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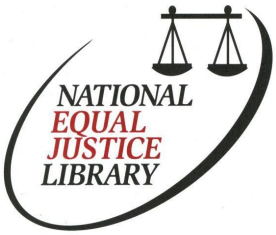

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Interview with

Anthony Lewis

Conducted by Victor Geminiani

March 18, 1993

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Interview with Anthony Lewis
March 18, 1993
By Victor Geminiani
Transcriber: Virginia Dodge

VICTOR GEMINIANI: This is the oral history of Anthony Lewis. The interviewer is Victor Geminiani. The interview will be—will concentrate primarily on Mr. Lewis' critical contributions to indigent representation in America by authoring the book entitled, *Gideon's Trumpet*. Mr. Lewis' exceptional contributions preserved for the future readers the activities in the case of *Gideon vs. Wainwright*, which ensured legal representation for indigents in criminal settings. His book did much to inform the public about the implications of this most fundamental of our concepts. The interview is being conducted in the campuses of American University in Washington, DC, on March 18, 1993.

Today is the 30th anniversary of the historical decision by the Supreme Court in the case of Gideon vs. Wainwright. The interview is being taken as part of the oral history collection of the National Equal Justice Library, which is located here at American University.

Thank you, Mr. Lewis, for making time available to us today on this historical day.

ANTHONY LEWIS: It is my delight to do so.

GEMINIANI: Can you tell me a little about your background prior to becoming involved in the writing of *Gideon's Trumpet*?

LEWIS: Well, the important thing was that I was the Supreme Court correspondent of the New York Times. And it—in those days, pre-Xerox, pretty long ago, the Supreme Court had only one copy of the petitions, the documents filed by poor prisoners, in forma pauperis petitions, often in hand or typewritten. And that copy would circulate among the judges until the day when they decided what to do with each one. And then they would go down into the file room.

And when the Court agreed to hear a case, I would go to the file room and ask to see the prisoner's petitions. I did that the day that the—June 4, 1962, that the Supreme Court agreed to hear the case of Gideon against Wainwright.

That fact was made known to us, the few of us who then were covering the Supreme Court for the press, when the clerk posted the Court's order list, a mimeographed list. And one of the items on the list that day was that the Court had agreed to hear the case of Gideon against Wainwright. And then it said, "Counsel are directed to argue, among other questions, whether this Court's decision in Betts against Brady should be overruled."

Well, that was like a flashing red light to me. It made it very—I mean, it suggested to me that the Court was ready to overrule Betts and Brady. Very interesting. The Court doesn't do that very often, overrule an earlier case. So I would have gone and looked it up anyway, but I was particularly eager to do so.

And I got this jacket, a sort of red-colored file, cardboard, manila file folder. And in it, was Gideon's—really a letter, petition to the Supreme Court, asking the Court to hear his case. Handwritten, rather simple handwriting, on prison stationery. And all of that was sort of romantic.

Right at the beginning, it struck me that, you know, here was—something important might well happen, and it was started by this prisoner's handwritten letter on stationery that said "Approved Warden" or something like that.

GEMINIANI: Were you familiar with the implications of the case at that point? Had you been aware of the history of the development of the law in terms of the right to representation in the 20 or 30 years prior to that time?

LEWIS: Yes. I wasn't at all as intimately familiar with it—with it as I became in the course of this case, but I knew that Betts and Brady had decided that only prisoners, poor—poor defendants who could show some special circumstances such as a mental defect or whatever, were entitled to a free lawyer.

And I knew that several members of the Court, noticeably—notably Justice Black, had railed against that rule and wanting to have a universal rule of the right to counsel for many years. So the fact that Betts and Brady was up for reconsideration was of great interest to me.

GEMINIANI: Did you follow the case from that point on, or did you focus more as the case came up for argument and final decision?

LEWIS: No. I decided—at that point, I mean, oddly, I had been asked to write a children's book about the Supreme Court, and I'd agreed to do it. I had no idea what the book was, and I hadn't done any work. And I thought, well, this might make a good sort of chapter for the book, maybe a vignette to start the book.

So I—I thought about this letter, Gideon's letter, and I began doing the work. Rather shortly after that, Abe Fortas was appointed to—by the Supreme Court to represent him, represent Gideon, in the argument of the case, to argue the case, brief it and argue it.

And I went to Abe Fortas and asked if I could follow their work as they went along. And I spent quite a lot of time in the law firm, Arnold, Fortas & Porter, talking to the younger people working on the case and to Fortas, and reading their memos.

And I became quite involved and followed it. And of course, it turned out to be not a chapter and not a children's book, but an entire book in itself.

GEMINIANI: When did you first decide to write about the events concerning Gideon versus Wainwright?

LEWIS: It became so interesting. There was so much going on. The law firm did an exhaustive job of briefing, far more than one would in an ordinary case, I think. Even though here was a nonpaying client, it was as if Abe Fortas and his colleagues wanted to give the Supreme Court everything that bore on the question: the history, the legal arguments, which had been going on for a very long time, the practical experience. They did a very thorough job.

GEMINIANI: During your research for the–the—the book, did you have an occasion at all to ever meet Clarence Earl Gideon? Could you tell me something about your impressions of him?

LEWIS: Yes. I went down to Florida for two reasons: to meet and talk with counsel for the state of Florida, the assistant attorney general who was handling the case and would argue it, Bruce Jacob; and to go to the Raiford Penitentiary and meet Gideon, which I did.

It was astonishingly easy to meet Gideon. The warden and the others were delighted to have me meet him. He was a sort of favorite. He was a harmless old chap.

He wasn't very old. I must say he was then about 15 years younger than I am now, but he was—he seemed a lot older. He was rather pathetic, shaky. I said in the book—I used the phrase he looked "used up." He'd had a pretty rotten life, and he wasn't very healthy and vigorous.

But anyway, he was regarded as a harmless and nice old gent by the prison staff. So they took me to him, and I met him in some room they'd put aside. I think it was what they called the library, a prison library where the prisoners could do work on the law to get themselves out. Well, there were a half dozen books in this room. It wasn't much of a library. And Gideon commented sourly on "This is what they call a library." [Laughs]

GEMINIANI: He understood the implications of this case, I presume?

LEWIS: I'm not sure how fully he understood it, but he certainly had a—a firm idea that people were entitled to lawyers before they were convicted. That was engraved in him. It was an obsession. He was confident that that was right and that the laws of the Medes and the Persians or the Greeks or the Romans—you know, he was just sure that that was right.

Of course, historically, not so. I mean, it's only a rather recent concept in this country that people are entitled to free lawyers, if they are too poor, as we have to remember, most people are. Quite a substantial majority of people charged with crimes are too poor to hire their own lawyers, not surprisingly.

GEMINIANI: Clarence Gideon was convicted of the crime of breaking and entering with intent to commit a misdemeanor, and he was sentenced to seven years. Could you tell me a little about the background of that particular incident?

LEWIS: He came originally from Hannibal, Missouri. He was born in Hannibal, Missouri. I will jump ahead and say that when I learned of his death many years later, I was in London. And I telephoned the funeral parlor, whose name I learned, to ask the circumstances of his death and find out his mother's phone number because she was still alive and so on. And the owner of the

funeral parlor told me all those. And as I was about to hung up, he said, "Did you know that Hannibal, Missouri was the birthplace of Mark Twain?" I said, "Yes, I do. Goodbye." [Laughs] Anyway, that's what Hannibal, Missouri is famous for. And I've been there since. I've never been—I had never been there, but I once went for the unveiling of a tomb or a plaque, a memorial stone, to Clarence Gideon.

Then at a quite a young age—I don't remember exactly what age—it's all laid out in a long, long, very long letter from Gideon, which is printed verbatim in the book—his father died. His mother remarried, and he didn't get on with his stepfather. He always blamed his later troubles on the conflict with his stepfather, said his stepfather was cruel to him.

Now, his mother didn't take that view. And when I called her from London, she said to me, "You're the fellow wrote that terrible book."

I said, "What?"

And she said, "You told all those lies about my second husband."

I said, "I didn't—what do you mean?"

She said, "You said he was horrible and beat Clarence up and everything."

I said, "No. I didn't say that, Mrs."—whatever her name was. "Clarence said that."

She said, "Well, I didn't like it."

So anyway, that was the reason Gideon ran away from home, he said. And he began a career of petty thievery, mostly petty, although he had one federal conviction for theft from an armory, which might be—United States armory, which might be considered a little more than petty. But mostly his crimes were petty and they were never crimes of violence. He would be regarded today as a quite comfortable petty criminal, not very threatening.

GEMINIANI: Clarence Gideon was convicted of the crime of breaking and entering with intent to commit a misdemeanor, and he was sentenced to seven years. Could you tell me a little about the background of that particular incident?

LEWIS: Well, it was the most trivial of crimes. Gideon lived at the time in a really shabby, desolate area of the panhandle of Florida, a shabby area of Panama City. In that area, there was the Bay Harbor Poolroom. I had reason to see it subsequently, and I can tell you it was not—it was not Disney World. [Laughs] It wasn't very nice.

Anyway, Gideon used to hang about the Bay Harbor Poolroom all the time. That was his principal occupation. He was friendly with the habitués, but according to the indictment—or not the indictment, but the—because there wasn't an indictment, but the—whatever it is—the information, he—he broke into this poolroom in the middle of the night, 1 or 2 in the morning, and rifled the cigarette machine, cash box and the coke machine and walked off with the cash, the coins, from those two machines and a bottle of wine. Total value: some trivial sum.
And it wouldn't be the kind of offense for which you'd ordinarily get five years, to put it mildly. You might get 30 days. But he was a five-time loser or four-time loser. That was his fifth offense, so that's why he got the long sentence.

GEMINIANI: What happened in his trial?

LEWIS: Well, his trial was cut-and-dried. Gideon was representing himself. He asked for a lawyer, and the judge said, "I'm sorry, Mr. Gideon. Under the laws of the state of Florida, I can't appoint a lawyer for you unless it's a capital offense or unless I find that you're incapable of defending yourself because of some defect, and I—you don't meet either category."
And he would occasionally get up and ask some question on cross examination, which was always irrelevant and had no—wouldn't have helped him if he had—if the answer—if there'd been an answer, it wouldn't have helped him. He hadn't the faintest idea what to do.
An answer—an example is in my mind, which I—from the film and – [pause]
At the first trial, a taxi driver was called by the prosecution and testified that he had been telephoned by Gideon to come to the street corner right outside the Bay Harbor Poolroom at 2 in the morning and pick him up. And the taxi driver further testified that when he got in the cab, Gideon said, "Don't tell anybody you picked me up here."
That was the testimony on direct examination. And the judge said, "Do you have any questions?"
And Gideon said, "No."
Well, it's pretty damning, isn't it? I mean, "Don't tell anybody you picked me up here."
At the second trial, which I attended, the lawyer who was appointed to represent Gideon after the Supreme Court decided he had to have someone to represent him, same testimony. And then when the taxi driver said, "He told me not to tell anybody that he was here," the lawyer said, "Had he ever said that to you before?"

The taxi driver said, "Oh, yes. He said that whenever he got in the cab." And the lawyer said, "Well, why?"

And the taxi driver said, "I think it was woman trouble."

Well, you know, reason to have a lawyer, right?

Put an entirely different cast on the—on the statement.

GEMINIANI: After he was convicted and—and put in jail, he appealed to the—pro se through the court processes in Florida and lost at each level. And then he filed a petition for cert in the Supreme Court of the United States. And as you said, they accepted the petition. And as you mentioned, Abe Fortas from Arnold, Fortas & Porter were—was appointed pro bono counsel

You had an opportunity, apparently, to meet Abe Fortas. Could you tell me a little about your memories of Mr. Fortas?

LEWIS: Oh, I had met Abe Fortas before quite often. And he was one of the most prominent lawyers in Washington. Very significant, both for his private practice and for his wide political acquaintance. He was a tremendous close friend of Lyndon B. Johnson, Vice President at the time this case was argued and decided, and thereafter President. One doesn't need to say that a little later, Johnson appointed him to the Supreme Court himself.

Fortas moreover had represented Lyndon Johnson in the most critical moment of his life, his political life, when Johnson in 19—I can't remember the date—the year, but it was the year that Johnson was competing in the Democratic primary in Texas. He had been a member of the House. He was competing in the Democratic primary to be the Democratic nominee for the United States Senate. And he was running against the governor of Texas, Coke Stevenson.

And there was—it was a tremendously close election, in which I think it's fair to say both sides used methods that were less than pure. Robert Caro, in his series of books on—his multi-volume biography of Johnson, has made it seem as though Johnson's the villain in that election and Stevenson was an angel. I don't believe that to be the case. I think they both were quite non-angelic.

It ended up with a—somebody or other, I forget who, some authority, certifying that Johnson in an election with millions of votes had won by 87 votes.

And a Federal Court—Stevenson went to a Federal Court and got the Court to enjoin, prevent that result being certified to the Democratic authorities in Texas so that the name could go on the ballot. And it was essential for Johnson to get his name on the ballot because then he was going to win. And it was of course essential to Stevenson to continue the challenge process and not let it be concluded by putting the name on the ballot.

The matter was taken by Abe Fortas—Johnson retained Fortas in Washington—to a single Justice of the Supreme Court of the United States. Single Justices have general jurisdiction to supervise the lower courts in a particular area of the country.

The Fifth Circuit, as it then was, was an area of the country—at that time, the whole South; it's been divided since—that was, at that time, within the jurisdiction of Justice Hugo Black. And just—and Abe Fortas persuaded Justice Black to set aside the lower court ruling and allow the name to be certified. Set aside this injunction. It was a novel exercise of the power of a single Supreme Court justice, the first time one had done exactly that. And in the Supreme Court rules of procedure casebook or the citations of the rules, the name of the case, Johnson against Stevenson, was for a long time the leading case on the power of a single justice.

So to put it mildly, Abe Fortas had done a good turn for—for Lyndon Johnson. But as I say, I'd heard him argue a case in the Supreme Court brilliantly. Brilliantly. I think the case was Lever Brothers, an antitrust case.

And what made it so special was this: The time had been divided on the side of Lever Brothers, who were the defendants in a federal antitrust case, United States antitrust case. The Court generally disfavors more than one lawyer arguing on a side because it's confusing, but the counsel for Lever Brothers insisted on arguing. And he was supposed to have half an hour, and Fortas was supposed to have half an hour. It was a one-hour argument on each side.

But the counsel for Lever Brothers, the regular counsel—Fortas having been retained specially for the argument—took instead of 30 minutes, 50 minutes. This left Fortas with just 10 little minutes. And the other lawyer had been hopelessly inept.

In 10 minutes, with a tension unlike practically anything I've ever seen—I mean, it looked like as if you touched him, your hand would be electrified—Abe Fortas stood up there and argued that case and said everything that needed to be said and won the case in 10 minutes. It was brilliant. Maybe the best argument I've ever heard.

GEMINIANI: He was asked, I believe, by Justice Earl Johnson—Earl Warren, rather—to take the case on a pro bono basis.

LEWIS: They never say who asked. The Court simply puts down an order. The clerk of the court calls up a lawyer and says, "The Court would like you to take on the case of X."

And then the lawyer says, "Yes. Thank you. I will." Because that's a question like "Will you have dinner with the Queen?" You have to say yes.

GEMINIANI: Is that why he said yes or was there something in the case that particularly motivated him?

LEWIS: No. I think you don't have a choice. I mean, in—of course you have a choice, but it would be very, very bad form for any lawyer, given the honor of being appointed by the Supreme Court. I mean, I saw Dean Acheson, the former Secretary of State, represent a poor Texas criminal defendant who didn't have an issue at all as interesting as the Gideon issue. It was just some completely particular question of facts or something. Acheson did it. It's noblesse oblige. You do it because the Court asks you to do it.

GEMINIANI: As he began and the team at Arnold & Porter began the research on the—on the case and the current state of the law, how did Abe Fortas analyze the initial elements or the essential elements of the case?

LEWIS: Well, I'll tell you. It's long ago [laughs], and perhaps I should have reread my own book in preparation for this conversation, where it's all laid out.

But Fortas wanted to make a good showing. He knew that the very fact that the Court had asked the question "Should we overrule Betts against Brady?" meant in all likelihood that it was going to—you don't ask that question unless there's a pretty clear indication that you are going to overrule it.

And in fact we now know that there had been one or two previous times when the Court was about ready to overrule it, and then something happened and they didn't. And they finally picked on this case as the case that would be the appropriate one to overrule it.

Why did they do so? Probably because there was nothing special about Gideon. He wasn't mentally defective. He wasn't a black person overwhelmed by racial prejudice in a community. He was white, in fact, though I didn't know that when I started.

In other words, if there had been some specially adverse circumstances, there was always the chance that the Court would not overrule Betts and Brady but would simply go along with the Betts and Brady rule and say, well, Mr. Gideon was especially afflicted, so he should have had a lawyer, and they wouldn't face the question of whether everybody should have a lawyer.

But looking roughly at what—the materials the Court had before it, it seemed that he, you know, was a rather typical defendant, not specially afflicted, so he would be a good case in which to consider whether the typical poor criminal defendant really could do an adequate job of representing himself.

So Fortas knew that he was almost certainly going to win the case. He wanted to win unanimously. That was the—I'd say the compulsion. And for good reason, because it was a big Constitutional step. It's better if the Court is unanimous, as in Brown against Board of Education or whatever.

And he wanted to supply the Court with materials that would enable it to write a strong opinion. Historical materials on the origins of the Sixth Amendment, which provides for the right to counsel in federal criminal cases. This was a state case, and that was the issue, whether the federal rule should apply to all 50 states as well.

And the practical effects of overruling it, what would it do to all the people who were in prison who hadn't had counsel. Would they all have to be released? I mean, practical, historical, philosophical. The role of the Court. Is this the Court taking on something too big, overreaching? Is it—would the Court be performing a function that would be better left to state legislatures to do? All those kinds of questions. Each one, Fortas asked some person with him in the firm, associate or younger partner, to do research on.

GEMINIANI: The case that you referred to, Betts vs. Brady, was decided, I think 20 years before and—

LEWIS: 1942.

GEMINIANI: —and had created—

LEWIS: Or '43, I forget.

GEMINIANI: —created a situation where the states were not required to appoint counsel unless special circumstances were indicated. Could you tell me a little bit about what special circumstances had been defined by, either in that case or after that case?

LEWIS: That's one of the things that Fortas argued, that it was impossible to say what special circumstances were, because from case to case, the Court had found special circumstances for different reasons. It was a special circumstance if it was a Southern community beset by racial prejudice and a lonely black was all by himself against an all-white jury. That's a special circumstance. It's a special circumstance if his intelligence was subnormal. It was a special circumstance if he suffered from some mental disability, madness or whatever.

It was—I mean, what had happened—in fact, this was one of the questions asked by—at the oral argument. One member of the Court said to Fortas, "Mr. Fortas, can you tell me, when was the last time the Court did not find special circumstances?"

And he went back—I don't know —5 or 10 years in another Florida case. I think Cornley (Cornly?) against Cochran was the name of the case. I'm not sure. The Court, the members of the Court, essentially were unpersuaded that there was such a thing as special circumstances. They really thought that anybody, alone, friendless, against a prosecutor who was a trained lawyer really needed a lawyer to defend him.

So they—they managed to find special circumstances of one kind or another in every case until the moment came to say, well, we're just playing a game here.

GEMINIANI: The fact that special circumstances were defined by the Supreme Court after a conviction and with very little guidance for the state clearly created frictions continually—

LEWIS: Yes.

GEMINIANI: —between the states and the federal government.

LEWIS: That was another point that Fortas made in the brief and very effectively at oral argument. One of the issues was whether, as I said before, this would be—if the Court were to overrule Betts

and Brady and impose the requirement of a lawyer, free lawyer, in every case of a poor criminal defendant, whether that would be an imposition on states' rights, whether it would be an intrusion by the Supreme Court on state independence.

And Fortas argued that in fact, there was far more conflict under the existing situation because nobody could tell in advance whether the Supreme Court would find special circumstances. A guy wanders into a courtroom as a defendant, and he looks all right. And the judge says, "Looks to me like you can defend yourself."

And then five years later, the Supreme Court says, "We find that special circumstances"—and they have to have the trial all over again, and everybody's very irritated.

And Fortas said—I think was one of his most convincing points—that it's a greater irritant in federal-state relations than a protection. And that impressed, I think, Justice Harlan especially, who was a very—the judge, the member of the Court, most concerned about intrusion on state independence.

GEMINIANI: I think you also mentioned that you had a chance to meet Bruce Jacobs, who was the attorney for the State of Florida.

LEWIS: Yes, I did.

GEMINIANI: Could you tell me a little about your impressions of him, your memories of him?

LEWIS: Bruce Jacob was a very young man then. He had never argued a case in the Supreme Court of the United States. I don't think he'd ever seen the Supreme Court of the United States.

And he was, it's fair to say, apprehensive about going up there, up against this highly experienced, high-powered lawyer for the other side, Abe Fortas. Of course, the irony was that the scales had been completely turned around. At the trial, Clarence Earl Gideon was all on his own. The State of Florida had a trained prosecutor, quite a skillful lawyer. And he had nobody on his side.

Now he was going to be represented in the Supreme Court by this veteran, high-powered Abe Fortas. And the State of Florida was going to be represented by someone who was very capable but really a novice. Moreover, as it turned out, most of the states, most amazingly, joined in a brief as a friend of the court urging the Supreme Court to impose on the states an obligation to

appoint counsel for poor defendants. So Bruce Jacob didn't even have the other states on his side except for one or two.

GEMINIANI: One of the things you brought up in your book is that 22 states ended up supporting the position of Abe Fortas in support of Gideon's position that the right to counsel existed in all situations. I found that fascinating. Could you tell me how that occurred?

LEWIS: Well, I can tell you how it happened. It happened because Bruce Jacob wrote a letter to all of the state attorneys general saying we have this case. Supreme Court has granted certiorari. And we think that it's—should be a matter of concern to every state because you're going to have imposed on you a requirement to supply free lawyers to people. That ought to worry you. I mean, that wasn't the tone of the letter, but that was the message.

And one of the state attorneys general who read it was the attorney general of Minnesota, a chap called Walter F. Mondale, later Senator and Vice President of the United States. And he read it, and he said to himself, “Gee, I think we should be on the other side. I think the poor people should have lawyers when they're tried for crimes.”

So he sent a letter to—I don't know how many other states expressing this view, but at least—the one state I know, because it was crucial, was Massachusetts. The attorney general in Massachusetts at the time was Edward J. McCormack, and he had an assistant for civil rights, civil liberties, called Gerald E. Berlin.

And [laughs] it happened through grotesque circumstances that I ran into Gerry Berlin at a concert last night. And I told him I was going to come to Washington to talk about the 30th anniversary of Gideon. And he said, "Do you remember how that happened?"

I said, "No, I don't." And he reminded me, so I can answer your question.

He and I both had houses on Martha's Vineyard, or at that time, I didn't have a house, but I went there and rented houses during the summer. And I saw him at a cocktail party during the summer of 1962 after the Supreme Court had agreed to hear the case. And I knew about this letter from Fritz Mondale, and I said to Gerry Berlin, "What are you doing about that letter from Fritz Mondale?"

And Gerry Berlin said, "Gosh, I forgot about it. You're right. I should do something."

And last night, Berlin said to me, "Now, you were just a reporter, and of course you wouldn't have dreamt of suggesting what I should do," but of course my question was by itself a suggestion.
And he called his assistant and said, "Hey, let's write a brief on the side of Clarence Earl Gideon." And they drafted the brief, and they sent it around to the other states, and 22 of them signed it.

GEMINIANI: What was the essential argument the state made in the—in the defense of their position?

LEWIS: It was that this—no different from—from Fortas' argument, that it was overdue, that you couldn't get justice representing yourself and that the states could easily handle it, and that it was—the friction would be greater if you went on with a case-by-case decision, rather than having an absolute rule.

GEMINIANI: What about Florida's position? What were the essential arguments Florida was making to preserve their independence? Was it states' rights? Classic states' rights argument?

LEWIS: Oh, it was a historical argument, which I think was quite strong, that at the time of the adoption of the constitution, (a) the Sixth Amendment, which speaks of the right to counsel, applied, like all the rest of the Bill of Rights, only to things done by the federal government. At the beginning, when the Bill of Rights was ratified, written by Congress, the first Congress in 1789 and ratified by the states in 1791, all of the provisions of the Bill of Rights—freedom of speech, freedom of religion, right to counsel and so on—those applied only to the federal government, only at federal trials, for example, on the right to counsel. And it wasn't even altogether clear that the right to counsel meant a right to a free lawyer as a defendant if you couldn't afford to hire one of your own.
Historically, it's very likely that it meant simply that you were entitled to hire a lawyer because it was only quite recent in Britain, from which after all the American experience—experience derived, that you were allowed to have a lawyer, even if you could afford one. As a criminal defendant, you didn't used to be able to have a lawyer. And so very likely the Sixth Amendment merely assured you the right to bring your own lawyer into the room.

The Supreme Court had, in recent times, interpreted the Sixth Amendment to require appointment of free lawyers in federal cases. And it had also, at an earlier time, in the Scottsboro case, Powell against Alabama, interpreted the 14th Amendment, which is the amendment that applies to the states and says that no state shall deprive any person of life, liberty or property without due process of law. And one meaning of that is that at a criminal trial where your life, liberty or property may be at stake, you have a right to a fair procedure. And the Court had interpreted that to require appointment of a free lawyer when your life was at stake, in a capital case.

So Bruce Jacob could say, historically, it only applied to the federal government. Historically, it only had to do with the right of people to hire a lawyer, not a right to a free lawyer. That was quite a strong argument to make.

But you know, history had been overtaken. The history was changing. The process of change had already begun. And it was—you know, it was moving, and it was very hard to resist that movement.

GEMINIANI: Did you have a chance to attend the oral arguments? And if so, could you tell me a little about what happened, your memories?

LEWIS: The oral argument was what one would have expected from the relative experience of counsel and the relative attractiveness of the arguments.

In fairness to Bruce Jacob, one has to say that the Court was ready to overrule Betts and Brady. The Court was ready to decide that every poor criminal defendant was—in a serious case was entitled to a free lawyer. So he was up there battling—Bruce was up there battling the odds. And he was nervous.

I think he did a very honorable job, but here was an exchange which I remember. Justice Black, who had dissented Betts against Brady and had many times said in court that Betts against Brady was an abomination that should be overruled—Justice Black had this sort of soft Southern voice. He'd sit back in his chair, looking very small behind the bench and sort of ask a soft question. And if you didn't know it, what was happening as a lawyer, by the time the question and the answer and the next question were over, your head would be off.

And Justice Black said, "You say, Mr. Jacob, that Mr. Gideon was quite capable of representing himself in this case and he didn't need a lawyer."

"That's right, Mr. Justice."
"Do you think that he would have been capable of defending other people charged with crimes, acting on their behalf?"
"Yes, Mr. Justice. Quite capable."
"Don't you think the bar association might have had something to say about that?"
Of course the bar association would never want somebody who wasn't a lawyer acting like a lawyer.
And Bruce said, "Oh, yes. You're right, Mr. Justice. That was a stupid answer."
Well, it wasn't a stupid answer, but you know, he was a little nervous.
And Abe Fortas was extremely well-prepared and had this kind of peroration, which I can't recite from memory—it's in the book, again—which he gave when Justice Harlan, the state-minded, the most state-minded judge, asked him whether this wasn't an infringement on state independence. He had this wonderful peroration, saying this is the least intrusive way to deal with the problem. It's the right answer. It's the answer that history now calls for. We're ready for it. And it was quite a ringing, effective answer.

GEMINIANI: You mentioned before that there was a presumption that the case in fact would be won. Your book mentions that I think three justices, Justice Warren, Justice Black and Justice Douglas, already had taken positions publicly in opinions, dissenting opinions, saying that they were ready to overrule Betts.

LEWIS: Right.

GEMINIANI: And Justice Frankfurter had just resigned and been replaced by Arthur Goldberg, and Justice Brennan also was thought to be someone leaning in favor. Was the—

LEWIS: Frankfurter having been the most tenacious defender of Betts against Brady.

GEMINIANI: Was there a feeling on both sides that the verdict would come down as it was, as it would, or the opinion rather, the decision?

LEWIS: I think so. You'd have to ask Bruce Jacob, but I think he knew the odds were against him. That's my guess.

GEMINIANI: Was there a lot of surprise when it turned out to be unanimous?

LEWIS: Not on my part. Justice Harlan was the—was the only real question. And he wrote a separate opinion, very nice separate opinion, concurring opinion, saying that he agreed that it was time to overrule Betts and Brady, but he thought that it nee—that it was entitled to a little more—that Betts was entitled to—he didn't use the phrase, but I think he meant a more decent burial, at least on the part of those who were not on the Court when it was decided, which was a very nice gesture to Justice Black, as if to say, you were there. You're entitled. You dissented at the time. You're entitled to say you were right all long. But I can't agree. You know, I don't agree.

Because the line that Justice Black took in his—Justice Black wrote the opinion of the Court in Gideon against Wainwright. It was assigned to him by Chief Justice Warren, I think as a kind of poetic gesture. Twenty years later, you've got to write—you've got the right to say, "I was right all along. I was right when I dissented against Betts and Brady."

And the way Justice Black did it was to go back to the Scottsboro case, the case in which the Court had said that in capital crimes, the defendant was entitled to a free lawyer, and say that that laid down the standard, and the Court departed from that wise rule in Betts against Brady. The Court went wrong. And now we're just going back to where it really was all along.

And Justice Harlan said, “Well, I can't agree.” I think that the Scottsboro – [interruption in audio].

So Betts and Brady, though it may have been right when it was decided, is no longer right. He took that different approach.

GEMINIANI: You mentioned before that you had a chance to attend the second trial of Clarence Gideon. Could you tell me what exactly happened?

LEWIS: I don't have a very strong memory of it except for the jury verdict (laughter), which was very important from the point of view of someone writing a book about Clarence Earl Gideon

and the case of Gideon against Wainwright. It would have been, shall we say, a bit of a spoiler if the jury had convicted him. [Laughter]

It was—it was, you know, sort of proved that lawyers are valuable. And the jury, on essentially the same facts, acquitted him. The one memory I have is the crucial memory of what—how very, very important Gideon's lawyer was.

Gideon had been—after the decision, he was still in prison. The American Civil Liberties Union office or branch in Florida sent two people to see Gideon in Raiford, the penitentiary, and said, "We're ready to represent you."

And Gideon, who was a very cantankerous chap, said, "I don't want you to represent you—represent me."

And they said, "But we're here. I mean, we're lawyers. We're from the American Civil Liberties Union. We can get you off."

"I don't want you."

So they went away. [Laughs]

So by now—then they went back into court. And the people from the American Civil Liberties Union were there and said to the judge, "He doesn't want us."

And the judge said, "One thing I can tell you: He's not going to have another trial without a lawyer, not in front of me. So come on, Mr. Gideon. Who do you want as a lawyer?"

"I want Fred Turner."

Now Fred Turner was a local lawyer, subsequently was a judge down there.

And the judge—Judge McCrary [McCray?] said, "You want Fred Turner? You'll get Fred Turner." And he appointed Fred Turner to represent Gideon. And Fred Turner represented him very enthusiastically and very effectively.

And that's the main thing I remember. I mean, it was not—you know, the trial took a couple of hours. It wasn't—[laughs]—the facts were rather minimal. Breaking and entering a poolroom. A few witnesses. And that was about it.

GEMINIANI: Do you have any thoughts about the importance of this case and its implications for our current criminal justice system?

LEWIS: Well, I have to tell you that the decision in Gideon and Wainwright stands as a kind of lonely landmark of an era, the other pillars of which have mostly been washed away. Now, I think I mixed my metaphor there, but perhaps you'll understand.

The Court—the Warren Court, at that time and in subsequent years, established a number of strengthened rights of criminal defendants, rights against illegally seized evidence, rights against the third degree; that is, the right to see a lawyer before being questioned by the police, and habeas corpus, federal habeas corpus, the right to go to a Federal Court to test the Constitutionality of your conviction after you'd been all through the state process, if you were a state prisoner.

All the others, the current, more conservative Rehnquist Court has eroded almost to the vanishing point. It has put such limits on federal habeas corpus that it hardly exists anymore. It has greatly loosened the protections against the use of illegally seized material. It has—et cetera, et cetera.

But the Court, in an opinion of Jus—Chief Justice Rehnquist, has said the right to counsel is fundamental. We're not going to turn our backs on that. So it's this—kind of the one surviving landmark, to which I have to put a caveat.

The principle survives, but the question is whether the practice is as good as the principle because very often the lawyers who represent poor criminal defendants are either not very experienced, not very committed, not very competent, or they don't have the resources. It's a major criminal trial, and the state allows the defense lawyer—pays him a trivial sum that hardly compensates him for his time. Doesn't. And doesn't allow him any money to hire expert witnesses or psychiatrists or this or that.

GEMINIANI: Your wonderful book was later made on—made into a movie starring Henry Fonda as Clarence Gideon, and it further enabled the American public to be educated about the facts in the case, the background in the case and the importance of the case in the development of our judicial system. Can you tell us a little about how that developed and whether you think it was an accurate recitation of what actually occurred?

LEWIS: I had nothing to do with what went into the movie. That was done by a man I came to know as a friend and have—and is a close friend to this day, David Rintels, who wrote the script.

He has written a number of plays and films with legal or quasi-legal subjects. He's very interested in the law. He wrote the play *Darrow*, in which Fonda also played, and others. He wrote the script. He sent me a copy of the script to ask what I thought of it. And I read it, and I was very impressed, and I told him I liked it.

He then invited me to watch the film being made. I went out to Hollywood. As I say, I had no control whatever. Nothing. I just sat there as a guest, but I enjoyed it a lot.

I got to meet Henry Fonda, and we were on location for a week at a prison in California, the Chino prison, with lots of scenes being shot with actual prisoners and a few people like Henry Fonda mixed in among them. Virtually all of that ended on the cutting room floor. There are very few prison scenes in the movie. But we spent a very nice week, and we could have dinner together every night. And Fonda was very interesting, so I enjoyed it.

And then they shot the remaining scenes in—on a soundstage in Hollywood or the Supreme—no. The sec—Supreme Court scenes were on a soundstage, Supreme Court of the United States. The scene—the second trial was shot in a small, old courtroom in a village or town to the—in southern—or south of Los Angeles.

I remember one funny thing about—which I think it's not harmful to say—about the Supreme Court scenes. Though they never use names of judges, it was obvious that certain actors were supposed to be different Supreme Court justices. They had John Houseman, who was the executive producer of the film and had been—had played Professor Kingsfield in *The Paper Chase*. He played Earl Warren. He's a rather large man. He didn't look a bit like Earl Warren except that he was large. And he played Earl Warren.

And then they had Sam Jaffe playing Felix Frankfurter. And as you've pointed out, Frankfurter was—in fact had retired from the Court. But to represent his point of view, they decided to have him on the Court. They didn't use his name, as I say. But Sam Jaffe was a great character actor in his day. He had played—now we go back only for those who are very old or fans of old movies. He had played *Gunga Din*, the Indian runner in the film *Gunga Din.* He played the old lama in what I think was one of the greatest movies ever made—remind me the name. Shangri-La—*Lost Horizon*, great film of a book by James Hilton. Really, I commend it to you. It's one of the best dozen movies ever made, I think; in which Sam Jaffe had probably 100 pounds of makeup on because he was playing a grand lama in this lost valley in the Himalayas that was a magic valley where you never grew—you never died. But he was 372 years old or something

like that. And he was very, very old, and he had lots of lines on his face. He said to the hero, whoever it was, Ronald Colman, somebody like that, "My son," you know, very old.
But by the time that this movie was shot, Sam Jaffe in person looked about the way he did playing the grand lama in Lost Horizon. He was very old. And he was both very deaf and quite blind. I mean, he couldn't see very well. Put it that way. He was very nice, but he couldn't see very well. And he couldn't hear very well or at all. And so the problem was how, would you cue him? Here was nine judges sitting on the bench, and it came his turn to ask a question of counsel in the scenes, and he hadn't heard the previous question and answer. So the system devised was that John Houseman, who was sitting next to him, would kick him in the shins underneath the bench, and Sam Jaffe would then say, "Well, counsel" – [laughs].

GEMINIANI: Any final thoughts on—or memories on your involvement in this historical occurrence?

LEWIS: No. I feel lucky and privileged to have been involved because I think it was a wonderful case. And I think the participants, all of them—I mean Abe Fortas, Bruce Jacob, the state lawyers who worked up that brief, Gerry Berlin and Eddie McCormack and Fritz Mondale, Hugo Black, John Harlan—I mean, they were great figures.
And also Fortas' assistants, you know, the youngest of them, who was just there as a summer clerk, John Hart Ely, went on to become a professor at the Harvard Law School and dean of the Stanford Law School.
Abe Krash is now a senior partner at Arnold & Porter. And they've all gone on to do great things. And so I feel as if I was just—had lucked into history.

GEMINIANI: Mr. Lewis, I want to thank you on behalf of the National Equal Justice Library for sharing your memories and your thoughts and your insights into the *Gideon vs. Wainwright* case. The nation owes a great debt of gratitude to you for preserving that history for us, not only in your written materials and your wonderful book, but also this—this oral history tape. And you've done a lot to educate all of us about the important fundamental issues of fairness and due process and the right to counsel. Thank you very much.
LEWIS: Thank you.
[Conclusion of interview]