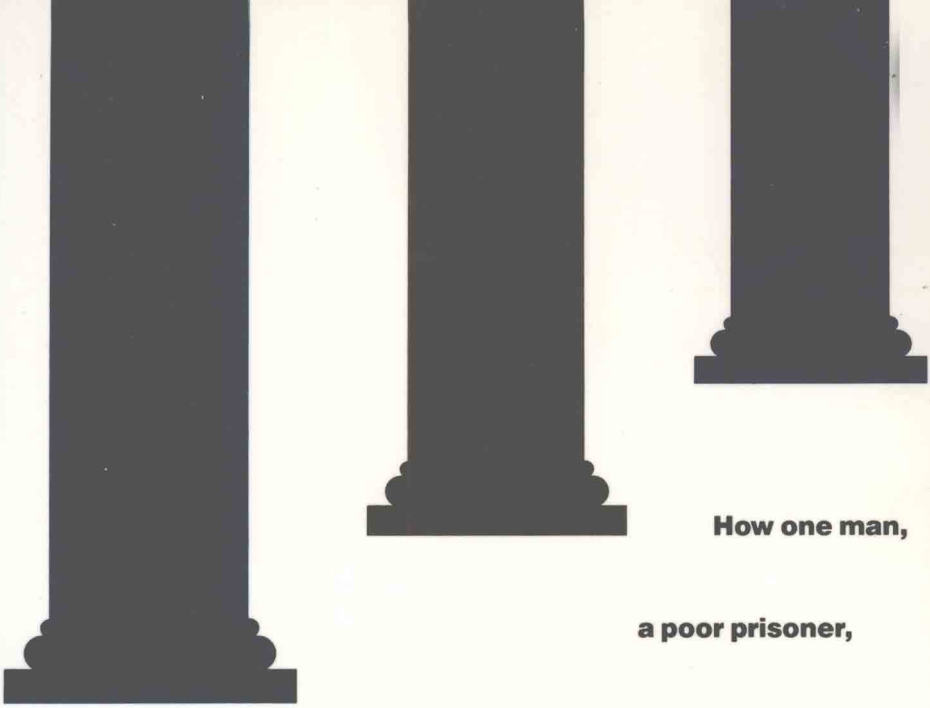

How one man,

a poor prisoner,

took his case

to the Supreme Court—

and changed

the law of the United States

ideon's Trumpet

Anthony Lewis

Trumpet

ANTHONY
LEWIS

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Gideons Trumpet

1

In the morning mail of January 8, 1962, the Supreme Court of the United States received a large envelope from Clarence Earl Gideon, prisoner No. 003826, Florida State Prison, P.O. Box 221, Raiford, Florida. Like all correspondence addressed to the Court generally rather than to any particular justice or Court employee, it went to a room at the top of the great marble steps so familiar to Washington tourists. There a secretary opened the envelope. As the return address had indicated, it was another petition by a prisoner without funds asking the Supreme Court to get him out of jail—another, in the secretary's eyes, because pleas from prisoners were so familiar a part of her work. She walked into the next room and put the

envelope on the desk of an assistant clerk of the Supreme Court, Michael Rodak, Jr.

Mr. Rodak, among other duties, concerns himself with what the Supreme Court calls its Miscellaneous Docket. This is made up mostly of cases brought by persons who are too poor to have their court papers printed or to pay the usual fee of one hundred dollars for docketing a case in the Supreme Court—bringing it there. A federal statute permits persons to proceed in any federal court *in forma pauperis,* in the manner of a pauper, without following the usual forms or paying the regular costs. The only requirement in the statute is that the litigant "make affidavit that he is unable to pay such costs or give security therefor."

The Supreme Court's own rules show special concern for *in forma pauperis* cases. Rule 53 allows an impoverished person to file just one copy of a petition, instead of the forty ordinarily required, and states that the Court will make "due allowance" for technical errors so long as there is substantial compliance. In practice, the men in the Clerk's Office—a half dozen career employees, all lawyers, who handle the Court's relations with the outside world—stretch even the rule of substantial compliance. Rule 53 also waives the general requirement that documents submitted to the Supreme Court be printed. It says that *in forma pauperis* applications should be typewritten "whenever possible," but in fact handwritten papers are accepted.

Gideon's were written in pencil. They were done in carefully formed printing, like a schoolboy's, on lined sheets evidently provided by the Florida prison. Printed at the top of each sheet, under the heading Correspondence Regulations, was a set of rules ("Only 2 letters each week . . . written on one side only . . . letters must be written in English . . .") and the warning: MAIL WILL NOT BE DELIVERED WHICH DOES

NOT CONFORM TO THESE RULES. Gideon's punctuation and spelling were full of surprises, but there was also a good deal of practiced, if archaic, legal jargon, such as "Comes now the petitioner. . . ." It seemed likely to Rodak that Gideon had a copy of the Supreme Court Rules.

The first of the documents in the envelope was a two-page affair headed "Motion for leave to proceed in forma pauperis" and including the notarized affidavit that the statute requires. A quick check indicated to Rodak that this prisoner had substantially complied with the rules. He appeared, for example, to have met the requirement that criminal cases be brought to the Supreme Court within ninety days of the lower court decision. Gideon had applied to the Florida Supreme Court for a writ of habeas corpus—an order freeing him on the ground that he was illegally imprisoned. He enclosed a copy of that application and of a brief order of the Florida court denying it. The Florida ruling against him, which he wanted the Supreme Court of the United States to review, was dated October 30, 1961, less than ninety days before.

There was very little in what he had sent to the Court to portray Clarence Earl Gideon the man. His age, his color, his criminal record if any—not even these basic facts appeared, much less any details for a more complete portrait. Because the case came from the South, one's assumption might have been that he was a Negro. He was not.

Gideon was a fifty-one-year-old white man who had been in and out of prisons much of his life. He had served time for four previous felonies, and he bore the physical marks of a destitute life: a wrinkled, prematurely aged face, a voice and hands that trembled, a frail body, white hair. He had never been a professional criminal or a man of violence; he just could not seem to settle down to work, and so he

had made his way by gambling and occasional thefts. Those who had known him, even the men who had arrested him and those who were now his jailers, considered Gideon a perfectly harmless human being, rather likeable, but one tossed aside by life. Anyone meeting him for the first time would be likely to regard him as the most wretched of men.

And yet a flame still burned in Clarence Earl Gideon. He had not given up caring about life or freedom; he had not lost his sense of injustice. Right now he had a passionate—some thought almost irrational—feeling of having been wronged by the State of Florida, and he had the determination to try to do something about it. Although the Clerk's Office could not be expected to remember him, this was in fact his second petition to the Supreme Court. The first had been returned for failure to include a pauper's affidavit, and the Clerk's Office had enclosed a copy of the rules and a sample affidavit to help him do better next time. Gideon persevered.

Assistant Clerk Rodak, knowing and caring nothing for any of this, stamped Gideon's papers and gave them a number—890 Miscellaneous, meaning that the case was the 890th entered on the Miscellaneous Docket in the October Term, 1961. (Supreme Court terms, which usually run from October into June, are formally designated by the month in which they begin.) On a green file card a secretary typed the number and the title of the case: Clarence Earl Gideon, petitioner, versus H. G. Cochran, Jr., Director, Division of Corrections, State of Florida, respondent. Then the papers were put into a large red folder and tied with a string. (Red is the color for Miscellaneous cases; regular prepaid cases, on what is called the Appellate Docket, go into blue folders.) The Gideon folder was dispatched to the file room, one floor down, by an electric dumbwaiter.

Sometimes Rodak or his colleague in the Clerk's Office, Edward Schade, looking over the confused and often unintelligible prisoners' petitions that come before them, will spot one with an impressive legal claim. Their view has nothing whatever to do with the action the Supreme Court may take, since only the nine justices act for the Court and they do not discuss the merits of cases with the employees in the Clerk's Office. Still, just in the office, it enlivens things to say once in a while: "Here's one that I'll bet will be granted."

No one said that about *Gideon v. Cochran,* No. 890 Miscellaneous, October Term, 1961. In the Clerk's Office it had no ring of history to it. It was just one of nine *in forma pauperis* cases that arrived in the mail on January 8, 1962. Four others were, like Gideon's, criminal cases from the state courts—from Iowa, Washington, New York and Illinois. Two were appeals from federal convictions. One was a civil case, a claim by an unhappy and unaffluent author that someone had plagiarized his copyrighted play. The last was so confused that the Clerk's Office was unable to put it in any category at all.

Gideon's main submission was a five-page document entitled "Petition for a Writ of Certiorari Directed to the Supreme Court State of Florida." A writ of certiorari is a formal device to bring a case up to the Supreme Court from a lower court. In plain terms Gideon was asking the Supreme Court to hear his case.

What was his case? Gideon said he was serving a five-year term for "the crime of breaking and entering with the intent to commit a misdemeanor, to wit, petty larceny." He had been convicted of breaking into the Bay Harbor Poolroom in Panama City, Florida. Gideon said his conviction violated the due-process clause of the Fourteenth Amend-

ment to the Constitution, which provides that "No state shall ... deprive any person of life, liberty, or property, without due process of law." In what way had Gideon's trial or conviction assertedly lacked "due process of law"? For two of the petition's five pages it was impossible to tell. Then came this pregnant statement:

"When at the time of the petitioners trial he ask the lower court for the aid of counsel, the court refused this aid. Petitioner told the court that this Court made decision to the effect that all citizens tried for a felony crime should have aid of counsel. The lower court ignored this plea."

Five more times in the succeeding pages of his penciled petition Gideon spoke of the right to counsel. To try a poor man for a felony without giving him a lawyer, he said, was to deprive him of due process of law. There was only one trouble with the argument, and it was a problem Gideon did not mention. Just twenty years before, in the case of *Betts v. Brady,* the Supreme Court had rejected the contention that the due-process clause of the Fourteenth Amendment provided a flat guarantee of counsel in state criminal trials.

Betts v. Brady was a decision that surprised many persons when made and that had been a subject of dispute ever since. For a majority of six to three, Justice Owen J. Roberts said the Fourteenth Amendment provided no universal assurance of a lawyer's help in a state criminal trial. A lawyer was constitutionally required only if to be tried without one amounted to "a denial of fundamental fairness." The crucial passage in the opinion read:

"Asserted denial [of due process of law] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other consider-

ations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors. . . ."

Later cases had refined the rule of *Betts v. Brady.* To prove that he was denied "fundamental fairness" because he had no counsel, the poor man had to show that he was the victim of what the Court called "special circumstances." Those might be his own illiteracy, ignorance, youth, or mental illness, the complexity of the charge against him or the conduct of the prosecutor or judge at the trial.

But Gideon did not claim any "special circumstances." His petition made not the slightest attempt to come within the sophisticated rule of *Betts v. Brady.* Indeed, there was nothing to indicate he had ever heard of the case or its principle. From the day he was tried Gideon had had one idea: That under the Constitution of the United States he, a poor man, was flatly entitled to have a lawyer provided to help in his defense.

Gideon was tried on August 4, 1961, in the Circuit Court of the Fourteenth Judicial Circuit of Florida, in and for Bay County, before Judge Robert L. McCrary, Jr. The trial transcript begins as follows:

The Court: The next case on the docket is the case of the State of Florida, Plaintiff, versus Clarence Earl Gideon, Defendant. What says the State, are you ready to go to trial in this case?

Mr. Harris (William E. Harris, Assistant State Attorney): The State is ready, your Honor.

The Court: What says the Defendant? Are you ready to go to trial?

The Defendant: I am not ready, your Honor.

The Court: Did you plead not guilty to this charge by reason of insanity?

The Defendant: No sir.

The Court: Why aren't you ready?

The Defendant: I have no counsel.

The Court: Why do you not have counsel? Did you not know that your case was set for trial today?

The Defendant: Yes sir, I knew that it was set for trial today.

The Court: Why, then, did you not secure counsel and be prepared to go to trial?

The Defendant answered the Court's question, but spoke in such low tones that it was not audible.

The Court: Come closer up, Mr. Gideon, I can't understand you, I don't know what you said, and the Reporter didn't understand you either.

At this point the Defendant arose from his chair where he was seated at the Counsel Table and walked up and stood directly in front of the Bench, facing his Honor, Judge McCrary.

The Court: Now tell us what you said again, so we can understand you, please.

The Defendant: Your Honor, I said: I request this Court to appoint counsel to represent me in this trial.

The Court: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.

The Defendant: The United States Supreme Court says I am entitled to be represented by counsel.

The Court: Let the record show that the defendant has

> asked the court to appoint counsel to represent him in this trial and the court denied the request and informed the defendant that the only time the court could appoint counsel to represent a defendant was in cases where the defendant was charged with a capital offense. The defendant stated to the court that the United States Supreme Court said he was entitled to it.

Gideon was wrong, of course. The United States Supreme Court had not said he was entitled to counsel; in *Betts v. Brady* and succeeding cases it had said quite the opposite. But that did not necessarily make Gideon's petition futile, for the Supreme Court never speaks with absolute finality when it interprets the Constitution. From time to time—with due solemnity, and after much searching of conscience—the Court has overruled its own decisions. Although he did not know it, Clarence Earl Gideon was calling for one of those great occasions in legal history. He was asking the Supreme Court to change its mind.

2

The Supreme Court of the United States is different from all other courts, past and present. It decides fundamental social and political questions that would never be put to judges in other countries—the boundaries between church and state, the relations between the white and Negro races, the powers of the national legislature and executive. One could easily forget that it is a court at all. Its public image seems sometimes to be less that of a court than of an extraordinarily powerful demigod sitting on a remote throne and letting loose constitutional thunderbolts whenever it sees a wrong crying for correction.

But the Supreme Court is not a demigod, nor even a roving inspector general with a conscience. It is a court,

and for all its power it must operate in significant respects as courts have always operated. It cannot, like a legislature or governor or President, initiate measures to cure the ills it perceives. It is, as Justice Robert H. Jackson said, "a substantially passive instrument, to be moved only by the initiative of litigants." In short, the Court must sit and wait for issues to be presented to it in lawsuits.

And not every issue, nor every lawsuit, can come to the Supreme Court of the United States. Its jurisdiction—the reach of the Court's power—is limited by the Constitution itself, by statutes and by the Court's own precedents. The first question in the case of *Gideon v. Cochran,* as in any case brought to the Supreme Court, was whether it was within the Court's jurisdiction.

The Constitution defines and limits "the judicial Power of the United States" in Article III. Taking only the most important clauses, the article provides that the jurisdiction of federal courts may extend (subject in most instances to the wish of Congress) to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . ; to all Cases of Admiralty and maritime Jurisdiction; . . . to Controversies between two or more States; . . . [and] between Citizens of different States. . . ." Volumes have been written on the meaning of those brief phrases, and great cases litigated over them. When, for instance, can a legal dispute be said to "arise under" the Constitution? But such intricate questions may be put aside for some generalities.

An Englishman or a Frenchman lives under one national law; not so the American. Our Constitution created a system of dual governments, state and federal, each with its own laws. To take a simple example: A New Yorker must fill out an income-tax return whose intricacies are written

by Congressmen in Washington; he also has to fill out an annoyingly different New York State return drafted by legislators in Albany. This is the kind of civil statute that concerns most citizens. On the criminal side, take the case of a car thief. He breaks the law of New York when he drives away a Chrysler parked on East Eighty-seventh Street, Manhattan, with the key conveniently left in the ignition; if he drives across the George Washington Bridge to New Jersey, he also violates a federal law against interstate transportation of stolen vehicles.

Most of the law under which an American lives is the law of his state. His marriage, his property, his will are all governed by state law. If he gets into a lawsuit about a business contract or a real estate deal or an automobile accident, the result will ordinarily be determined by state law—law laid down in state and local statutes and by the decisions of state courts.

Cases of this kind, which are brought by the hundreds of thousands in the United States every year, are almost all tried by state courts. They can get into the federal courts only in one circumstance—if they are suits between citizens of different states. This diversity-of-citizenship jurisdiction of the federal courts, as it is called, was included in Article III of the Constitution to protect out-of-state litigants from prejudice in the local courts: The Vermonter involved in a lawsuit in South Carolina could hope for more impartial justice from a federal judge. But in diversity-of-citizenship cases federal courts must apply state statutes and state decisions; if state courts have held that a certain kind of oral contract is binding, the federal judge hearing a diversity case on that issue must follow the same rule, no matter how wrong-headed it may seem to him. The Supreme Court so held in 1938, brusquely overruling a hundred-year-old prec-