

**THE RICHARD J. CHILDRESS MEMORIAL LECTURE 2016
KEYNOTE: THE CONTINUING DENIAL OF COUNSEL AND
ASSEMBLY-LINE PROCESSING OF POOR PEOPLE ACCUSED OF
CRIMES**

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My address today concerns the problem of poverty in our court system. There are many poor people with urgent, unmet legal needs who lack access to

Those of you going into the legal profession should worry about whether we have a legal system that actually provides justice to people high and low throughout our society. We are increasingly trending in a direction where many people who are wronged, who clearly are entitled to some kind of legal relief, have absolutely no ability to get it because they have no access to a lawyer. That is also true of some people in the criminal courts.

I am going to address what happens to people accused of crimes in the state courts. You learn a lot about federal courts, but that is five percent of the cases. Ninety-five percent of the cases, the great mass of people who come in

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thought a Ryder truck would pull up and boxes of the record in this capital case would be unloaded. Actually, we only got a small package of documents. When we looked at the documents, we found that the penalty phase was nothing but two really bad closing arguments. The defense lawyer just gave a

people became interested in his case. I had him come to my class one time at Yale and he told his story and, at the end, he pulled out of his jacket this legal document. He opened it to the last page and he read it: "The petition of Rubin Carter for writ of habeas corpus is hereby granted; signed, the Honorable H. Lee Sarokin, United States District Judge." He said, "This gave me back my life." He spent the rest of his life helping free other people who had been wrongfully convicted.²³

Today, Hurricane Carter would be nineteen years too late under the statute of limitations. For most people in these later stages of their cases, there is no access to a lawyer unless the person is under a death sentence and a lawyer volunteers to represent them. But a person who is not sentenced to death may have no lawyer at all. In his book *Just Mercy*

they were property and at least they had some interest in protecting their property. When they leased convicts, they could literally work them to death because you just called the sheriff and got some more. The coal companies sent people down into the coal mines around Birmingham, Alabama. When the coal mine collapsed, the operators would just call the sheriff and rent some more prisoners. The second book is *Slavery by Another Name* by Douglas Blackmon, which is also

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monuments to the people who were lost in World War I, World War II, Vietnam, or Korea. The one at Caddo Parish courthouse has Robert E. Lee, Stonewall Jackson, Pierre Beauregard, and Henry Watkins Allen, a lesser-known Confederate general. It's got an all-purpose Confederate soldier at the top. It's a monument to the Confederacy and to resistance to the United States and resistance to emancipation. Everybody who goes into the courthouse passes this monument that symbolizes resistance to the freedom of slaves. The prosecution struck all the African Americans from the jury so that he was tried by an all white jury. Despite the very weak case against him, Ford was convicted and sentenced to death.

After thirty years, the prosecutors admitted that they did not have a case against Glenn Ford, and they released him and gave him \$20.00.²⁸ In just this one case, race and poverty denied a man thirty years of his life. Marty Stroud was the chief prosecutor in the case, and he apologized to Ford in a letter that he wrote to the Shreveport newspaper that was published in 2015.²⁹ He said, "In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very

are not adequately represented at trial and don't have lawyers who can test the state's case. In another sad case, James Fisher spent twenty-seven years on death row in Oklahoma without anybody ever figuring out whether he was guilty of the crime.⁴² He was first represented by a lawyer who spoke only nine words at the penalty phase of his trial⁴³ and who did not seem to like Mr. Fisher. His case was reversed many years later in federal court.

After his case was reversed, Fisher was sent back for a new trial, and he got another lawyer who was even worse than his first lawyer. The second lawyer was both an alcoholic and drug addict. This lawyer had such a bad relationship with Mr. Fisher that, at one time, he asked the sheriffs to take his handcuffs off so that he could have a fistfight with Mr. Fisher, his own client. Nonetheless, the judge left the lawyer on the case. Mr. Fisher was again sentenced to death at the second trial, but the conviction and death sentence were reversed by the Oklahoma courts. After that reversal, the prosecutor offered Fisher his immediate release if he would plead guilty, leave Oklahoma, and never come back. Fisher was allowed to maintain his innocence while pleading guilty, as allowed by *North Carolina v. Alford*,⁴⁴ leave Oklahoma, and never return. If you had the two trials that Mr. Fisher had, what would you do? He took the *Alford* plea. By insisting the Fisher plead guilty even while maintaining his innocence, the prosecutors protected themselves from being accused of prosecuting an innocent man.

In a Georgia case, Robert Holsey's lawyer drank a quart of vodka every night during the trial. That is the equivalent of twenty-one shots of vodka every day.⁴⁵ As a result of his inattention to his client's case, as Judge Barkett says in her dissent, he failed to put on evidence that Robert Holsey was intellectually limited, and that Mr. Holsey "subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home 'the Torture Chamber.'"⁴⁶ Despite all this, Mr. Holsey was put to death by the state of Georgia.⁴⁷

42. See Dan Barry, *In the Rearview Mirror, Oklahoma and Death Row*, N.Y. TIMES (Aug. 10, 2010), <http://www.nytimes.com/2010/08/11/us/11land.html> [<http://perma.cc/X78E-BJT7>].

43. *Id.*

44. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (finding that a judge can accept a guilty plea from a defendant who pleads guilty even while maintaining his or her innocence).

45. Marc Bookman, *This Man's Alcoholic Lawyer Botched His Case. Georgia Executed Him Anyway.*, MOTHER JONES (Apr. 22, 2016, 6:00 AM), <http://www.motherjones.com/politics/2014/04/alcoholic-lawyer-botched-robert-wayne-holsey-death-penalty-trial> [<https://perma.cc/PT7F-EA73>].

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him, they answered the phone, “Kelly’s Keg.” Kelly’s Keg is a bar right across

When I was a public defender in Washington, D.C., I took my clients to the probation office after sentencings. We didn't pay the probation officer anything. The goal was not to suck money out of defendants, but to help defendants deal with whatever it was that got them into the criminal justice system to begin with so they could become useful and productive citizens. That is not the goal in jurisdictions that make defendants pay the probation officer.

Defendants who reject plea offers and insist on trials will pay a heavy price if they are convicted at those trials. They will receive a more severe sentence, even death, for rejecting the plea offer. Georgia executed Kelly Gissendaner, a woman, in 2015. She was tied to the gurney and managed to get half way through the second verse of *Amazing Grace* before the lethal drugs stopped her.⁵⁶ She and her boyfriend had killed her husband. This crime is tragic, but occurs from time to time. Most of the time, it does not usually result in the death penalty. In this case, the boyfriend actually did the stabbing. He was covered with blood. Knowing that the state had a locked case against him, he agreed to plead guilty and testify against Ms. Gissendaner so that he could get a life sentence. The prosecutor offered Ms. Gissendaner life imprisonment plus twenty-five years and told her that, if she didn't plead guilty, the state would seek the death penalty. Based on some bad advice, she rejected the plea offer, went to trial, and was sentenced to death. For over twenty years, she was a model prisoner. The guards wrote about how she had been a powerful and positive influence in their lives and their children's lives. The former chief justice of Georgia, Pope Francis, and many others urged the state's board of pardons and paroles to commute the sentence. The state was satisfied with life imprisonment plus twenty-five years. Surely, it did not need to kill this woman. But the prosecutor reminded everyone that she had rejected the plea offer. She was executed. A legal education should not teach one to "think like a lawyer" in a way that finds this morally acceptable.

There are solutions for the problems I have addressed. First, there is a need for structure to maximize resources and personnel. There are some states that do not have public defender offices. Without a public defender program, states are left with a bunch of lawyers taking cases and getting paid small amounts or, even worse, lawyers contracting with jurisdictions to handle a high number of cases at a flat rate. Few defendants will be well defended.

Second, the public defender programs must be independent of the executive and judicial branches. In states like Missouri, the public defender program is independent and run by a board. There have been two important

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challenges taken to the Missouri Supreme Court⁵⁷ that would never be brought in other states because the public defender would be fired if they brought these lawsuits.

In Georgia, the public defender serves at the pleasure of the governor. If the public defender had the audacity to bring cases like the Missouri public defender, he or she is gone. Georgia public defenders know that, so they don't bring these cases. It raises several questions. Are we concerned about the clients? Are we concerned about zealous representation of the clients? Or are

performances of lawyers made a difference or not. Yet, like in Mr. Holsey's

enough agitation. Agitation like what we have seen in St. Louis County since a police officer shot and killed Michael Brown.⁶⁵ The agitation like what Black Lives Matter has carried on all over this country. But lawyers have to be agitating, too. Every type of lawyer has a responsibility in this. This means going out and trying to make sure that we have a full measure of justice for everybody.

There is a story told about General Patton. The General sent someone out to do some scouting, and the scout found out they had been outflanked by the enemy. The scout came back to General Patton, and said, "General, we have got one hell of a problem." General Patton said, "Soldier, in this army we don't have problems. We have opportunities." The soldier replied, "General, we have got one hell of an opportunity." When you think about our criminal justice system, you can feel very discouraged. You can think that it looks so overwhelming and so bleak that there is no hope of ever achieving justice.

My recommendation to lawyers and law students is that they look at the state of the criminal justice system as an opportunity. Look at it as a great challenge. They should decide whether they want to take on this challenge and,

