OKLAHOMA BAR ASSOCIATION SEMINAR
AUGUST 14, 1992

I am honored to be invited to participate in this important discussion this morning on defense of criminal cases. Along with all of you and the bar generally, I share your deep concern that all persons—rich and poor alike—may have effective assistance of counsel. Without an even playing field and the guarantee of such basic fairness in the criminal process, the system will have scant respect from the public and those who are faced with the prospect of prosecution.

I thought I would give a brief overview of the historical development in our country concerning the right to counsel for indigent defendants. It is distressing at times to recount the shortcomings of the system early on in American history, but there have been remarkable developments during our lifetime.

At the common law there was a right to counsel only in misdemeanor cases, surprisingly. No such right existed in felony or capital cases. The Sixth Amendment was designed to address this unfairness. The connection between the right to retain counsel and the importance of appointed counsel for the indigent was recognized early. The Judiciary Act of 1790 provided that in federal courts the indigent should have the right of appointed counsel when there was an indictment for treason or some other capital crime. 1 Stat. 118.

It was not until 1932 that the Supreme Court dealt with the direct question of the right of an indigent defendant to appointed counsel in a capital case. This was *Powell v. Alabama*, 287 U.S. 45 (1932). There several black youths were charged with raping a group of white girls. The defendants were illiterate and their families lived in another state. The trial judge appointed all the members of the local bar as counsel for the defendants. A particular lawyer was only appointed at the start of the capital trial itself. The defendants were all found guilty and sentenced to death. In reversing, the Supreme Court noted that the United States by statute and every state by express provision of law or the determination

of its courts, had made it the duty of the trial judge where the accused was unable to employ counsel, to appoint counsel for him. In most states, the court said the rule applies broadly to all criminal prosecutions and in others was limited to the more serious crimes and in a few to capital cases. The Supreme Court concluded that a rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed at least in cases like the present capital ones, and lends convincing support to the conclusion of the fundamental nature of the right.

Then in 1938, in *Johnson v. Zerbst*, 304 U.S. 458, the Supreme Court announced the rule of an absolute right to appointed counsel in the federal courts. The defendants there were indigent and the issue was whether they had knowingly waived their right to counsel. However in *Betts v. Brady*, 316 U.S. 455, in 1942 the Court refused to establish the right absolutely to counsel in all state criminal cases.

As we know, Gideon's trumpet blew in 1963 and in *Gideon v. Wainwright*, the Supreme Court made its landmark decision, explicitly overruling *Betts v. Brady*, and holding that the right to be represented by counsel is fundamental and applies to all criminal prosecutions so that appointed counsel for indigents was a constitutional mandate.

The importance of what counsel can do is burned into my memory by a case decided by the Court of Appeals of our circuit in 1983. This was *Sanders/Miller v. Logan*, 710 F.2d 645. The woman involved in that case had agreed to take part in a convenience store robbery and drove around the block and returned to pick up her accomplice. He climbed in and told her he had been forced to shoot the clerk in the store. The record showed her shock and a strong inference that she did not know he even had a gun. She was, nevertheless, convicted of first degree murder as an aider and abetter.

She filed a *pro se* habeas case and then an appeal. We appointed a Professor Gottlieb of the University of Kansas law faculty to represent her. He did so with distinction and dedication. We were convinced by him that we should reject the state's argument, which was made without convincing authorities, that there was no requirement of proof of premeditated design for one to be convicted as an aider and abettor to murder in the first degree under Oklahoma decisions. We concluded that proof of Sanders's mental state was an essential element to be proved beyond a reasonable doubt and that proof was required that she have knowledge of the intent of the person who committed the murder in order

to support such a conviction in a first degree murder case. Applying the federal standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), we held that the first degree murder conviction could not stand under the Due Process Clause of the Fourteenth Amendment and reversed the denial of habeas relief.

It was not only the critical importance of the relief given in that case that impressed me. It was also the particular service of Professor Gottlieb as appointed counsel, giving his time and effort tirelessly, to serve the highest ideals of American justice.

I turn now to the particular problem we face here in Oklahoma. I am sure that you have heard of two fairly recent opinions from our Court of Appeals for the Tenth Circuit, *Harris v. Champion*, 938 F.2d 1062 (10th Cir. 1991) and *Richards v. Bellmon*, 941 F.2d 1015 (10th Cir. 1991). In those instances, because of the severe limitation on the indigent appellate defender system in the state, the defendants were advised that it would be at least three years before briefing could be done on the appeal of right to our Court of Criminal Appeals. These circumstances were held to be an inexcusable delay. I emphasize that there was no suggestion that the hard-working and dedicated indigent appellate defenders in Oklahoma were not doing their best, but the limitations of their staffs made the situation intolerable. The cases were remanded to the federal district courts for hearings and a determination about relief to be granted.

I will report that on remand, the *Richards* and *Champion* cases have progressed through a pretrial order in the Northern District of Oklahoma. In a recent order Judge Cook noted that lack of financing was not a defense to the habeas claims. His order sets out issues for a hearing which has not been held yet.

I am surely proud of the effort being made for volunteer assistance to relieve the crisis in the Oklahoma criminal appeals system. There is no higher call upon the professional duties of a lawyer than to aid the indigent defendant, facing the resources of the state in a criminal case. The moving words of Justice Sutherland from *Powell* were repeated in *Gideon*:

> "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." 287 U.S. at 68–69.

Our problem now is to meet the current crisis. I understand that the appellate indigent defense system has 10 attorneys working on noncapital cases who face the mountain of appeals to be handled from all over Oklahoma. The current caseload I am told is approximately 488 cases. This is a daunting responsibility for 10 attorneys—to take the records, read and study them, to do the necessary research and consultation with the defendant, and to prepare a thorough brief. It is essential that they be aided by the voluntary assistance of Oklahoma lawyers who answer their professional responsibility.

I assure you that no greater satisfaction will come to you than to join in the effort by volunteering your help. You may do so by contacting Mr. Lloyd McCoy or Patty Palmer in the Appellate Public Defender's Office for the Indigents. A combined effort by a good response from the Oklahoma lawyers can help mightily to give relief.