

***Gideon v. Wainwright:*
A 40th birthday celebration
and the threat of a mid-life crisis**

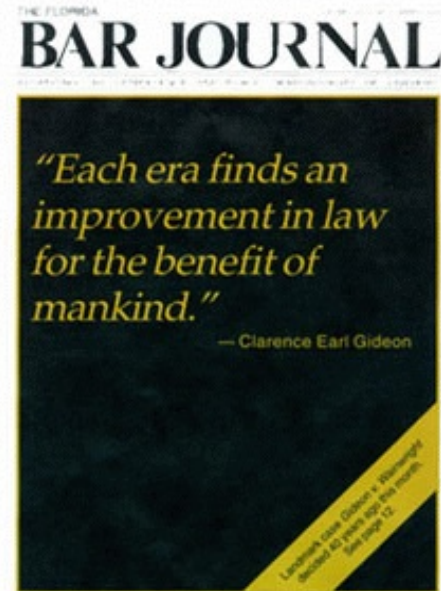
by Paul M. Rashkind

“The United States Supreme Court says I am entitled to be represented by Counsel,” the accused told the judge, in anticipation of his trial for the crime of burglary. He was poor, unable to retain counsel, and was facing a felony trial. Few observers would doubt the accuracy of the defendant’s explanation of his right to appointed counsel.

“I am sorry,” the trial judge ruled, “but I cannot appoint Counsel to represent you in this case ... I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.”

Generations of lawyers can cite from memory the case that holds the trial judge’s ruling is wrong: *Gideon v. Wainwright*.¹ Yet the defendant was wrong and the judge was following Florida law. This was Bay County, Florida, August 4, 1961, and the accused was Clarence Earl Gideon. This was nearly two years before the U.S. Supreme Court decided that the Constitution guarantees the right to counsel for every person accused of a felony, in state and federal courts, and for those who cannot afford counsel, the state must provide a lawyer free of charge.

The decision in *Gideon v. Wainwright*, handed down on March 18, 1963, is about to turn 40, and as with all 40th birthdays, that’s reason to celebrate. It’s worth the time to reminisce, reflect on Florida’s courtrooms before *Gideon*, the many interesting Floridians who had a hand in the development of the decision, and the future of indigent defense, particularly as Florida prepares to re-allocate the funding of court-appointed counsel under Article V of the Florida Constitution.



Before *Gideon*, the constitutional right of an indigent defendant to court-appointed counsel was recognized only in federal court trials. *Johnson v. Zerbst*, 304 U.S. 458 (1938). When, during World War II, accused robber Smith Betts sought to have the federal constitutional right applied to the state of Maryland, the U.S. Supreme Court held that the Sixth Amendment did not apply to the states and did not require them to supply court-appointed counsel for criminal defendants. *Betts v. Brady*, 316 U.S. 455 (1942). That was the law on August 4, 1961, despite Clarence Gideon’s somewhat different explanation of Supreme Court jurisprudence on that day.

In the years after *Betts v. Brady*, however, many states began to provide court-appointed counsel to indigent defendants. Forty-five states had such a rule by the time Gideon was tried. Five southern states, including Florida, resisted the movement. There were some exceptions, even in Florida. A right to court-appointed counsel did exist in capital cases and for those who fit within a vague “special circumstances” rule, covering an accused “incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy or the like ...” *Powell v. Alabama*, 287 U.S. 45, 71 (1932). Special circumstances were recognized on a case-by-case basis. In practice the rule was difficult to apply and the finding was rarely made. Equally troubling, the U.S. Supreme Court found it necessary to reverse nearly every case brought to it in which a finding of special circumstances had been denied, yet the bulk of those denied a lawyer were incapable of perfecting appellate review of the denial of counsel.

In virtually all of Florida's counties, the majority of defendants were without legal counsel. They either pleaded guilty or represented themselves at trial, often with predictable results. They had no lawyer to appeal for them and rarely perfected one themselves. A letter handwritten by Gideon described a typical day in court:

One day when I was being arraigned, I seen two trials of two different men tried without attorneys. In one hour from the time they started they had two juries out and fifteen minutes later they were found guilty and sentenced. Is this a fair trial? This is a common practiced thru most of the state.²

It is difficult to envision now, four decades later, but prior to 1963, lawyers were likely to appear in Florida courtrooms only for the wealthy. Poverty carried the additional handicap of loss of the right to counsel.

Two Florida counties had voluntarily created public defender offices. These were the large metropolitan areas of Dade County and Broward County. A third, Duval County, had a court-appointed counsel system, and Hillsborough County was about to get a public defender office under the terms of a population act applicable only to Hillsborough County.³ But how, one might fairly ask, could Bay County be expected to provide court-appointed counsel in the trial of all indigent defendants, when it had only 36 lawyers in the entire county, two of whom were the prosecutor and the judge, one of whom was not admitted to practice in Florida, and most of whom did not try cases or practice criminal law?

Considering both the *stare decisis* effect of *Betts v. Brady* and the practical problems of the day, how did Gideon have a chance of establishing the existence of a constitutional right to court-appointed counsel? Good timing and a compelling argument by lawyers.

During the years following World War II and the Korean War, America was preoccupied with Communism, McCarthyism, the arms race, and the race to space. At the same time, the U.S. Supreme Court was brewing a renaissance of individual liberties, often directly overruling its own earlier decisions refusing to recognize the same rights and liberties. In 1954, the Court integrated public schools with its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896). Two Terms later, the Court decided *Griffin v. Illinois*, 351 U.S. 12 (1956), requiring states to pay for appellate transcripts for those unable to afford their cost, implicitly ignoring the then-prevailing rule of federalism set down in *Palko v. Connecticut*, 302 U.S.

319 (1937). In 1957, despite a national anti-Communist fervor, the Court overturned anti-Communist Smith Act convictions in *Yates v. United States*, 354 U.S. 298 (1957), and for the first time set limits on the investigative authority the powerful House Un-American Activities Committee. *Watkins v. United States*, 354 U.S. 178 (1957). In 1961, the Court extended the Fourth Amendment's exclusionary rule to the states, *Mapp v. Ohio*, 367 U.S. 643 (1961), overruling *Wolf v. Colorado*, 338 U.S. 25 (1949). And in 1962, the Court ordered reapportionment of state legislatures, *Baker v. Carr*, 369 U.S. 186 (1962), overruling its decision in *Colegrove v. Green*, 328 U.S. 549 (1946). This was certainly a time of change, uninhibited by *stare decisis* or deference to other branches of government.

Against this backdrop, Clarence Earl Gideon perfected his case. The trial judge declined to appoint counsel for him, he represented himself in a jury trial, and was convicted as charged. He did not appeal, but filed a petition for writ of habeas corpus in the Florida Supreme Court, which was summarily denied. From his prison cell, he hand-wrote a petition for writ of certiorari, which he mailed to the U.S. Supreme Court, and the rest is the history we are about to celebrate.

The Supreme Court appointed Abe Fortas, a prominent Washington lawyer who would later serve as an Associate Justice of the Supreme Court, to argue Gideon's case. The Court's grant of certiorari made clear that it was considering a dramatic change in the law; the parties were directed to discuss the question, "Should this Court's holding in *Betts v. Brady* 316 U.S. 455, be reconsidered?"⁴ During a three-hour oral argument on January 15, 1963, Fortas argued forcefully that the Court should overrule *Betts* and apply the Sixth Amendment right to counsel to the states. The argument became a discussion of the requisites of civilized society in a nation built on federalism, shaded by the extreme difficulty of applying the special circumstances rule in day-to-day practice:

MR. FORTAS: ... I believe that this case dramatically illustrates the point that you cannot have a fair trial without counsel. Indeed, I believe that ... a criminal court, is not properly constituted ... under our adversary system of law, unless there is a judge and unless there is a counsel for the prosecution and unless there is a counsel for the defense. Without that, how can a civilized nation pretend that it is having a fair trial, under our adversary system, which means counsel for the state will do his best within the limits of fairness and honor and decency to present the case for the state, and counsel

for the defense will do his best, similarly to present the best case possible for the defendant, and from that clash will emerge the truth. ... [H]ow can it be suggested that a court is properly constituted, that a trial is fair, unless those conditions exist.⁵

Florida was represented by a young Assistant Attorney General, Bruce R. Jacob. Although Richard W. Ervin was Attorney General, both the brief-writing and oral argument were assigned to 26-year-old Jacob. He argued that, historically, there had been no requirement of appointed counsel in noncapital cases, the Court's due process jurisprudence did not require it, and federalism militated against imposing a federal rule on the states. Jacob argued for the power of states to establish their own rules over criminal proceedings, using the system of case-by-case determinations set forth in *Betts v. Brady*, rather than an inflexible rule requiring counsel.⁶ Several justices seemed receptive to the federalism issue and others looked for a way to salvage *Betts*.

When the decision was handed down two months later, Justice Hugo Black delivered the opinion of the Court, overruling *Betts v. Brady* as "an anachronism when handed down" and relying instead upon its 1932 decision in *Powell v. Alabama*, 287 U.S. 45 (1932):

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Gideon, 372 U.S. at 344-45. Applying this principle to the states, the Court again borrowed from *Powell*, holding "that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment" and that "the right to the aid of counsel is

of this fundamental character." *Id.* at 342-43.

Today, Americans accept this principle as a cornerstone of criminal jurisprudence, even though the cornerstone is only 40 years old, erected nearly two centuries after the Constitution and Bill of Rights were adopted, and a century after the Fourteenth Amendment was ratified.

The story of the case is best told by Anthony Lewis in his book, *Gideon's Trumpet* (1964), and the movie of the same name, starring Henry Fonda. But nearly 40-years after the book's publication, new historical perspective is available, of both the law and the principal participants of the case, especially those members of the Florida legal profession who played a part.

Unlike some other landmark decisions of the Warren Court, which suffered dilution over time, *Gideon v. Wainwright* has prospered. The *Gideon* decision was merely the beginning of a four-decade series of U.S. Supreme Court decisions, each broadening the right to counsel. *Douglas v. California*, 372 U.S. 353 (1963), applying the right to counsel to criminal appeals, was decided on the same day, and has been reiterated during the past four decades in *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Penson v. Ohio*, 488 U.S. 75 (1988). The right to counsel was expanded to juvenile proceedings by *In re Gault*, 387 U.S. 1 (1967), and to misdemeanor prosecutions that could result in imprisonment in *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Just this past Term, the Court again expanded the right to counsel in *Alabama v. Shelton*, 122 S. Ct. 1764 (2002), holding that not even a suspended or conditional sentence of imprisonment can be imposed in the absence of counsel.

The *Gideon* decision also gave rise to Florida's first rule of criminal procedure. The *Gideon* case was applied retroactively, requiring new trials or freedom for thousands of Florida's 7,500 inmates who had been convicted without counsel. A petition for writ of habeas corpus, an inmate's vehicle for relief under *Gideon*, had to be filed in the locale of the defendant's prison. Florida Criminal Procedure Rule No. 1 was adopted to avoid an avalanche of habeas corpus filings in the courts in close proximity to the Florida prisons, which were all clustered in North Florida. Instead, Rule 1 directed that the petitions be filed in the trial court in which a given defendant was convicted, spreading the workload throughout the state. See *Roy v. Wainwright*, 151 So.2d 825 (Fla. 1963). Rule 1, now numbered Florida Rule of Criminal Procedure 3.850,⁷ was the first in what has become a complex code of procedural rules governing criminal court proceedings. It was followed by what are now Rules 3.111, 3.130(c), and

3.160(e), which set forth procedures for the appointment of counsel for eligible defendants. In a very real sense, the Florida Rules of Criminal Procedure began as a by-product of the *Gideon* decision.

We celebrate this year the constitutional right Clarence Earl Gideon brought to Florida, even if we don't necessarily celebrate the life of Clarence Earl Gideon, himself. Gideon was a drifter and, based on his arrest record, a longtime petty criminal. By the time he was accused of burglarizing and stealing from the Bay Harbor Poolroom, just outside Panama City, Florida, he was in his 50's, had been convicted numerous times, in both state and federal courts, and had served time in jails throughout the country. He was certainly no Henry Fonda. His stubborn pursuit of the right to counsel was mixed with what is politely described as a quixotic personality. After his victory, he wrote to the ACLU, requesting the help of a trial lawyer for his retrial. When two Florida lawyers, Tobias Simon and Irwin Block, volunteered to represent Gideon on the ACLU's behalf, he declined their offer of free representation. He also rejected the appointment of the newly-created office of the Public Defender for Bay County. We celebrate, not for Clarence Earl Gideon the person, but rather for the advancement in civilization that his case represents. Simon placed Gideon and the decision bearing his name in perspective forty years ago:

It has become almost axiomatic that the great rights which are secured for all of us by the Bill of Rights are constantly tested and retested in the courts by the people who live in the bottom of society's barrel ...

In the future the name "Gideon" will stand for the great principle that the poor are entitled to the same justice as those who are able to afford counsel. It is probably a good thing that it is immaterial and unimportant that Gideon is something of a "nut," that his maniacal distrust and suspicion lead him to the very borders of insanity. Upon the shoulders of such persons are our great rights carried.

Report from Tobias Simon to Florida Civil Liberties Union, subtitled "How the Florida Civil Liberties Union Wasted \$300, and How Two Attorneys Each Traveled over 1200 Miles and Killed an Otherwise Perfectly Enjoyable July Fourth Weekend," as quoted in Anthony Lewis, *Gideon's Trumpet* 227-28 (1964).

The trial judge insisted that Gideon have counsel for the retrial, over Gideon's objections. Ironically, if he had been convicted again, Clarence Earl Gideon might

have been the named petitioner in the Supreme Court's later case upholding a defendant's constitutional right to represent himself. See *Faretta v. California*, 422 U.S. 806 (1975).

As we celebrate the 40th birthday of the constitutional right to counsel, it is interesting to reflect on the many Florida lawyers who played a part in the proceedings. The list is impressive, a veritable legacy of public service, another by-product of the *Gideon* decision.

Bruce Jacob, who represented Florida in the Supreme Court, left the Attorney General's office before completing his brief. He joined a 17-lawyer Bartow law firm, Holland, Bevis & Smith, now known as Holland & Knight. He spent evenings and weekends writing Florida's brief and preparing to argue its position in the U.S. Supreme Court. When *Gideon v. Wainwright* was decided, the Florida Legislature was in session and immediately passed remedial legislation, creating a public defender system.⁸ The new law also authorized unpaid Special Assistant Public Defenders. Jacob volunteered. Later, he left the private practice of law to teach law at Ohio State, Emory, Mercer, and Stetson, where he served as Dean. Along the way, he established the Legal Assistance for Inmates Program at the Atlanta Penitentiary and assisted in the establishment of Harvard's Prison Legal Assistance Project. And he got a second shot to argue in the U.S. Supreme Court, when he was appointed by the Court in *Kaufman v. United States*, 394 U.S. 217 (1969). This time he prevailed in a case that broadened a prisoner's right to federal collateral relief. Today, he is Dean Emeritus of the Stetson University College of Law, and continues to teach criminal law, tax, and administrative law courses.

Richard W. Ervin, Florida's Attorney General as the *Gideon* case wound its way to the Supreme Court, later served as a Justice and distinguished Chief Justice of the Florida Supreme Court. As Chief Justice, he authored *Baggett v. Wainwright*, 229 So.2d 239 (Fla. 1969), permitting a belated appeal – outside of the jurisdictional time period – for an indigent defendant who had been denied appointed counsel on appeal. He relied, in part, upon *Douglas v. California*, decided by the U.S. Supreme Court on the same day as *Gideon v. Wainwright*.

A Yale law student, John Hart Ely, is credited with spending the summer of 1962 preparing a detailed memorandum from which Abe Fortas formulated his argument for Gideon. "Between my second and third years of law school, I had the best job ever (well, best ever for a law student), helping Abe Fortas ... prepare the brief for petitioner in *Gideon v. Wainwright*." John Hart Ely, *On Constitutional Ground* 203 (1996). Ely

was back in law school by the time of oral argument and never got to see it. But he did eventually get to the Supreme Court – as a law clerk for Chief Justice Earl Warren. He later served as a criminal trial lawyer with Defenders, Inc., in San Diego. Ely became a distinguished author and law professor, teaching at Yale, Harvard and Stanford, where he also served as its Dean. Today, Professor John Hart Ely is the Richard A. Hausler Professor of Law at the University of Miami School of Law. He is one of the nation's foremost constitutional law experts and theorists.

The Florida Civil Liberties Union filed in the Supreme Court an *amicus curiae* brief in conjunction with the American Civil Liberties Union. Of counsel for Florida were its president, Howard W. Dixon, and two young lawyers, Richard Yale Feder and Tobias Simon. All three had significant careers championing civil rights. Feder capped his law career with two decades on the bench, as a Circuit Judge of the Eleventh Judicial Circuit. Tobias Simon may not have represented Gideon at trial, as he volunteered to do, but he remained a tireless civil rights advocate for whom The Florida Bar posthumously named its Pro Bono Service Award, given each year by the Chief Justice of the Florida Supreme Court. The 1989 recipient of the Tobias Simon Pro Bono Award was Howard Dixon, who devoted his 50-year legal career to ensuring legal services for the poor. He served as counsel to the NAACP, president of the Florida Civil Liberties Union, founder and Executive Director of Legal Services of Greater Miami, and concluded his career with a decade with the Legal Aid Society.

The attorney who did represent Gideon at the retrial was Panama City lawyer W. Fred Turner. With the assistance of counsel, Gideon was acquitted. Turner later served as a Circuit Judge of the Fourteenth Judicial Circuit of Florida. He is now retired and lives in Panama City, where it all began over forty years ago.

One peculiar fact is that none of the lawyers ever worked on a case titled *Gideon v. Wainwright*. Chief Justice Earl Warren's call of the case for oral argument was somewhat different, "Clarence Earl Gideon, petitioner, versus H.G. Cochran, director, Division of Corrections."⁹ Through the time of oral argument, the Director of the Florida Department of Corrections was H.G. Cochran and he was the named respondent in the case formally styled *Gideon v. Cochran*. After oral argument, but before the Court's decision, Bruce Jacob wrote to the Supreme Court Clerk, advising the Court that Mr. Cochran had been replaced as Corrections Director by Louie L. Wainwright. Although Jacob never received an acknowledgment, when the decision was delivered it was re-styled *Gideon v. Wainwright*.

Much has changed in 40 years, including the landscape of the legal profession. Criminal law is now practiced by many of Florida's lawyers. The Florida Bar grants board certification to lawyers in both criminal trial practice and criminal appeals. Florida's criminal courtrooms are filled with lawyers representing the poor and wealthy alike. Bay County, which had only 36 lawyers in 1963, now has over 100, with 23 private practitioners including criminal law in their practice, along with another dozen lawyers in the state public defender's office.¹⁰

The criminal law has also changed over the past 40 years. It is far more complicated, with new statutory crimes unknown to the common-law; a complex code of rules of criminal procedure and sentencing guidelines; and a maze of habitual offender laws. More constitutional rights are recognized by the courts, yet procedural roadblocks increasingly bar their enforcement. If indigent defendants had difficulty defending themselves 40 years ago, the task is now virtually impossible. In fact, the Sixth Amendment emphasis today has matured from the right to counsel to the right to the effective assistance of counsel, concentrating on the inability of skilled lawyers to grasp fully the intricacies of criminal defense.

The Florida Legislature's response to *Gideon* has been noteworthy. It created public defender offices in every judicial circuit. In addition, each county funds court-appointed counsel for those cases in which public defender offices have conflicts of interest. Throughout the past four decades, however, the mandate for court-appointed counsel has been at the mercy of government funding and it has been in jeopardy of becoming an under-funded mandate. Compare "The Crisis in Indigent Defense Funding. Gideon Undone: The Crisis in Indigent Defense Funding" (1982) <<http://www.abanet.org/legal/services/downloads/sclaid/GideonUndone.pdf>> with "National Symposium on Indigent Defense" (2000) <<http://www.ojp.usdoj.gov/indigentdefense/symposium.pdf>>.

The fear of under-funding is exacerbated by the ongoing implementation of Revision 7, the 1998 amendment to Article V of the Florida Constitution. The amendment requires the state Legislature to assume all funding of state public defender offices and court-appointed counsel, along with the funding for state attorneys offices and most aspects of the state courts system. Although that total amount will likely be a small fraction of the state budget, around 2% of the total state expenditures,¹¹ the ethereal nature of indigent defense often camouflages the state's need to fund it.

When, in 1961, Judge Robert L. McCrary, Jr. told Clarence Earl Gideon that he could not appoint a lawyer for him, it was because the Florida Legislature had not authorized it for cases like his. Despite Gideon's victory, the Florida Legislature still controls whether the right will be funded, or left as an under-funded mandate. As we celebrate the 40th birthday of the right to counsel, in a time of budgetary shortfalls, there is every reason to be wary of a mid-life crisis.

Recently, Anthony Lewis, the author of *Gideon's Trumpet*, presented the keynote address at a symposium on indigent criminal defense. He reminded those assembled of why we celebrate Gideon's victory, recalling Winston Churchill's words to Parliament in 1910:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal against the state, a constant heart searching by all charged with the duty of punishment. These are the symbols which, in the treatment of crime and criminal, mark and measure the stored up strength of a nation and are sign and proof of the living virtue in it.¹²

Clarence Earl Gideon died in 1972, buried in an unmarked paupers grave. Some years later, the American Civil Liberties Union, which argued on his behalf as a friend of Court, placed a headstone on his grave. It reads, "Each era finds an improvement in law for the benefit of mankind," the words Gideon wrote in the final paragraph of his letter to Abe Fortas four decades ago. The lawyers of Florida, who played such important parts in the development of our state's indigent defense, now have the duty to ensure that our advance in civilization ages with the grace it deserves.

To mark this special occasion, we plan to celebrate. On March 18, 2003, the Florida Association of Criminal Defense Lawyers-Miami, in conjunction with Miami's federal and state public defenders, The Florida Bar, and the Criminal Justice Section of the American Bar Association, will have a birthday party. Among our guests will be Bruce Jacob, Fred Turner, and John Hart Ely. Join us. Your electronic invitation is available online at www.gideon40.org.

roles in the *Gideon* decision. Just a few months later, Professor Ely succumbed to cancer. Not long after, Fred Turner passed away. The presentation that accompanies this FLORIDA BAR JOURNAL reprint captures the people and memories that gave life to the right to counsel.

Afterward: The 40th birthday party took place on March 18, 2003. It included a televised and videotape-recorded panel discussion in which Bruce Jacob, John Hart Ely and W. Fred Turner, reminisced about their

. 372 U.S. 335 (1963).

. Quoted from Gideon's letter to Abe Fortas. Anthony Lewis. *Gideon's Trumpet* 75-76 (1964).

. Chapter 61-639, Laws of Florida 1961.

. *Gideon v. Wainwright*, 370 U.S. 908 (1962) (cert. granted).

. Transcript of Oral Argument, *Gideon v. Cochran*, January 15, 1963 at 4.

. *Id.* at 34, 49.

. *State v. Broom*, 525 So.2d 639 (Fla. 2d DCA 1988).

. Chapter 63-409, Laws of Florida 1963.

. Transcript of Oral Argument, *Gideon v. Cochran*, January 15, 1963 at 1.

. Based on membership records of The Florida Bar and listings in Martindale-Hubbell®.

. This computation is part of presentation materials prepared by the State Courts Administrator, available online at <http://www.flcourts.org/osca/divisions>.

. http://www.uta.edu/pols/moore/indigent/symp_key.doc.

Paul M. Rashkind is the chief of appeals for the Federal Public Defender, Southern District of Florida. He serves as vice chair of the American Bar Association's Criminal Justice Section, chair of its Book Publication Board, a contributing editor of *Criminal Justice* magazine, and as president of the Florida Association of Criminal Defense Lawyers-Miami.