

SUMMARY JUDGMENT

A Lawyer's Memoir

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Humans have a responsibility to their own time . . . a responsibility to find themselves where they are, in their own proper time and place, in this history to which they belong and to which they must inevitably contribute either their response or their evasion.

—Thomas Merton

We have different gifts, according to the grace given to each of us. If your gift is prophesying, then prophesy in accordance with your faith; if it is in serving, then serve; if it is teaching, then teach; if it is to encourage, then give encouragement; if it is giving, then give generously; if it is to lead, do it diligently; if it is to show mercy, do it cheerfully.

Romans 12:6–8

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PROLOGUE

The Crime

On an ordinary summer evening in rural Alabama in 1984, Randall Curry and his coworker Randy Mitchell were driving away from the town of Moulton on Highway 33 to go to a bootlegger's house located atop a mountain in the Bankhead National Forest. Known as the "land of a thousand waterfalls," the William B. Bankhead National Forest, covering more than 181,000 acres, was a popular spot among the locals for hiking, hunting, and swimming.

Just inside the national forest, Curry noticed a blue Ford Maverick automobile stopped on a short spur off Ridge Road where it meets Highway 33. The Maverick had its hood raised. Curry leaned over the steering wheel of his truck and observed a woman sitting in the driver's seat of the Maverick, a woman sitting in the front passenger seat, and a child sitting in the back seat. Nothing about their demeanor seemed distressed or suspicious, but Curry took note of the group just the same.

Curry and Mitchell continued to the bootlegger's house and then left, traveling back toward Route 33 by taking Ridge Road. When they reached the spur road, they again noticed the Maverick with the same

occupants. Curry and Mitchell then turned onto Highway 33 heading back to town. They passed a white Ford truck heading in the opposite direction toward Ridge Road. Soon afterward, for reasons unknown, Curry and Mitchell turned around and headed back in the direction of the bootlegger's house.

At some point below the intersection of Highway 33 and Ridge Road, Curry and Mitchell encountered the blue Maverick traveling toward Moulton. It now had three adults sitting in the front seat. When Curry and Mitchell arrived at the spur road, they found the white Ford truck and a man's body lying in front of it, covered in blood. They quickly realized that the man had been shot, so they flagged down a passing motorist to send for law enforcement.

Although I wasn't there, and I didn't know it at the time, my life would intersect with the people in that blue Maverick and be changed forever. This book is the story of how a trial lawyer from Chicago came to represent a death row inmate from Alabama. These are my memories. Most of them are true.

CHAPTER ONE

The Attorney

The first question was always the same. And there was only one acceptable answer.

“Did you win?”

The query was the post-court-appearance conversation starter directed at me by the partners at Isham, Lincoln & Beale, one of Chicago’s most venerable law firms. It had been founded in 1872 by Edward Swift Isham, son of Vermont Supreme Court Justice Pierpont Isham, and Robert Todd Lincoln, the only surviving son of President Abraham Lincoln. Lincoln had met Isham at the time of the Great Chicago Fire. On the evening of Sunday, October 8, 1871, a fire started in the barn of Patrick and Catherine O’Leary on the city’s West Side. The fire, which raged for three days, killed up to three hundred people, destroyed roughly three square miles of the city, and left some one hundred thousand residents homeless. Lincoln’s law office burned in the fire. Isham’s office was spared, and he graciously allowed Lincoln to share office space until the city and Lincoln rebuilt. Their relationship evolved from landlord and tenant to law partners. Together, they

became the law firm of choice for notable individuals and significant corporations.

After seven years of working as an associate attorney, I was on the brink of being considered for partnership at this storied firm. My path to partnership was unusual. I had known that I wanted to be a lawyer, and specifically a trial lawyer, ever since I was in the seventh grade. I don't know from where this passion was born, as no member of my family had ever been a lawyer. Still, even as a child, I loved to argue and found it exhilarating to persuade others to share my point of view on topics large and small.

After completing my freshman year of college, I wanted to get as close as I could to the profession I aspired to join. I sought any job remotely related to the law. I ultimately succeeded by being employed to work in Isham, Lincoln & Beale's mail room. Besides delivering mail to the lawyers in their offices, I messengered their pleadings and documents to other law firms in the city. Not infrequently, it was my honor to get lunch for some of the lawyers to enjoy in their offices. After graduating from Williams College and law school at Rutgers University, I began working for the firm as an associate attorney in 1979. At the start, I was working hand in glove on cases and legal matters with attorneys to whom I had been delivering correspondence and lunch only a few years earlier. Seven years after that, I was in line to become the first person who had begun his career working in the mail room to become partner.

But first, I had to prove myself to the powers that be. A senior partner sent me to represent one of the firm's top clients at the Daley Center downtown, which had been named after the patriarch of the most powerful political dynasty in Chicago and was home to the Circuit Courts of Cook County, Illinois—one of the busiest court systems in the nation. Perched behind a six-foot-long mahogany desk on what appeared to be more throne than chair, in front of cabinetry that rose from the floor to the top of the almost fourteen-foot-high ceiling, the partner asked about the outcome of my efforts on behalf of his client. Sunlight poured through the curtain wall of windows that formed one side of the office. Green tweed side chairs flanked the desk. A hint of pipe smoke filled the air.

“Did you win?”

Making partner would be a significant accomplishment at a firm that had developed a reputation for gentility, if not stodginess. Sartorial distinctiveness within the firm, at least for the men, was largely defined by whether you wore a bow tie rather than a necktie finished with a Windsor knot. But in the latter half of the twentieth century, things were beginning to change. In 1956, Robert Helman became the first Jewish lawyer to be hired by the firm. Pioneering lawyer Sharon L. King, an Isham, Lincoln & Beale partner, was likely one of the first women to sit on the managing council of a major law firm, at a time when only 2 percent of attorneys were women. Reynaldo Glover, the firm's first Black partner, went on to become the President of the City Colleges of Chicago. And in 1973, former Illinois Governor Richard B. Ogilvie joined as a partner and became the public face of the firm.

By the 1980s, Isham had come to value powerful and connected corporate lawyers, but trial attorneys were underappreciated. Notably younger than many of the lawyers serving in other practice areas, Isham's trial attorneys were smart, energetic, and—most importantly—successful in representing their clients in court. Many of them would go on to have distinguished careers in politics, law, and business. James B. Burns, a former player for the Chicago Bulls professional basketball team, would become the United States Attorney for the Northern District of Illinois and vie, albeit unsuccessfully, for the Democratic Party's nomination for Governor. Pamela B. Strobel would become an executive at the energy giant Exelon (the successor corporation to Commonwealth Edison), and she would be touted in the local business press as one of the hundred most influential women in Chicago.

A few trial attorneys, such as David M. Stahl (a magna cum laude graduate of the University of Michigan Law School and a member of the honorary legal scholastic society the Order of the Coif), would go on to form their own blue chip litigation boutiques. Others, such as Vietnam War veteran Hugh R. "Rick" McCombs, a former Clerk for a Federal District Court Judge, and Paul W. Schroeder, a Phi Beta Kappa graduate of the University of Illinois and then a managing editor of its law school's law journal, would become noted litigation partners in some of the world's largest law firms. Ron Jacks, the former General Counsel for CNA Insurance Company, the first President of the Reinsurance Association of America, and the attorney who sponsored

my own admission to the Bar of the Supreme Court of the United States, went on to head the international insurance practice at the law firm of Mayer Brown.

But in the 1980s, the members of this remarkable collection of legal talent were my colleagues at Isham, Lincoln & Beale. More than that, they were mentors and friends. I was as one with them, with my own office some fifty stories high in a modern office tower at the corner of Madison and Dearborn streets in the heart of Chicago's Loop, just a short walk from both the state and federal courthouses. My journey from the mail room had figuratively and literally brought me to the pinnacle of Chicago's legal profession. I could not have been happier at that moment, standing in the doorway of the partner and telling him about what had happened in court that day.

"Yeah, yeah . . . but did you win?"

When it was repeated for the third time, the partner's question became more of a demand than a query. He was not interested in hearing which legal arguments the Judge had found to be persuasive and which were deemed wanting. He just wanted to know whether the motion had been granted. He only cared whether I had won.

Trial lawyers are a distinct breed among attorneys. The measure of success for a trial lawyer is decidedly different than it is for a transactional attorney. Success for the dealmakers, contract drafters, and tax advisors is nuanced, if quantifiable at all, and it extends along a continuum of economic advantage gained over periods of time. But trial lawyers are gladiators, and the metric of success is unambiguous, often instantaneous, and always unforgiving. Whether arguing a pre-trial motion or an evidentiary objection, making a closing argument, or presenting an oral argument in an appeal, the range of outcomes is blunt and binary: you either win or you lose. While colleagues may appreciate the skills that produce the result, for clients it is the result alone that matters. The pressure to win is enormous.

"Yes, we won."

This outcome undoubtedly pleased the partner; he could report success to his client. But winning alone was no longer enough to satisfy me. Ambition and hubris had begun to fuel a desire to test myself with ever greater challenges. I felt a pull toward cases that seemed unwinnable. This does not mean that a case must be complex to be professionally

challenging. There is perhaps no legal issue more straightforward and at the same time more challenging than one that turns on little more than which of two witnesses is telling the truth.

Maybe that is why I jumped at the chance to represent a minister who had been arrested for allegedly soliciting an undercover police officer to engage in sex acts. The residents of a conservative small town were upset because a public park where their children played had become the venue for secretive sexual liaisons between men. Facing intense pressure from the townspeople, the local constabulary had decided to set up a sting operation. An undercover male officer was assigned to loiter in the park; if he was solicited for a sex act, an arrest would be made.

Under normal circumstances, after several arrests, word would spread among the targeted offenders that the park was no longer a haven. Those arrested would have their lawyers negotiate deals by which they would plead guilty to a lesser charge, likely a misdemeanor of disorderly conduct, to reduce the penalty to a fine and mitigate the burden of their resulting criminal record. But there was nothing normal about the arrest of a minister in an undercover sex crimes operation in this tight-knit religious community. The harm to the reputation of the minister and his church, let alone the threat that the allegations posed to his marriage, far exceeded the criminal penalties he was facing. My client might as well have been charged with a felony, given the gravity of the consequences that would follow a conviction or a guilty plea to the underlying conduct of which he had been accused. The mere fact of the arrest was certain to generate media coverage. He was facing a reputational death sentence.

At first glance, the case boiled down to who was telling the truth: a minister of the cloth or a policeman sworn to uphold the law. They were the only two individuals who had been present and party to the events that transpired between them. Both could not be right; one of them would have to be doubted, if not disbelieved. As the defendant's attorney, it was therefore my job to convince a finder of fact that a police officer was not credible regarding the criminal charges he had made.

The first strategic decision in defending this matter was whether to request a jury. The pretrial publicity was likely to pollute the pool

of citizens from which a jury would be drawn. Still, the degree of taint was probably not enough to successfully argue that the case should be tried in another jurisdiction to ensure an impartial tribunal for the defendant. At the same time, some preliminary investigation suggested that the arresting officer had a reputation for being the local equivalent of Deputy Barney Fife from Mayberry—a bit overzealous and a tad ineffective. While this assessment probably was not widely known in the community, I hoped that it might have bubbled up to the local judiciary. Thus, I made the decision to forego my client's right to a jury trial, placing his fate in the hands of a Judge at the conclusion of a bench trial.

My client vehemently denied that he had solicited the police officer for sex, but an early lesson learned by trial lawyers is that you should not overstate your case or any position you take in support of it. In short, do not take on more than is necessary to win. Since this was a criminal case, the prosecutor needed to prove her allegations beyond a reasonable doubt. I did not have to prove the policeman was a liar to win. I could win by sufficiently suggesting that he was mistaken. I did not have to risk hypocrisy by pleading that my client was innocent; it was enough to argue that he was not guilty because there existed a reasonable doubt as to his guilt.

I met with the minister at his home and asked him to tell me his version of the events. The arrest had occurred during the last weekend of his summer vacation. Although scheduled to return to the church on Monday, he had wanted to get a head start on the work that had piled up during his absence. A visit to the church office before Monday would leave him inundated with greetings and requests from welcoming parishioners, so he decided to drive his recreational vehicle to the park and attempt to make a dent in his work there.

He parked his RV in the parking lot and began to work. He told me that after a while, he heard a knock on the door. He opened it, and a stranger struck up a conversation and eventually asked the minister if he could come inside. The minister told me that he invited the man in. Immediately upon entering the RV, the man identified himself as a police officer and arrested the minister for soliciting a sex act.

I asked the minister whether anything the man was wearing indicated he was a law enforcement officer. According to my client, the

officer was dressed in jeans and a T-shirt. Nothing in his appearance or behavior suggested he was a policeman. Then I asked the minister whether anything about his own attire indicated he was a minister. The arrest occurred on a hot summer day, and since the minister planned to work for a few hours, he did not want to run the vehicle's air-conditioning for a long period of time. After looking inside the RV for cooler clothing to put on, all he could find was a bathing suit. That's all that he was wearing when he opened the door of the RV.

I asked him if he still had the bathing suit. He told me that he did, so I asked to see it. The garment was boxer shorts in style, made of baby-blue pinstriped fabric. It had a drawstring and mesh interior, common in men's swimwear.

The rules of criminal and civil procedure vary from state to state and over time. In the jurisdiction in question at this time, criminal pretrial procedure offered me the opportunity to depose the arresting officer before the case went to court. A deposition is sworn testimony taken outside a courtroom that can either be presented in court as if the witness were present or used to impeach a witness whose in-court testimony deviates from his deposition. Taking full advantage of the opportunity to question the officer before the trial, I asked him most of the questions I had posed to the minister. My goal was to compare their stories about each aspect of the events on the day of the arrest.

The policeman recounted how he had been assigned undercover duty in the park to see whether solicitation for sex acts was occurring and to make arrests if anyone solicited him. He stated that while he was patrolling the parking lot, a man had opened the door of an RV and waved, as if to beckon the officer toward the van. The officer stated that when he approached the door to the van, the man invited him in and solicited sex from him. He promptly arrested the man, who he then came to learn was a minister, and told him to put on a pair of pants.

I asked the officer what the minister was wearing when he allegedly solicited the officer for sex. The officer said that the minister was wearing underwear. I asked the police officer to describe the underwear, and he told me that it was a pair of boxer shorts made of baby-blue pinstriped fabric.

It is no small challenge to get a local Judge to view the testimony of a local law enforcement officer skeptically, and to rule against a local prosecutor who (likely) appears in her courtroom on a regular basis. When an out-of-town lawyer appears in court, the reception is almost always cool. When a corporate lawyer from Chicago appears in a small-town court for a criminal case, it generates a kind of defensiveness. I wanted to use this to my advantage. I wanted to shift the attention away from my client—the defendant—and onto me and the prosecution’s witness, the police officer. I needed to put the police officer on trial instead of my client.

Based on the deposition, I now had an angle with which to press my case. I took possession of the minister’s bathing suit and stuffed it inside a four-foot-long cardboard tube, the kind used for storing rolled-up maps or posters. I used duct tape to seal the ends of the cylinder and prevent anyone from knowing what was inside, then I had it marked for identification as “Defendant’s Exhibit A.” During a preliminary hearing, I asked the court to take possession and control of the exhibit before any trial testimony had been offered so that there could be no assertion that this exhibit was created or obtained in response to testimony that was given.

Everyone in court, especially the prosecuting attorney, was puzzled by my request. This was a solicitation case, a case about what the defendant had said to a police officer. No one could understand how physical evidence of any kind might be relevant to an assertion that an undercover police officer had been solicited for a sex act, and no one had any idea what relevant evidence would be in a map tube. Nevertheless, without objection from the prosecutor, the Judge took custody of Defendant’s Exhibit A.

The case for the prosecution was straightforward. The arresting officer testified as to the history of criminal solicitation problems in the park; law enforcement’s plan to stem the tide; and his role as an undercover operative on the day of the minister’s arrest. He testified that after a man in a motor vehicle matching the description of the minister’s recreational vehicle entered the park, the officer approached the vehicle, and the occupant solicited him for sex. The officer identified the defendant as the occupant of the recreational vehicle and the

man who had made the illicit solicitation in violation of the criminal code.

Of all the elements of a trial, I love cross-examination of a witness best. It can be the most dramatic portion of a trial. Done well, it can win your case. Generally, you never ask a question on cross-examination for which you do not already know the answer. Based on my pretrial questioning, I had the arresting officer committed to certain statements. The art of cross-examination includes presenting those statements through a series of questions that drive home your case. Your objective is to get the witness to agree or disagree with the statements that you, the questioner, are making. In doing so, you effectively become the one giving testimony. The witness is simply answering yes or no.

To be effective, my cross-examination needed to be short and sweet. Standing at the defense table, I asked the officer to confirm that he was present in the park as part of an undercover operation designed solely to arrest individuals soliciting sex acts, and not for the purpose of enforcing other laws. Because of the frequency of such behavior in the park, I asked the officer to confirm that he expected such activity to occur on the day he was assigned to his task and that he expected that he would be solicited to engage in sex acts. I asked the officer to confirm that he was alleging that he had heard the minister solicit him for sex in violation of the law:

Question: You were assigned to patrol the park that day as part of an undercover operation to arrest men who solicited you for sex, weren't you, officer?

Answer: Yes.

Q: And that was your only assignment that day, wasn't it, officer?

A: Yes.

Q: And you devoted yourself to that assignment, didn't you, officer?

A: Yes.

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Q: You focused on your assignment and nothing else that day, didn't you, officer?

A: Yes.

Q: Now, prior to meeting the Reverend, no one had solicited you for sex in the park, had they, officer?

A: No.

Q: It was very hot that day, wasn't it, officer?

A: Yes.

Q: And you had been in the park, in that heat, for hours before you met the Reverend, hadn't you, officer?

A: Yes.

Q: And you had not yet made a single arrest, had you, officer?

A: No, I had not.

Q: It is your testimony, sir, that the Reverend waved at you from his RV, isn't it?

A: Yes.

Q: And you testified that in response to his wave you walked over to the RV and eventually entered inside, didn't you?

A: Yes.

Q: And it is your testimony that once inside the RV, the Reverend solicited you for sex, isn't it?

A: Yes.

With this foundation laid, I turned to what I proposed to make the heart of the matter. I asked the officer to describe what he saw the minister wearing at the time the alleged solicitation occurred.

Question: Officer, what was the Reverend wearing at the time that you allege he solicited you for sex?

Answer: He was wearing his underwear.

Q: And what did this clothing look like?

A: He was wearing boxer shorts.

Q: And what material were these boxer shorts made of?

A: They were made of baby-blue pinstripe fabric.

I paused. And then in a louder voice, I stated: "Your Honor, may I please have Defendant's Exhibit A, which we previously placed in the care of the court before this trial began and before the officer began his testimony."

The Judge directed the bailiff to retrieve the exhibit, and the bailiff handed me the four-foot-long cardboard map tube. I could feel all eyes upon me as I slowly removed the duct tape from one end of the tube and removed the garment that was inside.

Question: Officer, I am holding in my hands a garment that has been previously marked for identification as "Defendant's Exhibit A." It is a garment that is boxer shorts cut in style and made of fabric that is baby-blue pinstripe. Do you recognize this garment?

Answer: Yes.

Q: What do you recognize this garment to be?

A: It is the underwear the defendant was wearing inside his RV.

After getting the exhibit admitted into evidence, I asked the Judge: "May I approach the witness, Your Honor?" The Judge granted my request. I moved from counsel table to the witness stand. I was now mere inches from the police officer. All eyes were on the two of us.

Question: Officer, I am going to hand you Defendant's Exhibit A, the clothing the Reverend was wearing when you say he solicited you for sex. And I ask that you examine that clothing.

Question: Officer, Defendant's Exhibit A, the clothing you say the minister was wearing when he solicited you, is a man's swimsuit, isn't it?

Answer: It appears to be.

Q: It appears to be a swimsuit because it is a swimsuit, isn't it, officer? It has a drawstring and it has a mesh interior, both commonly found in a man's swimsuit, doesn't it, officer? And it is in fact a swimsuit, isn't it, officer?

A: Yes.

Q: It is not underwear, is it, officer?

A: No.

Q: On the day you arrested the Reverend, you thought you saw him wearing underwear, you testified today that

he was wearing underwear, and until just a moment ago you believed he was wearing underwear, didn't you, officer?

A: Yes.

Q: But now, you see that it is not underwear, you recant that it is underwear, and you no longer believe it is underwear; isn't that right, officer?

A: Yes.

Q: And your testimony that the Reverend was wearing underwear at the time you allege he solicited you for sex is wrong, isn't it, officer?

A: Yes.

My closing argument was direct and to the point. The arresting officer had one task in mind that day in the park. He was there to arrest men for soliciting sex. And he wanted to be successful in performing that task. He wanted to make an arrest. And so, when he approached the good Reverend in pursuit of his assignment and struck up a conversation in pursuit of his task, *he heard what he wanted to hear, just like he saw what he wanted to see*. But he was wrong. The minister was not wearing underwear. And the minister never solicited sex.

The Judge found my client not guilty, with a glance that made it clear to me that she shared my understanding of the difference between a criminal defendant being not guilty and being innocent.

Winning cases like the minister's can be intoxicating. But while I loved the challenge of winning a seemingly unwinnable case, I also wanted to do something to serve the cause of justice more explicitly. I searched for a case in which I could do both, and that's what eventually led me to rural Alabama.

Lawyers are sometimes defined by others in terms of economic greed. The story goes that the prospective client asks the lawyer: “How much would you charge me to answer just three questions?”

The lawyer responds: “I would charge you one thousand dollars.”

“One thousand dollars!” the prospective client reacts. “Isn’t that kind of expensive?”

“Yes,” the lawyer replies. “What is your third question?”

Isham, Lincoln & Beale charged hourly fees that reflected the standing of its clients and the importance of their legal interests. In 1979, a fee of two hundred dollars per hour was as typical as it was breathtaking. As a first-year attorney, I was paid the enormous salary of twenty-five thousand dollars per year. Profits per partner, one of the principal metrics of law firm financial health, were a staggering two hundred thousand dollars.

Yet, the legal profession also has a storied history of generosity. Indeed, doing legal work *pro bono*—without charging a fee—is part of the ethic of being a lawyer. The term *pro bono* comes from the Latin *pro bono publico*, which means “for the public good.” When society confers the privilege to practice law on an individual, he or she accepts the duty to promote justice and make justice accessible to all people.

Following reinstatement of the death penalty in state after state beginning in 1976, America’s death row population increased rapidly. Yet these convicted and sentenced prisoners—the majority of whom were illiterate and indigent—were effectively deprived of the assistance of a lawyer in mounting challenges to their convictions and sentences. There was an overwhelming need for lawyers who were willing to represent these defendants, especially during their final appeals.

A death penalty trial is the composite of two proceedings. The first determines guilt; the second decides the punishment. When a defendant is convicted of a capital offense—one that is death penalty eligible—the prosecution may seek imposition of the death penalty rather than years of imprisonment, if the case includes at least one “aggravating factor.” Aggravating factors vary by state, but they commonly include the killing of a law enforcement officer acting in the line of duty, the killing of more than one person, or murder committed during a robbery.

Once the prosecution has established guilt of a capital offense beyond a reasonable doubt, the prosecution presents aggravating evidence—that is, reasons to execute the defendant. These might include prior violent acts. The defense presents “mitigating factors,” reasons to punish with imprisonment rather than death. These may include family history or mental or physical health issues. After hearing the evidence of aggravating and mitigating factors, the jury makes a sentencing recommendation to the Judge. The Judge is the final arbiter of what sentence is imposed.

A defendant convicted and sentenced to death may appeal the guilt determination, the sentence, or both. Such appeals, often referred to as direct appeals, are heard by the appellate court. An unfavorable outcome on appeal may be further appealed to the state’s highest court. After the state’s final tribunal has ruled on a case, the defendant may ask the United States Supreme Court to review the case.

Most people know that criminal defendants have the constitutional right to have an attorney appointed for them at trial and during direct appeals if they are unable to afford one. Few people, however, are aware that additional legal remedies—known as collateral remedies—remain available to those convicted of crimes even after they have unsuccessfully exhausted all direct appeals of their convictions. And fewer still know that indigent convicts are orphaned as far as having legal representation provided so that they can meaningfully pursue these collateral remedies.

In general, the right to contest a criminal conviction and a sentence that have been upheld on direct appeal can be traced to the ancient writ of *habeas corpus*. A petition to a court for a writ of habeas corpus asserts that someone is being imprisoned unlawfully. If the court is sufficiently impressed by the claim, it issues the writ—which is essentially a summons addressed to the prisoner’s custodian—demanding that the prisoner be brought before the court and that the custodian present proof of its authority to detain the prisoner. If the custodian is acting beyond its authority, then the prisoner must be released.

The United States inherited habeas corpus from English common law. The U.S. Constitution specifically includes the habeas procedure in the Suspension Clause, Article One, Section 9, Clause 2, which states: “The privilege of the writ of habeas corpus shall not be

suspended, unless when in case of rebellion or invasion the public safety may require it.”

For a convicted criminal, it is an appeal of virtually last resort. Thus, some of the most controversial presidential acts in history have been the suspension of habeas corpus by President Lincoln during the Civil War, by President Grant during Reconstruction, and by President Roosevelt during World War II. And it decidedly is not an opportunity to retry a case. Generally, in these post-conviction proceedings, it is permissible to raise only issues that were not or could not have been raised at trial or on appeal—such as the ineffective assistance of trial or appellate counsel, or matters arising from newly discovered evidence.

In the historic case of *Gideon v. Wainwright*, the Supreme Court read the Fourteenth Amendment as extending the Sixth Amendment’s guarantee of a right to assistance of counsel to state court criminal defendants. In his unanimous opinion for the Court in *Gideon*, Justice Hugo Lafayette Black, who was a United States Senator from Alabama for a decade before assuming his role as an Associate Supreme Court Justice, held that the Constitution requires state courts to appoint attorneys for defendants who cannot afford counsel to defend them at trial.

The Court, however, did not extend the right of appointed counsel to prisoners seeking relief *after* trial, conviction, and direct appeals. This was made clear in the case of *Murray v. Giarratano*, which involved indigent Virginia death row inmates seeking to pursue post-conviction remedies. A plurality of Supreme Court Justices overturned rulings by a District Court Judge and the Fourth Circuit Court of Appeals sitting as a whole, holding instead that provision of counsel to pursue post-conviction, habeas-type relief was not constitutionally required.

The concurring opinion of Justice Kennedy nonetheless recognized not only the critical role that post-conviction proceedings play in death penalty litigation, but also the importance of counsel to an inmate’s meaningful access to those proceedings:

It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death. As Justice Stevens observes [in dissent], a substantial portion of these prisoners succeed

in having their death sentences vacated in habeas corpus proceedings. The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.

Although some have lamented that the post-conviction appeal process is prone to abuse, the history of collateral review of capital cases has demonstrated its critical importance to the fair administration of justice. The number of death sentences that have been vacated at the federal level because of constitutional infirmity in state proceedings is notable. Some studies have shown that in noncapital cases, federal courts have granted relief less than 7 percent of the time, whereas in capital cases, the success rate has been estimated at 60 to 70 percent. This suggests an epidemic, rather than episodic, rate of error in capital cases. Given the finality of the penalty, the importance of meaningful access to post-conviction review cannot be overstated.

In 1986, the American Bar Association created the Death Penalty Representation Project to address this need. Headed by Esther Lardent, the Project sought to convince lawyers to volunteer on a pro bono basis to represent death row inmates in challenges to their convictions or sentences. Lardent, the daughter of Holocaust survivors who had emigrated to the United States, was driven to help others by a desire to repay the help her parents had received in this country. In Boston, Lardent worked for a low-income legal clinic, then headed the Boston Bar Association's Volunteer Lawyers Project, after which she moved to Washington, D.C., to lead the Project. She then became the founder of the Pro Bono Institute in 1996, where she served until her death at age sixty-eight in 2016. She was known as the "Queen of Pro Bono."

In a letter that was sent in the late 1980s to all members of the American Bar Association's Litigation Section, of which I was one, Esther Lardent acknowledged that some of the ABA's members favored the death penalty and some opposed it. Still, she argued, as lawyers we should all be in favor of the ability of individuals to meaningfully pursue rights that are available to them under the law. Thus, she asked counsel to volunteer to represent someone on death row: an inmate

who had been tried, convicted, and sentenced to death and who had already lost all of his or her direct appeals.

The solicitation to meet my professional responsibilities in this manner had a trifecta of appeals to me. First, providing representation in such cases aligned with my moral beliefs. Second, few lawyers wanted condemned convicts for clients. And third, these were cases that most everyone thought could not be won. I sought permission from the leadership of Isham, Lincoln & Beale to volunteer. I shall forever be grateful that the firm fully endorsed the idea. I immediately volunteered to take one of these cases.

Would I be selected by the ABA's Death Penalty Representation Project to serve? I was an associate at a white-shoe law firm who had never tried or appealed a violent crime case, let alone a death penalty case. If I was selected, who might be my client? For what crime might my client have been sentenced? Where might my client be located while awaiting the state to put him to death?

All my questions would soon be answered.