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CIVIL GIDEON: THE POOR MAN'S FIGHT

by LEE SHEVELL

John Wuerffel learned about legal procedure by watching the O.J. Simpson trial on television.¹ He told the judge and jurors at his trial he relied on this knowledge to defend himself.² Still, during the civil case proceedings, the trial was interrupted several times when the judge “had to remind Wuerffel of the legal process.”³



Wuerffel, a Vietnam veteran who is unemployed due to a disability, bought a home in Schaumburg, Ill. in 1971 and has resided there since.⁴ Earlier this year, John was brought to trial by Schaumburg officials on code violations alleging his yard was so cluttered it was hazardous.⁵ The nature of this case is a civil matter; therefore, despite being poor, disabled, and uneducated about courtroom processes and legal procedures, Wuerffel does not qualify for a court-appointed attorney.⁶

Wuerffel's situation is an example of the ongoing discussion in the United States about whether attorney representation for the poor in civil cases is a human rights issue— a movement often referred to as “Civil Gideon”.

LACK OF RIGHT TO COUNSEL IN CIVIL CASES IN THE UNITED STATES

For over 40 years, legal representation has been provided as a civil right in all United States criminal cases.⁷ In 1963, the United States Supreme Court held in *Gideon v. Wainwright* that an attorney must be appointed for criminal defendants because “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.”⁸

Further, in the opinion, Justice Black elaborated, “[The accused] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”⁹

Despite the presence of the same issues in civil cases, the Supreme Court passed on the opportunity to make a similar ruling of federal due process in civil cases.¹⁰ Instead, the Court ruled “an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”¹¹ The current rule provides that absent a threat of incarceration or extreme circumstances, counsel will not be provided.¹²

Individual states are seeking to expand the right to counsel in civil cases.¹³ In Wisconsin, 1,286 residents filed a petition with the Wisconsin Supreme Court requesting the issuance of a rule requiring a judge to appoint counsel for poor persons in a civil cases when the issue is complicated, involves fundamental rights, or the person is not able to represent himself.¹⁴ The human rights issue was presented by the Legal Action of Wisconsin as so vital that a poor person needs “a lawyer in the courtroom, just as they need a doctor in the operating room.”¹⁵

Civil cases often determine the rights, liberties and freedoms available to the parties. In *Price v. Turner*, a man was held in civil contempt and imprisoned because he was unable to pay his child support, yet because it was a civil matter, an attorney was never appointed for him at any time.¹⁶

Less dramatically even, in *Frase v. Barnhart*, a custody case in which a mother was not provided with an attorney, the concurrence boldly suggested:

[B]y our failure to determine the constitutional limits of the rights, if any at all, of the indigent to provided representation, the issue remains a ‘bouncing

ball,' subject to being bounced back and forth between the legislative, executive, and judicial branches of government, each branch leaving it to the other to address . . . the answers being sought in this Court, whatever the answers may be, cannot be found anywhere else. In my view, we should no longer leave them, and this issue, in limbo.¹⁷

Currently, the options for the poor to receive legal representation in civil cases are primarily to seek the assistance of overloaded, underfunded legal aid organizations.¹⁸ For example, based on income, at least fifty percent of New Mexicans qualify for Legal Aid services, yet the entire state of New Mexico has only forty-three Legal Aid attorneys.¹⁹

Susanne Pringle, Staff Attorney at the Legal Assistance Foundation of Metropolitan Chicago, notes that “a major challenge for litigants who don’t qualify for appointed legal representation is that legal aid agencies are incredibly overwhelmed and underfunded and therefore unable to take many of the cases they see. I talk to people all the time who tell me that they’ve already called everybody on my referral list and none of the agencies can help them.”²⁰

Alternatively, many argue the effect of *Gideon* for criminal defendants has not been positive or effective.²¹ Instead, it has provided a class of lawyers that are overworked and under-resourced, suggesting a result of a lower standard of effective counsel for public defenders.²² Some propose that by improving *pro se* outreach programs and focusing on *pro se* reform rather than Civil Gideon, defendants would fare better and not face the challenges of *Gideon*.²³ The idea is that “rather than seeing the plight of the poor as an opportunity to fund more lawyers, we should see it as an opportunity to make American law simpler, fairer and more affordable.”²⁴

INFLUENCE OF INTERNATIONAL POLICY

In the past, the United States Supreme Court has looked to international legal policy to determine how to address issues of human rights in the United States.²⁵ For example, *Roper v. Simmons*²⁶ overturned a law allowing the death penalty for mentally ill defendants; *Adkins v. Virginia*²⁷ overturned a law allowing the death penalty for juveniles; and *Lawrence v. Texas*²⁸ overturned the criminalization of consensual homosexual sex in a private setting. These cases followed the footsteps of the European courts’ commitment to certain individ-

ual rights and may be an indicator of how the “Civil Gideon” debate should be addressed.

Europe has a long history of providing counsel to the poor in civil cases.²⁹ In England, government appointment of counsel for both plaintiffs and defendants in civil cases dates back to 1495.³⁰ In 1979, the European Court of Human Rights declared that access to the courts was a human right; implicit is that a layperson’s right to a fair trial is through “effective access to court” provided by appointed counsel.³¹ Additionally, in France, Finland, Greece and other countries, financial need is only one factor in consideration of providing appointed counsel, such as an automatic civil representation for veterans.³²

In an English case, *Steel and Morris v. United Kingdom*, the court analyzed the fundamental fairness by balancing a lay person’s understanding of the court process and possible resources for representation against an adverse party that was a corporation.³³ The court determined that fundamental fairness in courts involves attorney representation on both sides and as such, the government should provide counsel to protect a lay person’s rights to justice.³⁴

CONCLUSION FOR WUERFFEL

If the United States Supreme Court resolved “Civil Gideon” by analyzing human rights through the international lens, equal access to justice would follow that the poor would have appointed counsel in civil cases. In England, Wuerffel would receive representation for a variety of reasons: he is fighting a case against the government, a large entity with endless resources; he is a lay person who clearly is not educated on the courtroom procedure; and he is a Vietnam veteran.

Conversely, if *pro se* reform was launched, Wuerffel would likely be more successful understanding the complex legal procedures at trial.

In the meantime, Pringle explains the vitality of representation for a client like Wuerffel. “The system can be incredibly confusing to people with no legal background,” she said. “Even figuring out what the forms mean can be overwhelming. This is especially true for *pro se* litigants with less education or with any sort of cognitive disability. I think these people should be first on any list of those litigants entitled to appointed civil representation.”³⁵

NOTES

- 1 Kate Thayer, *Schaumburg Yard Case: Defendant Tells Jury: 'Just let me live my life'*, CHICAGO TRIBUNE, Sept. 2, 2010.
- 2 *Id.*
- 3 *Id.*
- 4 *Id.*
- 5 *Id.*
- 6 *Id.*
- 7 *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- 8 *Id.* at 345.
- 9 *Id.*
- 10 *Lassiter v. Dep't of Soc. Services*, 452 U.S. 18 (1981).
- 11 *Id.* at 27.
- 12 *Id.*
- 13 Press Release, *Poor People Desperately Need Lawyers*, Legal Action of Wisconsin, (Sept.27, 2010), www.wisgideon.com/petition.html.
- 14 *Id.*
- 15 *Id.*
- 16 *Price v. Turner*, 387 S.C. 142 (2010).
- 17 *Frase v. Barnhart*, 379 Md. 100, 134 (2003).
- 18 Kia Franklin, *Times are Tough. . . Time for Civil Gideon*, Tort Deform: THE CIVIL JUSTICE DEFENSE BLOG (May 22, 2009, 3:05pm), available at www.tortdeform.com/archives/2009/05/times_are_tough_for_civil.html.
- 19 *Id.*
- 20 Email Interview with Staff Attorney Susanne Pringle at the Legal Assistance Foundation of Metropolitan Chicago (Oct. 21, 2010).
- 21 Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 Fla. L. Rev. ____ (2010).
- 22 *Id.* at 2.
- 23 *Id.*
- 24 *Id.* at 10.
- 25 Raven Lidman, *Civil Gideon: A Human Right Elsewhere in the World*, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY, July-Aug. 2006, p. 288-89.
- 26 *Roper v. Simmons*, 543 U.S. 551, (2005).
- 27 *Atkins v. Virginia*, 536 U.S. 304 (2002).
- 28 *Lawrence v. Texas*, 539 U.S. 558, (2003).
- 29 Lidman, *supra* note 25, at 289.
- 30 *Id.* at 289-90.
- 31 *Id.* at 290.
- 32 *Id.* at 292.
- 33 *Id.*
- 34 *Id.*
- 35 Pringle, *supra* note 20.