. 238 (1972),

Rideau won a new trial in 2005. As he describes in the book, the first issues at his retrial in Lake Charles, Calcasieu Parish, was whether he would be represented by the two lawyers who had successfully won him a new trial and were thoroughly familiar with his case or, by two lawyers the judge appointed, the local public defender and another lawyer who had recently lost a capital case there. The public defender protested being appointed because he had four capital cases among the 400 felony cases he was defending.

There was a long battle over who would represent Rideau, which is described in the book. Eventually the two lawyers who knew his case and had won the new trial represented Rideau at the retrial. For the first time, Rideau was represented by real lawyers who investigated the case and presented a defense. The jury returned a verdict of manslaughter and Rideau, who had served far beyond the maximum sentence for that crime walked out of court that day and he spent the next year writing his book

Five years later, another man, Jason Manuel Reeves, faced the death penalty before the same judge in the same place, Lake Charles, Calcasieu Parish, Louisiana.<sup>62</sup> Reeves was tried twice. At his first trial he was represented by lawyers from the Capital Defense Project of Southeast Louisiana who specialized in the defense of capital cases.<sup>63</sup> At that trial, the jury was unable to agree on the issue of guilt and a mistrial was declared.<sup>64</sup> One would think that the same lawyers, being thoroughly familiar with the case and specializing in defending death penalty cases, would represent Reeves at his retrial.

However, as in *Weis* and as often occurs in Louisiana, the government claimed that there was not sufficient funding for the defense. The trial judge could

---

<sup>62</sup> State v. Reeves, 11 So.3d 1031 (La. 2009).

<sup>63</sup> *Id.* at 1047.

<sup>64</sup> *Id.* at 1047-48.

have ordered the State or the Parish to either provide funding for a proper defense or forgo seeking the death penalty. Instead, the judge removed Reeves's lawyers and appointed the local public defender – the same public defender that the same judge tried to foist on Rideau – would represent Reeves.<sup>65</sup> Once again, the public defender protested, arguing that he could not represent Reeves because of his excessive caseload.

This time, the judge prevailed. Reeves, represented by the public defender and another lawyer was, as expected, convicted and dispatched to death row. The Louisiana Supreme Court affirmed the conviction and death sentence, holding that poor defendants have no right to continuity of counsel.<sup>66</sup>

In each of these three cases, the trial judges sought to bring about a certain result through the appointment of counsel. When judges appoint lawyers that are not up to the task of defending the cases, it determines the outcome. Rideau and Weis would not have had an adequate defense and any chance at their trials if they had been represented by the overworked public defenders that the judges tried to impose upon them. Reeves did not have a chance because the judge assigned his case to a public defender with an overwhelming caseload. What the trial judges did in these cases is highly improper, but not at all that uncommon in many jurisdictions. The American Bar Association calls for the independence of counsel from the judiciary as the first of its *Ten Principles for Indigent Defense*.<sup>67</sup> These cases illustrate why that principle is so important.

---

<sup>65</sup> *Id.* at 1053.

<sup>66</sup> *Id.* at 1065-66.

<sup>67</sup> See American Bar Association, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, at 1, 2 (2002), available at [www.americanbar.org/content/dam/aba/migrated/legal\\_services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legal_services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf) (last visited Feb. 5, 2011).



The Georgia Supreme Court relied on *Reeves* in upholding the substitution of counsel in *Weis*.<sup>68</sup> Then it applied its decision in *Weis* to do even greater violence to the constitutional right to counsel in *Phan v. State*.<sup>69</sup> The capital case against Khanh Dinh Phan had been pending for over *five years* without trial because the Georgia public defender agency was again unable to provide funds for attorneys, investigators, and expert witnesses.<sup>70</sup> The agency originally agreed to pay Phan's lawyers \$125 per hour, but reduced the amount to \$95 per hour and then did not pay them at all after August 30, 2008.<sup>71</sup> It also refused to fund an investigation that was recognized as constitutionally required.<sup>72</sup>

On a pretrial appeal, the Georgia Supreme Court, in another 4-3 decision, remanded the case to the trial court to *consider appointing other counsel*.<sup>73</sup> The majority went beyond its decision in *Weis*, in which it approved a judge's replacement of defense counsel, and placed *an affirmative duty* on trial courts to interrupt and disregard ongoing attorney-client relationships instead of enforcing the Sixth Amendment right to counsel. On remand, the trial court in *Phan* – which had already found that there is no funding available for defense representation from any source – is to shop for lawyers who will work for little or nothing yet somehow represent Phan in accordance with recognized performance standards, even without resources for necessary expert and investigative assistance.<sup>74</sup>

---

<sup>68</sup> *Weis*, 694 S.E.2d at 355.

<sup>69</sup> *Phan v. State*, 699 S.E.2d 9 (Ga. 2010).

<sup>70</sup> Bill Rankin, *5-Year Delay Kills Case, Suspect's Lawyers Argue*, ATLANTA JOURNAL-CONSTITUTION, Mar. 10, 2010, at B8.

<sup>71</sup> *Phan*, 699 S.E.2d at 703 n.1 (Thompson, J., dissenting).

<sup>72</sup> *Id.* at 698.

<sup>73</sup> *Id.* at 699.

<sup>74</sup> See, e.g., Welsh S. White, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006) (describing the demands upon defense lawyers in capital cases); American Bar

## 8.1 Tennessee Journal of Law and Policy 190

The witnesses with regard to both guilt-innocence and mitigation are in Vietnam. The survivor of the murders with which Phan is charged fled to Vietnam and all of Phan's family lives there.<sup>75</sup> The majority in *Phan* said the investigation might be accomplished in the most superficial manner – “such as phone or internet interviews of witnesses.”<sup>76</sup> However, a thorough investigation requires following leads, surveying the physical environment in which the client developed,<sup>77</sup> talking to people who may not be available by telephone or internet, conducting repeated in-person interviews,<sup>78</sup> assessing the impact that witnesses will have on the jury, and preparing the witnesses for direct examination and cross examination.

---

Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, reprinted in 31 HOFSTRA L. REV. 913 (2003) (setting out detailed guidelines which constitute the standard of care required for the proper defense of capital cases).

<sup>75</sup> *Phan*, 699 S.E.2d at 697.

<sup>76</sup> *Id.* at 699.

<sup>77</sup> See Gregory J. Kuykendall et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989, 1009-11 (2008) (describing the need to survey the physical environment where the client has lived, particularly in the case of those who have lived in foreign countries).

<sup>78</sup> See *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) (finding counsel ineffective for “not even” taking the first step of “interviewing witnesses” or requesting records); William M. Bowen, Jr., *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 814 (2008) (describing the importance of “in-person, face-to-face, one-on-one interviews with . . . the client's family, and other witnesses who are familiar with the client's life, history, or family history” and the need for “multiple interviews” with some witnesses “to establish trust, elicit sensitive information”); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.7 – Investigation & Commentary to Guideline 10.7, reprinted in 31 HOFSTRA L. REV. 913, 1015-26 (2003) (discussing need for interviews of client and various witnesses by defense counsel, the investigator, the mitigation specialist, and other members of the defense team).

## 8.1 Tennessee Journal of Law and Policy 191

For poor people accused of crimes in Georgia and Louisiana – even those facing the death penalty – lawyers are now fungible and subject to replacement based on cost considerations at any time. Even worse, minimizing costs is recognized as a legitimate reason to replace counsel. The state is rewarded for not funding indigent defense by leaving the person accused virtually defenseless.

A defense lawyer who suggests that an investigation is needed can be swapped for a lawyer who will not investigate or will conduct only a superficial investigation. The poor are left with lawyers who may be overwhelmed with other work, who may not be qualified to handle their cases, and who, even if they cannot competently represent them, do not have the same ability as other lawyers to invoke their ethical obligation to decline representation. This is not “equal justice for all.” It is not even second class justice; it is no justice at all.

A judge played an even more sinister role in assigning counsel to represent Gregory Wilson, who was facing the death penalty in Kentucky. Wilson protested repeatedly about being represented by a lawyer who had given Wilson his phone number and when Wilson called it, it was answered “Kelly’s Keg.”<sup>79</sup> The lawyer practiced out of that bar, which was right across the street from the courthouse in Covington, Kentucky. All of Wilson’s pleas for a new lawyer were rejected by the judge. He was sentenced to death in a trial that was a farce.<sup>80</sup>

However, when Wilson raised on appeal the denial of his right to a lawyer, the Kentucky Supreme Court said it

---

<sup>79</sup> Wilson v. Commonwealth, 836 S.W.2d 872, 878 (Ky. 1992); see also Stephen B. Bright, *Death Trials That are a “Charade” and a Farce Do Not Deter Kentucky’s Efforts to Execute*, SECOND CLASS JUSTICE (2010), [www.secondclassjustice.com/?p=164](http://www.secondclassjustice.com/?p=164).

<sup>80</sup> See Wilson v. Rees, 624 F.3d 737, 739 (6th Cir. 2010) (Martin, J., dissenting from denial of rehearing en banc) (“Wilson’s defense counsel failed him and the principles of our legal system. From the very beginning of the case, Wilson’s defense was clearly a charade.”).

was Wilson's fault – that he should have cooperated with the lawyer.<sup>81</sup> Wilson loses either way. If he cooperates with the lawyer, he is not going to be properly defended by a lawyer who works out of a bar and is not capable of defending a capital case. If he complains and tries to get competent counsel, which is what the Constitution guarantees, the courts hold that he did not cooperate.

Jeffrey Leonard, a twenty-year-old, brain-damaged, African American man was sentenced to death by a Kentucky jury that did not even know his name or anything else about him.<sup>82</sup> He was tried under the name "James Slaughter."<sup>83</sup> His lawyer conducted no investigation and never learned his client's name or that he was brain damaged.<sup>84</sup> The lawyer testified that he had tried four death penalty cases, which was not true.<sup>85</sup> He also testified that he headed an organized crime prosecution unit in New York, which was also not true.<sup>86</sup> The Sixth Circuit Court of Appeals nevertheless upheld Leonard's sentence, holding that the outcome would not have been any different even if Leonard had been competently represented.<sup>87</sup>

### Race

Holly Wood was a victim of both the Alabama education system and its second class system of justice. Wood shot and killed his girlfriend. There is no question about his guilt. But at the penalty phase of his trial – where the question was life or death – the sentencing decision is

---

<sup>81</sup> *Wilson*, 836 S.W.2d at 879.

<sup>82</sup> *Slaughter v. Parker*, 450 F.3d 224 (6th Cir. 2006).

<sup>83</sup> *Id.* at 228.

<sup>84</sup> *Id.* at 234.

<sup>85</sup> *Id.* at 229-30 n.1; Andrew Wolfson, *Lawyer Radolovich to Give Up License*, COURIER-JOURNAL, Feb. 6, 2007, at 1A.

<sup>86</sup> *Id.* The lawyer was later indicted for perjury. *Id.* The charges were dismissed in exchange for him resigning from the bar. *Id.*

<sup>87</sup> *Slaughter*, 450 F.3d at 234, 242.

to be a “reasonable *moral* response” to this crime.<sup>88</sup> The life and background of Holly Wood was essential to deciding that issue. But the jury did not learn anything about Holly Wood because his court-appointed lawyers did not even obtain school records and interview special education teachers in the same community where they practiced.

As a result, the lawyers did not present testimony by the teachers “that Wood’s IQ was probably ‘low to mid 60s,’ that Wood was ‘educable mentally retarded or trainable mentally retarded,’” “that all of the special education students, regardless of age or grade level, were placed in one room in a basement; the lighting was barely adequate; the room would flood when it rained a lot; and the students were known around school as the ‘moles’ that ‘lived in a mole hole,’” and “that Wood – even today – can read only at the third grade level and can ‘not use abstraction skills much beyond the low average range of intellect.’”<sup>89</sup>

James T. Fisher, Jr. spent 26 ½ years in the custody of Oklahoma – most of it under sentence of death – without ever having a competent lawyer and, as a result, without ever having a fair and reliable determination of whether he was guilty of any crime. Fisher, a black man, was convicted in 1983 of the murder of a white man based on the dubious testimony of the man originally charged with the murder. The lawyer assigned to represent him tried Fisher’s case and twenty-four others during September of 1983,

---

<sup>88</sup> Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (“Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a ‘reasoned *moral* response to the defendant’s background, character, and crime.’”).

<sup>89</sup> Wood v. Allen, 542 F.3d 1281, 1324 (11th Cir. 2008) (Barkett, J., dissenting), *aff’d*, 130 S. Ct. 841 (2010).

including another capital murder case the week before Fisher's trial.<sup>90</sup>

The lawyer called no witnesses at either the guilt or penalty phases of Fisher's trial other than Fisher. He made no opening statement or closing argument at either phase. The lawyer said *only nine words* during the entire sentencing phase of the trial.<sup>91</sup> Four of the words were "the equivalent of judicial pleasantries" and the other five "formed an ill-founded, unsupported and ultimately rejected objection to one portion of the prosecutor's closing argument."<sup>92</sup> The nine words contained no advocacy on behalf of Fisher.

On appeal, the Oklahoma Court of Criminal Appeals pronounced itself "deeply disturbed by defense counsel's lack of participation and advocacy during the sentencing stage," but it was not disturbed enough to reverse the conviction or sentence.<sup>93</sup> It held that the outcome would not have been different even without the incompetent representation.<sup>94</sup>

Nineteen years after Fisher's trial, a federal court of appeals set aside the conviction, finding that Fisher's lawyer was "grossly inept," and disloyal to his client by "exhibiting actual doubt and hostility toward his client's case."<sup>95</sup> It found that he lawyer "destroyed his own client's credibility and bolstered the credibility of the star witness for the prosecution," and "sabotaged his client's defense by repeatedly reiterating the state's version of events and the damaging evidence he had elicited himself."<sup>96</sup> The Court observed that the prosecution's case against Mr. Fisher "was not overwhelming" but "in essence a swearing match

---

<sup>90</sup> Fisher v. Gibson, 282 F.3d 1283, 1293 (10th Cir. 2002).

<sup>91</sup> *Id.* at 1289.

<sup>92</sup> *Id.* (quoting the district court).

<sup>93</sup> Fisher v. State, 739 P.2d 523, 525 (Okla. Crim. App. 1987).

<sup>94</sup> *Id.*

<sup>95</sup> Fisher v. Gibson, 282 F.3d at 1298.

<sup>96</sup> *Id.* at 1308.

## 8.1 Tennessee Journal of Law and Policy 195

between Mr. Fisher and [the state's witness], either of whom could have committed the murder.”<sup>97</sup>

Oklahoma gave Fisher a second trial in 2005 and a lawyer who was drinking heavily, abusing cocaine and neglecting his cases.<sup>98</sup> The lawyer physically threatened Fisher at a pre-trial hearing and, as a result, Fisher refused to attend his trial.<sup>99</sup> He was convicted and sentenced to death again. This time, the Oklahoma Court of Criminal Appeals recognized that Fisher had again been denied his right to counsel and that it made a difference.<sup>100</sup> His conviction was reversed again. Instead of trying Fisher a third time, prosecutors agreed to Fisher's release in July, 2010, provided that he be banished from Oklahoma forever.<sup>101</sup> Fisher may not have been guilty of any crime – he never had a constitutional trial – but he spent 26 ½ years in custody.

The consequences of inadequate representation are enormous. Todd Willingham, was convicted of arson in Texas after his house burned down and his three children died in the fire.<sup>102</sup> An assistant fire chief and a deputy fire marshal testified that in their opinion the fire was arson. Another man, Ernest Ray Willis, also was sentenced to death in an almost identical arson case. But Willis was fortunate – a law firm from New York represented him in post-conviction proceedings. The firm devoted more than a

---

<sup>97</sup> *Id.*

<sup>98</sup> *Fisher v. State*, 206 P.3d 607, 610-11 (Okla. Crim. App. 2009).

<sup>99</sup> *Id.* at 610.

<sup>100</sup> *Id.* at 612-13.

<sup>101</sup> See Dan Barry, In the Rearview Mirror, Oklahoma and Death Row, N.Y. TIMES, August 10, 2010. For additional discussion of James T. Fisher's case, see Man Spends 26 years on Oklahoma's Death Row Without Ever Receiving Effective Counsel, available at [www.secondclassjustice.com/?p=198](http://www.secondclassjustice.com/?p=198).

<sup>102</sup> David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009 at 42, available at [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann) (last visited Dec. 30, 2011).

dozen years to the case and spent millions of dollars on fire consultants, private investigators, and forensic experts to analyze the evidence in his case and point out that the expert testimony at his trial was based on theories and assumptions that had been completely discredited.<sup>103</sup>

Those same theories were the basis for the opinions in Willingham's case that the cause of the fire was arson. For example, an expert told the jury that intricate patterns of cracks on glass – "crazed glass" – recovered from the scene was proof that an accelerant had been used to start the fire.<sup>104</sup> However, studies have found that crazed glass results from cold water hitting hot glass, such as when a fire department sprays streams of water on a fire, trying to put it out.<sup>105</sup> There were similar explanations for other testimony given in both the Willis and Willingham cases.<sup>106</sup>

When the law firm took its evidence to the prosecutor in Willis' case, the prosecutor consulted his own expert and concluded that there had not been arson.<sup>107</sup> Willis was released. An expert who examined the evidence in Willingham's case reached the same conclusion – that there had been no arson. Willingham did not kill his one-year-old twin girls and his two-year-old girl when he had no motive to do so. But Willingham's case had already been through the courts. Texas executed Willingham on February 14, 2004. A switch of the lawyers in the two cases could have changed the outcomes. It is likely that if the New York law firm had taken Willingham's case, he would be alive today, and Willis would be dead.

Judge Alvin Rubin of the United States Court of Appeals for the Fifth Circuit, observed that "the Constitution, as interpreted by the courts, does not require

---

<sup>103</sup> *Id.* at 56.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 58-59.

<sup>106</sup> *Id.* at 59-62.

<sup>107</sup> *Id.* at 62.



that the accused, even in a capital case, be represented by able or effective counsel.”<sup>108</sup> The courts have lost sight of justice in a tangle of procedural rules, pretenses and administrative concerns so that finality – not justice – has become the ultimate goal of the criminal courts. Judges are concerned about moving dockets, not competent representation for the accused. Politicians talk about lawyers getting people off on technicalities. However, the Bill of Rights is not a collection of technicalities. People are getting killed on technicalities – procedural rules created not by James Madison and Thomas Jefferson, but by William Rehnquist and others on the Supreme Court and by the Congress.

Nevertheless, the system has its advocates, and Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit is one of them. He wrote, “I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented.”<sup>109</sup> He and I are in agreement with regard to that. But Judge Posner went on to say:

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

---

<sup>108</sup> *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

<sup>109</sup> Richard Posner, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 163-64 (1999).

system for defense of indigent criminal defendants may be optimal.<sup>110</sup>

Notice what he missed. He said that if the lawyers were any better, more *guilty people* might be acquitted. He missed the point that if the lawyers were any better, more *innocent people* would be acquitted. That apparently did not even occur to him. And, of course, this bare-bones system is only for poor people. It is not for commercial cases or cases that rearrange the assets of the upper one percent of people in society. It is only for poor people.

The question of what kind of system of justice we have for poor people accused of crimes is not about being tough on crime or soft on crime. It is about equal justice. It is about whether we have a fair and reliable system for deciding guilt or innocence and, for the guilty, the proper sentence. But as fundamental as the right to counsel is and as much as it may be celebrated in the abstract, governors and legislators throughout the country have convinced themselves that they cannot afford anything but justice on the cheap.

Officials all over America say with regard to indigent defense programs, "We don't want a Cadillac, we just want a Chevy" or that poor defendants are not entitled to *zealous* representation; they are only entitled to *adequate* representation. Harold Clark, when he was chief justice of Georgia, pointed out to the legislature:

We 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

---

<sup>110</sup> *Id.* at 164.

## 8.1 Tennessee Journal of Law and Policy 199

mean one-half injustice, and one-half injustice is no justice at all.<sup>111</sup>

We need to overcome this poverty of vision. We are talking about life and liberty, so why wouldn't we want a Cadillac? If we can spend over a trillion dollars to fight wars in Iraq and Afghanistan and \$64 billion every year to keep people in prisons and jails,<sup>112</sup> surely we can spend a fraction of that to make sure the courts are convicting only guilty people, making a fully informed decisions with regard to sentences, and treating people fairly.

There is going to be a reckoning at some point. It may be while you are lawyers, those of you who are students. Because the day will come when it becomes necessary to sandblast the phrase "equal justice under law" off the Supreme Court building and acknowledge that we are never going to have it. Maybe the Court will replace it with something like, "Your American Express card welcome here."

I want to end by asking you to do something about the quality of representation for poor people accused of crimes. No matter what kind of lawyer you are when you graduate from this law school – or what kind of lawyer you are now – whether you are a wealthy commercial lawyer, a prosecutor, a leader of the bar, a public official, a business person or any other kind of lawyer – you have a responsibility to see that poor people accused of crimes are

---

<sup>111</sup> Chief Justice Harold G. Clarke, Annual State of the Judiciary Address, *reprinted in* FULTON COUNTY DAILY REP., Jan. 14, 1993, at 5.

<sup>112</sup> There are various ways to calculate the cost of the wars, but it is clear that they are in excess of a trillion dollars. The Watson Institute at Brown University found that a conservative estimate was \$3.2 trillion in constant dollars and a more reasonable estimate puts the cost at nearly \$4 trillion. See <http://costsofwar.org/article/economic-cost-summary> (last visited February 3, 2012). "Every year America spends close to \$66 billion to keep people behind bars." Shima Baradaran, *The Right Way to Shrink Prisons*, N.Y. TIMES, May 30, 2011.

## 8.1 Tennessee Journal of Law and Policy 200

capably represented. Lawyers have a monopoly on legal services. Lawyers get very rich because of that monopoly. But that monopoly is more than a get-rich-quick scheme. It comes with responsibility for the integrity of the system. Lawyers are trustees of the system of justice.

If you are a prosecutor or attorney general, you can provide the kind of leadership that Walter Mondale, the Attorney General of Minnesota and later Vice President of the United States, provided when Clarence Earl Gideon's case was before the Supreme Court. Florida asked other states to file *amicus curiae* briefs in support of its position that there was no right to a lawyer. Mondale joined with attorneys general of 23 states to file an *amicus* brief *in support* of Gideon and the right to counsel.<sup>113</sup> He and his fellow attorneys general recognized that if we are going to have a fair system, those accused of crimes must have lawyers. That kind of leadership from public officials is missing today. Instead, some prosecutors have opposed efforts to improve indigent defense as a strategy for gaining advantage and winning cases.

You must provide the leadership that is urgently needed if the criminal courts are going to be legitimate and credible. If we are going to have a fair system, public defender programs and other lawyers who represent the poor must have adequate resources, reasonable caseloads, investigators, and access to experts. That is essential for a properly working adversary system. But in Tennessee and other states, the legislatures are not providing the resources needed and are threatening to cut them.

No matter what kind of practice or business you are in, you can help change that. Go to the criminal courts in your jurisdiction and see how they operate. What can of representation is being provided? The criminal courts are out of sight and out of mind for most people because they deal with poor people and a grossly disproportionate

---

<sup>113</sup> Gideon v. Wainwright, 372 U.S. 335 (1963).

number of people of color. It is important for *all* lawyers to see what is happening in those courts. In many jurisdictions, you will be shocked by the demeaning way the accused are treated, the careless attitude many court-appointed lawyers have toward their clients, the arrogance and rudeness of the judges and prosecutors, the lack of advocacy for defendants, and the arbitrary way in which cases are resolved.

Once you have knowledge, you can use it. You can convince legislators, most of whom know nothing about indigent defense, of the importance of lawyers for the poor. You can get other members of the bar and bar organizations involved. You can explain why representation by counsel is essential to the proper working of the adversary system. You can point out that when innocent people are convicted because of poor legal representation, the actual perpetrator of the crime remains free to commit other crimes. You can educate people that the Bill of Rights is not a collection of technicalities, but the most precious part of our Constitution. You can support your local public defender office by providing some *pro bono* assistance on some cases.

The representation of people accused of crimes is an issue constantly exploited by demagogues, who say that society should not waste money defending people who have done terrible things. They play on fear and ignorance. Lawyers must stand up to them. Lawyers must explain that the days of the lynch mob – and the perfunctory trial known as a “legal lynching” – are behind us. Today, every person accused of a crime, no matter how heinous, is entitled to a capable lawyer with the resources needed to defend that person in the adversary system. Every American should be proud of it when it works and ashamed when it does not. Everyone must understand that it will not work unless the legislatures provide the resources necessary for public defenders to do the job.

## 8.1 Tennessee Journal of Law and Policy 202

I hope that some of you will be that capable lawyer for some of the poor accused of crimes. You can work as public defenders, representing your clients with care and diligence. Just as with the Underground Railroad at the time of slavery, you may not be able to change the whole system, but you can help one person at a time. Legislatures may fail. Courts may fail. The executive branch may fail. But individual lawyers can take cases, counsel clients, investigate their cases, be their advocate, and tell their stories. It will make a difference. It will make the right to counsel a reality for that person and that person's family. And you will find it a very fulfilling and important way to spend a life in the law.

I was fortunate to grow up during the Martin Luther King, Jr. era in American history – the time between the Montgomery Bus Boycott and the assassination of Dr. King in 1968. The essential lessons that Dr. King taught us during his thirty nine years of life were that nothing was more important than ending racism and poverty and nothing was less important than how much money one made doing it. Our society did not follow those lessons, but we as individuals can. We need to make a sustained commitment to equal justice and to providing high quality representation for poor people whose lives and liberty are at stake.

Dr. King often said we stand on the shoulders of others so that someday others can stand on our shoulders. When you are working to improve representation of the poor and to end race discrimination in the criminal courts, you are standing on the shoulders of Thurgood Marshall who just a few years after graduating from the law school at Howard University, went by train from Baltimore to Oklahoma City, and then took a bus to Hugo, Oklahoma, to defend a man in a death penalty case.<sup>114</sup>

---

<sup>114</sup> JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 113-19 (1998).

You stand on the shoulders of Clarence Darrow, who, late in his career, tried a case to an all-white, all-male jury on behalf of African-Americans who had the audacity to move into an all-white neighborhood in Detroit and were on trial for murder.<sup>115</sup> He stood before the jury and said that the case was about race.<sup>116</sup> He asked the jurors to deal with the reality of race relations in Detroit and their own attitudes about race.<sup>117</sup> The first trial ended in a mistrial. At the second and final trial, before another all-white, all-male jury, after again talking frankly about race, Darrow won an acquittal for Henry Sweet.<sup>118</sup>

And you are standing on the shoulders of two African American lawyers who were practicing law in Chattanooga in the early 1900s, Noah Parden and Styles Hutchins. They were asked to take the case of Ed Johnson, an innocent man, who had been convicted of rape and sentenced to death.<sup>119</sup> Johnson's father met with Parden and asked him to take the case. He was unable to pay a fee.<sup>120</sup> After discussing the consequences of taking the case, including the possibility of a lynch mob coming after them if they took it, Parden and Hutchins took the case.<sup>121</sup> While working on the case, there was an attempt to burn down their offices and shots were fired into Parden's house.<sup>122</sup> Parden took a train to Washington and argued for a stay

---

<sup>115</sup> For a full account of the trials, see Douglas A. Linder, *The Sweet Trials: An Account*, [www.law.umkc.edu/faculty/projects/ftrials/sweet/sweetaccount.htm](http://www.law.umkc.edu/faculty/projects/ftrials/sweet/sweetaccount.htm) (last visited May 17, 2010); see also KEVIN BOYLE, *ARC OF JUSTICE: A SAGA OF RACE, RIGHTS, AND MURDER IN THE JAZZ AGE* (2004).

<sup>116</sup> Linder, *supra* note 115; BOYLE, *supra* note 115, at 292-95.

<sup>117</sup> BOYLE, *supra* note 115, at 292-95.

<sup>118</sup> *Id.* at 299, 336.

<sup>119</sup> The case is described in Mark Curriden & Leroy Phillips, Jr., *CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM* (2001).

<sup>120</sup> *Id.* at 133.

<sup>121</sup> *Id.* at 139.

<sup>122</sup> *Id.* at 178.

before Justice John Marshall Harlan.<sup>123</sup> After conferring with other members of the Court, who decided to accept the case for review, Justice Harlan granted the stay.<sup>124</sup>

When word of the stay got back to Chattanooga, a mob stormed the jail and took Ed Johnson to the bridge than goes over the Tennessee River in Chattanooga. They shot him and hung him off the bridge.<sup>125</sup> Noah Parden and Styles Hutchins experienced constant threats against their lives and rocks were thrown through the windows of their homes and office.<sup>126</sup> The Sunday after the lynching a minister preached a sermon against lynching. His house was set on fire.<sup>127</sup> A short time later, Noah Parden and Styles Hutchins left Chattanooga and never returned.<sup>128</sup>

Noah Parden and Styles Hutchins set a remarkable example for us to follow. When they were decided whether to take the case of Ed Johnson, they knew that if they took it, nothing would ever be the same again. They knew they would put at risk the law practice they had built in the segregated South and their ability to remain in the community that was their home. They even considered the possibility that they might be lynched if they took the case. And yet, Noah Parden and Styles Hutchins said, yes, we will take the case. “‘Much has been given to us by God and Man,’ Hutchins said. ‘Now much is expected.’”<sup>129</sup>

You will not be called upon not to make decisions like the one they made. However, the question of whether our society will provide representation to the poor and achieve equal justice is ever present. Our answers as lawyers must be the same as Noah Parden and Styles Hutchins: yes, we will take the case. Much has been given

---

<sup>123</sup> *Id.* at 12-17, 179-80, 188-89.

<sup>124</sup> *Id.* at 192-96.

<sup>125</sup> Curriden & Phillips, Jr., *supra* note 119, at 200-214.

<sup>126</sup> *Id.* at 234.

<sup>127</sup> *Id.* at 235.

<sup>128</sup> *Id.* at 234, 348-49.

<sup>129</sup> *Id.* at 139. *See* Luke 12:48.



## 8.1 Tennessee Journal of Law and Policy 205

to you – you are exceptionally fortunate. Much is expected from you. I urge you to take on the case of fairness, equal justice, and the right to counsel. I urge you to become public defenders and make the right to counsel a reality. I urge you to dedicate yourselves to overcoming the nightmare of hostility and fear mongering that is going on in this country and to being a part of making good on the promise of equal justice under the law.