

# Terry Lenamon on the Death Penalty

Sidebar with a Board Certified Expert Criminal Trial Attorney



**Terence M. Lenamon** is a Florida Bar certified expert in the area of criminal trial law. With over 17 years experience he has built a reputation as one of Florida's most respected criminal defense lawyers. His defense has been sought by many high-profile clients and has led him through 20 first-degree murder trials and eight death penalty cases. That experience has brought him national recognition as a go-to commentator on death penalty issues. He is the force behind both [deathpenaltyblog.com](http://deathpenaltyblog.com) and Florida Capital Resource Center ([floridacapitalresourcecenter.org](http://floridacapitalresourcecenter.org)), and can be reached at [terry@lenamonlaw.com](mailto:terry@lenamonlaw.com).

## Who are the Indigent and How Big is Their Right to Appointed Counsel?

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There are assorted definitions for the word "indigent" provided by state and federal statutes and case law, but for purposes of discussing the constitutional right to have a lawyer appointed to represent an individual (whose fees are paid for by the government), the description found in *Gideon* works best, *i.e.*, "any person too poor to hire a lawyer" is considered to be legally entitled to indigent defense representation. *Gideon v. Wainwright*, 372 U.S. 335 (1961).

### ***Who are the Indigent That Are Legally Entitled to Appointed Defense Lawyers?***

The legal right to indigent defense means those citizens of the United States who are so impoverished that they cannot meet their everyday needs (food, shelter, etc.), will have a lawyer provided to them, for free, by the government in certain criminal matters. The government bears the tab for *both* the defense and prosecution in these cases.

In both criminal and civil? No. The indigent's right to appointed counsel is essentially a criminal proceeding, at least at the moment, across the country and especially in the State of Florida.

In addition to the current span of criminal cases where the indigent is guaranteed appointed counsel, the Florida legislature has recognized only two other situations where there is a right to appointed counsel. First, Florida recognizes an indigent's right to counsel for indigent parents in dependency proceedings (Florida Statutes §39.013 (2008)); secondly, state law provides appointed counsel for indigent parents where the state is seeking to terminate their parental rights (Florida Statutes §39.807 (2008)). Florida law does not recognize a right to appointed counsel in any civil matter.

## *Origins of the Right to Appointed Counsel*

The Sixth Amendment to the United States Constitution states: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence,” and the 14th Amendment states in pertinent part, “... [n]o state ... shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Both the 6th and 14th Amendments of the Federal Constitution have been applied by the United States Supreme Court to define and mandate the indigent’s right to appointed legal counsel.

### ***The Sixth Amendment***

The Sixth Amendment, contained in the [Bill of Rights](#), provides a right to counsel – but the extent and scope of its language was left very much alone by courts and legislatures until the mid 1930s. Did it mean anything more than an individual had a right to have a lawyer present (the right to hire counsel)? It was not clear. Then, eight young and homeless African-American men were tried in Scottsboro, Alabama, one trial immediately after the other, for the gang rape of two runaway white teenaged girls on a railroad run between Chattanooga and Memphis, and sentenced to death.

This horrific and infamous situation led to the landmark Supreme Court opinion in *Powell v. Alabama* 287 U.S. 45 (1932) (the famous “[Scottsboro Case](#)”) where due process was found to include “fundamental personal rights,” not the least of which was “the right to the aid of counsel.” *Powell*, 287 U.S. at 59-60.

*Powell* was a narrow ruling. The Court recognized that “... in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.”

### ***Right to Appointed Counsel Distinguished from Right to Hire a Lawyer***

But where was the difference in the constitutional right to counsel between a defendant’s right to hire a lawyer to be present with him, and a defendant’s right to have a lawyer when they were too poor to retain one? Not long after *Powell*, the Supreme Court gave the answer – at least for federal courts, and the application of the 6<sup>th</sup> Amendment.

In *Johnson v. Zerbst*, 304 U.S. 458, 463-464 (1938), the Court explained: “[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.”

As for the states, the Supreme Court initially distinguished between federal and

state, and did not expand its ruling in *Johnson v. Zerbst* (the right to appointed counsel in federal cases) to state proceedings. Over twenty years passed without the scope of one's constitutional right to counsel being interpreted by the US Supreme Court. If there was an appointed right to counsel in a state proceeding during this time – and indeed, since the beginning of the union – it was created by the state itself. Some states recognized the right for the poor to have a lawyer (*e.g.*, Indiana, since 1853), others did not.

### ***The 14th Amendment***

Then, almost a quarter century after the Zerbst decision, the High Court heard *Betts v. Brady*, 316 U.S. 455 (1942) where it opined that it was the "... considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right essential to a fair trial." It appeared that the question of state governments being required to pay for appointed attorneys for the poor was resolved. According to *Betts*, the Constitution did not force the states to provide lawyers to the poor, unless a *particular* case might result in a conviction lacking in *fundamental fairness*.

### ***Betts v. Brady reversed by Gideon v. Wainwright***

Another twenty years passed, and the Supreme Court changed its mind. In a famous series of decisions, the Court defined and established a constitutional right to appointed counsel in almost all state criminal proceedings, the cornerstone of which is its 1961 opinion in *Gideon v. Wainwright*. It was an [unanimous decision, which held that an indigent person accused of a serious crime was constitutionally required to have a defense lawyer appointed to defend him or her, at state expense.](#)

This powerhouse of court opinion expanded the right to appointed counsel exponentially: "...that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Overruling *Betts*, the Court found that the right to legal counsel was indeed a fundamental right, applicable to the states via the due process component of the 14th Amendment. Now, state governments were mandated to protect the poor man or woman standing accused of a crime with the appointment of a defense attorney: to do otherwise was to violate that individual's fundamental right to a fair trial.

### ***Gault and Argersinger Combine with Gideon – The Right to Indigent Counsel is firmly Established***

Shortly after *Gideon* came *In re Gault* (indigent children charged in juvenile delinquency proceedings must have appointed counsel); *Argersinger v. Hamlin* (indigent accused in misdemeanor state proceedings where there is a potential loss of liberty must have appointed counsel); and other right to appointed counsel cases (see list of cases in the second part of this article). Suddenly, the right to legal counsel was a growing area of the law – and state government budgets.