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NATIONAL LEGAL AID & DEFENDER ASSOCIATION

CORNERSTONE

A large, detailed photograph of the Lady Justice statue, a symbol of the legal system. The statue is shown from the waist up, holding a pair of scales in her right hand. She is wearing a classical robe with a decorative brooch. The background is a bright, slightly cloudy sky.

The Advance from *Gideon*

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Gideon and Civil Right to Counsel: Two Sides of a Coin

By John Pollock

It may not be immediately intuitive, but the 50th anniversary of *Gideon v. Wainwright* is the perfect time to talk about the intersection of the rights to counsel in criminal and civil cases, and NLADA's *Cornerstone* is the perfect place.

In this country, there is a tendency to think of criminal and civil cases as separate and distinct. This way of thinking is furthered by the fact that we have, for the most part, separate systems for providing counsel in criminal and civil cases (which is rather unusual compared to most other countries). The reality, however, is that not only are both legal communities fighting to protect the basic needs of indigent people, but both communities also often have the same clients. In part, this is because criminal and civil cases have a way of affecting each other, of being essentially interwoven. The collateral impacts of criminal cases on civil ones are fairly well documented: the U.S. Supreme Court's decision in *Padilla v. Kentucky*, regarding the impact of criminal pleas on immigration cases, is one high-profile example, and much has been written about the effect of felony convictions on housing, on employment, on benefits. And criminal case pleas and convictions are often caused by the failure of states to provide adequate funding for effective representation by public defenders, so those of us who work on the civil right to counsel are very concerned with the failure of the states to meet *Gideon's* guarantees. At the same time, when poor people lack lawyers in civil cases involving their most basic human needs, it is not infrequent that they wind up interacting in some way with the criminal justice system. Thus, with four out of every five legal needs of the poor going unmet, the civil "justice gap" caused by the lack of a right to counsel in civil cases concerns us all.

NLADA's name, the National Legal Aid & Defender Association, embodies an awareness of the importance of working on the needs of the indigent defense and civil legal aid communities simultaneously. This awareness extends to some indigent defense programs, too, with programs like the Bronx Defenders adopting a "holistic defense" model in order to "fight both the causes and consequences of involvement in the criminal justice system ... [via] interdisciplinary teams of criminal, civil, and family defense lawyers." In a *Cornerstone* piece written the same year (2006) as the ABA resolution supporting the right to counsel in basic human needs civil cases, Defender Jim Neuhard recognized the wisdom of thinking about *Gideon* and the civil right to counsel at the same time. As he put it, doing so "presents a rare opportunity to not look backward about how to fund and deliver services in the manner we always have, but to look forward about how to meet the needs of those who cannot afford counsel and must face the loss of liberty or essential human services."



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Not only are criminal and civil cases intertwined, but also indigent criminal and civil litigants share an important attribute: they are likely to be equally bewildered by legal proceedings, and unequipped to adequately protect their interests. While the state is always the prosecutor in criminal cases, the state is often the plaintiff in numerous types of civil cases, such as abuse/neglect, termination of parental rights, paternity, and immigration. And even when the state is not present, the proceedings are routinely characterized by severe power imbalances, such as the vast disparity in representation between landlords and tenants, or the psychological power an abuser wields over a victim in a protection order proceeding. *Gideon* recognized 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” and that it was an “obvious truth” that providing counsel to those too poor to afford it is “fundamental and essential to a fair trial.” Surely these statements equally apply to adversarial civil proceedings where basic human needs are at stake.

Those of us in the civil right to counsel movement recognize that providing counsel in civil cases requires a significant investment of resources, and that more resources are already desperately needed for the strained indigent defense system. However, we have a number of responses to that concern. First, studies have demonstrated that providing counsel in civil cases is like preventative medicine: it stops problems from occurring that are even more costly to the county or state. Thus, lawyers may cost less than, for instance, shelters (for people who are evicted) or foster care (for children separated temporarily or permanently from their parents in custody proceedings) or emergency hospital care (for people denied medical benefits). Pilot projects in California, Boston, New York, and elsewhere are devoted to gathering data of this nature. Second, as noted above, it is our belief that failing to provide a right to counsel in civil cases puts further strain on public defenders. Third, we work hard to expand funding at the same time that new civil rights to counsel come online, and some such funding comes from different pots than those used by indigent defense. We also have some hope that *Gideon* and civil right to counsel advocates can find ways to pool their fundraising efforts, as the whole of such efforts may yield much more than the sum of their parts. And finally, the scope of the right we seek is not as broad as *Gideon* (which is one of the reasons we prefer the term “civil right to counsel” over “civil *Gideon*”): it is only for certain kinds of civil cases (basic human needs cases), and it very well may be accompanied by screening such that full representation is only provided in cases with some amount of merit.

There is another aspect of our answer to the cost concern, however, and that is that when something is a critically important right (one we feel rises to constitutional dimension, when basic human needs are implicated), it should not be possible to avoid that right simply because the states are experiencing budget constraints. It is our understanding that the indigent defense community would not advocate for the repeal of *Argersinger v. Hamelin* (which extended the right to counsel to misdemeanor cases of all types), even though it puts a much greater strain on felony defense. Likewise, the critically important needs of civil litigants in basic human needs cases should not be seen as a luxury only afforded in good times. While the Supreme Court has put physical liberty above all other

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NATIONAL LEGAL AID &
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Strickland to Padilla... A Detour in
Chaidez*
continued from Page 23*the scope and retroactivity of Padilla. An advisory describing the holding of Chaidez v. U.S. and providing initial guidance on claims and strategies can be found online at <http://immigrant-defenseproject.org/wp-content/uploads/2013/03/Chaidez-advisory-FINAL-201302281.pdf>*

1 372 U.S. 335, 345 (1963).

2 466 U.S. 668 (1984).

3 130 S.Ct 1473, 1484 (2010).

4 Id. at 1483 (noting that all controlled substances render a defendant deportable, with the exception of “the most trivial of marijuana possession offenses”).

5 Id. at 1485 (internal quotations omitted).

6 No. 11-820, 2013 WL 610201 (U.S. February 20, 2013)

7 In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the Supreme Court stated the following with regard to its retroactivity jurisprudence: “What we are actually determining when we assess the ‘retroactivity’ of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.” Id. at 271. The *Danforth* Court noted that the term “retroactivity” is somewhat misleading, because it implies that the constitutional right did not exist prior to its announcement; the Court indicated that it made more sense to reference the “‘redressability’ of violations of new rules, rather than the ‘retroactivity’ of such rules.” Id. The Court decided to continue to use the term “retroactivity” out of concern that “it would likely create, rather than alleviate, confusion to change our terminology at this point.” Id. n. 5. Thus, *Chaidez* did not hold that a *Padilla* violation couldn’t exist prior to *Padilla*, it rather held that such a violation was not redressable.

8 489 U.S. 288 (1989).

9 Brief for New Jersey et al as Amici Curiae at 1, *Chaidez v. U.S.*, 2013 WL 610201 (No. 11-820), 2012 WL 4338846, at *1.

10 <http://immigrantdefenseproject.org/defender-work/padilla-pcr>

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concerns with regard to the right to counsel, we reject this narrow view. Many would gladly spend a short stint in jail rather than suffer permanent termination of their parental rights or elimination of their life-sustaining benefits, or live in perpetual fear of domestic violence.

As the celebrations occur throughout this 50th anniversary year for *Gideon*, we hope to stimulate the conversation about how all of us, indigent defenders and civil right to counsel advocates alike, can work together to make justice a reality for all. Our clients are relying on us to find a way to bridge the gaps in order to meet both the promises of *Gideon* and the basic human needs of vulnerable civil litigants. ■

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