

---

IN THE  
**Supreme Court of the United States**

---

MICHAEL D. TURNER,  
*Petitioner,*

v.

REBECCA PRICE AND SOUTH CAROLINA  
DEPARTMENT OF SOCIAL SERVICES,  
*Respondents.*

---

**On Petition for a Writ of Certiorari to the  
Supreme Court of South Carolina**

---

**BRIEF OF AMICI CURIAE CENTER  
FOR FAMILY POLICY AND PRACTICE,  
PROFESSOR ELIZABETH G. PATTERSON,  
SOUTH CAROLINA APPLESEED LEGAL  
JUSTICE CENTER, AND SOUTH CAROLINA  
CENTER FOR FATHERS AND FAMILIES  
IN SUPPORT OF PETITIONER**

---

JOHN C. MOYLAN, III  
*Counsel of Record*  
ALICE W.W. PARHAM  
WYCHE BURGESS FREEMAN  
& PARHAM, P.A.  
801 Gervais Street, Suite B  
Columbia, SC 29201  
(803) 254-6542  
jmoylan@wyche.com

July 29, 2010

**Blank Page**

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
STATEMENT OF INTEREST .....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	5
I. INCARCERATION OF DESTITUTE PARENTS FOR NONPAYMENT OF CHILD SUPPORT IS A WIDESPREAD PROBLEM IN THE UNITED STATES...	5
A. Child Support Reforms Have Targeted “Deadbeat Dads” In Order To Improve The Economic Condition Of Poor Children And Recoup Government Welfare Costs.....	5
B. The Vast Majority Of Child Support Debt In The United States Is Owed By Destitute Nonresident Parents Who Lack The Means To Pay .....	7
C. The Poorest Noncustodial Parents Are The Most Likely To Face Incarceration For Nonpayment Through The Civil Contempt Process, Even Though Such Harsh Enforcement Measures Were Developed With “Deadbeat Dads” In Mind .....	12
II. ADMINISTRATION OF SOUTH CAROLINA’S CIVIL CONTEMPT SYSTEM IN CHILD SUPPORT CASES CREATES A HIGH RISK THAT INDIGENT PARENTS WILL BE “COERCIVELY” INCARCERATED DESPITE THEIR INABILITY TO PAY THE ORDERED SUPPORT .....	15

## TABLE OF CONTENTS—Continued

	Page
A. South Carolina Imprisons Large Numbers Of Child Support Obligor On Civil Contempt Charges .....	16
B. Observations Of Civil Contempt Hearings Involving Nonpayment Of Child Support In South Carolina Confirm That A Large Number Of Indigent Obligor Are Being Incarcerated Despite Their Inability To Comply With The Court Order .....	17
C. Recognition Of A Right To Counsel In Civil Contempt Proceedings That Could Result In Incarceration Of An Indigent Child Support Obligor Would Not Burden The Effectiveness Of The Child Support Enforcement System, The Legal Profession Or State Budgets .....	19
1. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not burden the effectiveness of the child support enforcement system .....	19
2. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not unduly burden the legal profession or state budgets ...	22

## TABLE OF CONTENTS—Continued

	Page
III. THERE IS A HIGH RISK OF ERRONEOUS INCARCERATION IN CIVIL CONTEMPT PROCEDURES INVOLVING INDIGENT CHILD SUPPORT OBLIGORS WHO ARE UNREPRESENTED BY COUNSEL .....	23
CONCLUSION .....	25

## TABLE OF AUTHORITIES

CASES	Page
<i>Hicks v. Feiock</i> , 485 U.S. 624 (1988).....	23
<i>International Union, United Mine Workers of America v. Bagwell</i> , 512 U.S. 821, 831 (1994).....	23, 24-25
<i>Michael F. v. Sharon R.</i> , No. OT-00-034, 2001 WL 227068, 2 (Ohio Ct. App. 2001).	9
<i>Pasqua v. Council</i> , 892 A.2d 663, 673 (N.J. 2006).....	24
<i>Price v. Turner</i> , 387 S.C. 142, 691 S.E.2d 470 (2010).....	23
<i>Sevier v. Turner</i> , 742 F.2d 262, 265-66 (6th Cir. 1984).....	20
<i>Shillitani v. United States</i> , 384 U.S. 364, 371(1966).....	23
<i>Wilson v. Holliday</i> , 774 A.2d 1123, 1127 (Md. 2001) .....	20
CONSTITUTIONAL AND STATUTORY PROVISIONS	
42 U.S.C. § 654 .....	5
42 U.S.C. § 666 .....	21
OTHER AUTHORITIES	
Tonya L. Brito, <i>The Welfarization of Family Law</i> , 48 U. KAN. L. REV. 229 (2000) .....	6
Jocelyn Crowley, <i>THE POLITICS OF CHILD SUPPORT IN AMERICA</i> 164 (2003) (citing Ronald Mincy & Elaine Sorensen, <i>Deadbeats and Turnips in Child Support Reform</i> . J. POL'Y ANAL. & MGMT. 17(I): 44-51 (1998)) .....	7

## TABLE OF AUTHORITIES—Continued

	Page
Paul K. Legler, The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act, 30 Fam. L. Q. 519 (1996).....	6, 21
Linda Levine, THE ECONOMIC STATUS OF NONCUSTODIAL FATHERS OF CHILDREN ON WELFARE 4-5, 13 (2002) .....	10
Pamela Loprest <i>et al.</i> , Policies For The Hard To Employ: Understanding State Approaches And Future Directions (2007), <i>available at</i> <a href="http://www.urban.org/UploadedPDF/411501_hardtoemploy.pdf">http://www.urban.org/UploadedPDF/411501_hardtoemploy.pdf</a> .....	11
Rebecca May, The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents, Center for Family Policy & Practice (2004) <i>available at</i> <a href="http://www.cffpp.org/publications/effect_child.html">http://www.cffpp.org/publications/effect_child.html</a> . ....	7, 8, 14
Rebecca May and Marguerite Roulet, A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices, CENTER FOR FAMILY POLICY & PRACTICE 40 (2005) <i>available at</i> <a href="http://www.cffpp.org/publications/index.html">http://www.cffpp.org/publications/index.html</a> .....	12, 13, 14
Marygold S. Melli, Constructing a Social Problem: The Post-Divorce Plight of Women and Children, 1986 AM. B. FOUND. RES. J. 759.....	5

## TABLE OF AUTHORITIES—Continued

	Page
Elizabeth Patterson, Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison, 18 CORNELL J.L. & PUB. POL'Y 95 (2008).....	29, 10, 24
Jessica Pearson & Esther Ann Griswold, New Approaches to Child Support Arrears, POL'Y & PRAC. OF PUB. HUMAN SERVS., 33 (2001), <i>available at</i> <a href="http://www.ancpr.org/new-approachestoschildsupport_.htm">http://www.ancpr.org/new-approachestoschildsupport_.htm</a> .....	9
Ovwigbo, Saunders & Born, Arrears Leveraging Pilot Project Outcomes Achieved and Lessons Learned, FAMILY WELFARE RESEARCH TRAINING GROUP (2005).....	8
Ronald Mincy & Elaine Sorensen, Deadbeats and Turnips in Child Support Reform. J. POL'Y ANAL. & MGMT. 17(I): 44-51 (1998).....	6, 7
Elaine Sorenson, Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program, 14 J. POL'Y ANALYSIS & MGMT. 604 (2002).....	9, 10
Sorensen E, Lerman R., Welfare reform and low-income noncustodial fathers. 41 CHALLENGE 101 (1998).....	11
Sorensen, Sousa, & Schaner, Assessing child support arrears in nine large states and the nation. Washington, DC: Urban Institute (July 11, 2007).....	10



## TABLE OF AUTHORITIES—Continued

	Page
Sorensen E, Zibman C., Getting to know poor fathers who do not pay child support. 75 SOC. SERV. REV. 420, 420–34 (2001).....	10, 11
U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State (2004) <i>available at</i> <a href="http://www.acf.hhs.gov/programs/cse/pol/DCL/2004/dcl-04-28.htm">http://www.acf.hhs.gov/programs/cse/pol/DCL/2004/dcl-04-28.htm</a> .....	8

**Blank Page**

IN THE  
**Supreme Court of the United States**

---

No. 10-10

---

MICHAEL D. TURNER,  
*Petitioner,*

v.

REBECCA PRICE AND SOUTH CAROLINA  
DEPARTMENT OF SOCIAL SERVICES,  
*Respondents.*

---

**On Petition for a Writ of Certiorari to the  
Supreme Court of South Carolina**

---

**BRIEF OF *AMICI CURIAE* CENTER  
FOR FAMILY POLICY AND PRACTICE,  
PROFESSOR ELIZABETH G. PATTERSON,  
SOUTH CAROLINA APPLESEED LEGAL  
JUSTICE CENTER, AND SOUTH CAROLINA  
CENTER FOR FATHERS AND FAMILIES  
IN SUPPORT OF PETITIONER**

---

**STATEMENT OF INTEREST <sup>1</sup>**

The Center for Family Policy and Practice (CFFPP)  
is a nonprofit public policy organization that focuses

---

<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no persons or entities, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Counsel for the parties received timely notice of the intent to file this brief, and letters from the parties consenting to the filing of this brief are on file with the Clerk.

on the nationwide impact of national and state welfare programs, fatherhood initiatives, and child support policy on parents and their children who navigate the family and social welfare systems without legal representation. CFFPP was established in 1995 by the Ford Foundation under the Strengthening Fragile Families Initiative. Recognizing the limited advocacy and policy analysis of these issues from the perspective of very low-income men of color, CFFPP's mission has been to concentrate on the perspective of those individuals, providing also public education and technical assistance on the challenges and barriers unique to those individuals and their families. CFFPP has tax-exempt status under federal and state laws.

Elizabeth G. Patterson is a legal scholar who has studied and published on the federal/state child support enforcement program and its impact on low-income noncustodial parents. She is a Professor of Law at the University of South Carolina School of Law and for four years was State Director of the South Carolina Department of Social Services, the agency that administers the child support enforcement program in South Carolina. Professor Patterson has conducted both empirical and scholarly research on South Carolina's child support enforcement program. She is the author of "Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison," 18 *Cornell Journal of Law and Public Policy* 95 (2008).

For more than 20 years SC Appleseed has engaged in advocacy and education to assure that statutes address the needs of the underprivileged and that our legal system is looking out for those most in need. SC Appleseed has published a large number of educa-

tional materials for low-income persons, including material for parents involved in the child support enforcement system.

Since 2002 the SC Center for Fathers and Families has worked with community-based fatherhood programs and many state and community partners to provide comprehensive services to more than 7,000 low-income fathers and to advocate for father-friendly policies and practices. The Center has worked closely with South Carolina's Child Support Enforcement and Court Administration to implement an alternative to incarceration for low-income non-custodial parents who are found in contempt for non-payment of child support. Based on our experience, many low-income noncustodial parents do, in fact, desire to provide financial and emotional support, but do not have the means to do so without support services. Also, many non-custodial parents cannot satisfactorily articulate or document their circumstances and consequently are often found in contempt. While the appointment of an attorney alone will not ensure consistent future payments, we support the need for court-appointed attorneys to ensure that low-income parents have the opportunity to be heard particularly when jail time may be the end result.

### **SUMMARY OF ARGUMENT**

Petitioner Michael Turner's experience is no anomaly; across the United States, destitute, noncustodial parents are incarcerated for failing to meet child support obligations they have no means to pay. This is despite the fact that child support law and policy is targeted elsewhere—at so-called “deadbeat dads” who have the ability to pay but choose not to.

Inflexible application of child support collection and enforcement measures—measures that are designed to ensure that child support payments are “automatic and inescapable” no matter the circumstance—lead to this devastating phenomenon when applied to the chronically poor. This is among the reasons why it is so vital that the Court grant certiorari in this case.

Although effective in securing payments from noncustodial parents with the means to pay, the impact of these reforms on low-income noncustodial parents and their families has been disproportionate and destructive. Today, the vast majority of child support owed in the United States is owed by noncustodial parents who live in poverty. These parents lack the means to pay their child support debt, yet they experience the full panoply of enforcement measures, including civil incarceration for nonpayment of support. Ironically, low-income noncustodial parents who lack the ability to pay their child support debts are more likely to face incarceration than are noncustodial parents who have the means to pay child support and refuse to do so. This is because other, less severe enforcement measures are effective in securing support from those with the means to pay. The end result is that jails across the United States are filled with low- and no-income parents who have been incarcerated (largely through civil contempt processes) for nonpayment of child support.

In South Carolina, where Michael Turner was incarcerated, approximately 15% of the jail population is made up of child support obligors imprisoned for civil contempt. The hearings that lead to these sanctions are brief and cursory, and they present a high risk that child support obligors who lack the means to comply with the court order are being coer-

cively confined. In the absence of a right to counsel, it is almost certain that low-income and no-income child support obligors will not be able to effectively assert the defense of inability to comply, and will continue to be improperly incarcerated.

## ARGUMENT

### I. INCARCERATION OF DESTITUTE PARENTS FOR NONPAYMENT OF CHILD SUPPORT IS A WIDESPREAD PROBLEM IN THE UNITED STATES

#### A. Child support reforms have targeted “deadbeat dads” in order to improve the economic condition of poor children and recoup government welfare costs

Child support reforms in the 1980s and 1990s were designed to increase noncustodial fathers’ financial support of their children and thus reduce the dependence of poor children and their custodial parents on public welfare assistance.<sup>2</sup> Equally important, the reforms served the goal of welfare cost recovery, the government practice of seeking reimbursement of welfare costs through child support enforcement.<sup>3</sup> Key elements of the laws included: (1) expanded and streamlined paternity establishment procedures; (2) the introduction of a national directory of new hires to track delinquents; (3) implementation of wage withholding to increase collections; and (4) mandatory administrative enforcement remedies, including

---

<sup>2</sup> Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1986 AM. B. FOUND. RES. J. 759.

<sup>3</sup> See Child Support Act of 1974 § 454, 42 U.S.C. § 654 (1994).

procedures to revoke drivers' and professional licenses.<sup>4</sup> The scheme of reforms created a system that is more streamlined and automated, less reliant on judicial involvement, and, particularly with respect to enforcement methods, more stringent and punitive.<sup>5</sup> As one commentator pointed out, the new child support provisions were designed to ensure that child support payments are "automatic and inescapable."<sup>6</sup>

The far-reaching reforms of 1996, in particular, were propelled by widespread societal hostility toward "deadbeat dads," a term that was applied indiscriminately to all noncustodial fathers who failed to support their children.<sup>7</sup> The public viewed all nonpaying fathers as men who could afford to pay support but flagrantly chose not to, depriving their children of desperately needed economic support. At the time, scant attention was paid to fathers who were characterized as "turnips,"<sup>8</sup> fathers who have insufficient income to pay child support because they are young, uneducated, and lack significant work experience. Subsequent empirical studies confirm

---

<sup>4</sup> Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 252-56 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 538 (1996).

<sup>7</sup> Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 263-64 (2000).

<sup>8</sup> Young, uneducated, never-married noncustodial parents who lack income to pay child support are called "turnips" after the phrase "You can't get blood from a turnip." Mincy & Sorensen, *Deadbeats and Turnips in Child Support Reform*. J. POL'Y ANAL. & MGMT. 17(I): 44-51 (1998).



that as many as 33% of noncustodial fathers are indeed “unable nonpayers.”<sup>9</sup> The researchers’ conclusion—that it would be futile to pursue child support from these impoverished fathers—has been borne out.<sup>10</sup> As set forth below, unnecessarily harsh laws place the poorest fathers in an economically untenable position by setting child support orders at levels that exceed their capacity to pay and then later punishing them for shirking their responsibilities when they are inevitably delinquent.

**B. The vast majority of child support debt in the United States is owed by destitute nonresident parents who lack the means to pay**

Child support laws purport to treat all nonresident parents alike in terms of holding them financially responsible for their children, with no exceptions for low-income fathers. However, the goal of recouping welfare expenditures incentivizes the state to aggressively pursue collections from the very poorest parents, rather than from middle- or upper-income parents, who are not welfare-reliant.<sup>11</sup> The sad irony is that, as a result, noncustodial parents with the least capacity to pay child support are also the

---

<sup>9</sup> Crowley, *THE POLITICS OF CHILD SUPPORT IN AMERICA* 164 (2003) (citing Mincy & Sorensen, *Deadbeats and Turnips in Child Support Reform*, J. POL’Y ANAL. & MGMT. 17(I): 44-51 (1998)).

<sup>10</sup> *Id.*

<sup>11</sup> May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, Center for Family Policy & Practice (2004) available at [http://www.cffpp.org/publications/effect\\_child.html](http://www.cffpp.org/publications/effect_child.html).

parents who have the greatest likelihood of experiencing the most severe penalties for nonpayment.<sup>12</sup>

Low-income and even no-income parents have been acknowledged by the U.S. Office of Child Support Enforcement (OCSE) to be responsible for the greatest portion of unpaid child support. According to OCSE, of the more than \$70 billion in child support debt nationally, 70% of all arrears due to the government (as reimbursement for welfare expenditures) are owed by noncustodial parents who have no quarterly earnings or earn less than \$10,000 annually.<sup>13</sup> Only 4% of child support arrears are held by noncustodial parents with more than \$40,000 in annual income.<sup>14</sup> The problem is nationwide; the child support caseloads in every state include very low income fathers who have accumulated enormous arrearages and who have virtually no prospect of ever paying them off.<sup>15</sup>

Congress's assumptions in designing the child support enforcement statutes were based on studies indicating that most unwed fathers could pay some financial support for their children, and that their

---

<sup>12</sup> *Id.*

<sup>13</sup> Ovwigho, Saunders & Born, *Arrears Leveraging Pilot Project Outcomes Achieved and Lessons Learned*, FAMILY WELFARE RESEARCH TRAINING GROUP (2005).

<sup>14</sup> U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* (2004) available at <http://www.acf.hhs.gov/programs/cse/pol/DCL/2004/dcl-04-28.htm>.

<sup>15</sup> May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, Center for Family Policy & Practice 9 (2004) available at [http://www.cffpp.org/publications/effect\\_child.html](http://www.cffpp.org/publications/effect_child.html).

incomes tend to rise within the few years after paternity is established.<sup>16</sup> This view, coupled with improvements in the effectiveness of the child support system, has led to significant increases in the number of low-income nonresident parents who are legally obligated to pay.<sup>17</sup> The amount of child support that they must pay, however, often outstrips their ability. This results, in part, from the practice of “imputing income” when setting support orders and from not modifying existing orders downward when circumstances warrant.<sup>18</sup> The court may impute to the obligor the ability to earn the minimum wage, or it may simply take a stab in the dark.<sup>19</sup> The court generally assumes a 40 hour work week, and generally overestimates the income of the low income parents, who often work less than 40 hours a week.<sup>20</sup> In addition, because poor parents lack access to courts and counsel, courts rarely modify child support

---

<sup>16</sup> Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95 (2008).

<sup>17</sup> Sorenson, *Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program*, 29 J. POL'Y ANALYSIS & MGMT. 604 (2002).

<sup>18</sup> Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95 (2008).

<sup>19</sup> See *Id.* See also *Michael F. v. Sharon R.*, No. OT-00-034, 2001 WL 227068, 2 (Ohio Ct. App. 2001) (finding that the court may exercise broad discretion when imputing income).

<sup>20</sup> Pearson & Griswold, *New Approaches to Child Support Arrears*, POL'Y & PRAC. OF PUB. HUMAN SERVS., 33 (2001), available at [http://www.ancpr.org/new-approachestoschild support\\_.htm](http://www.ancpr.org/new-approachestoschildsupport_.htm)

orders downward when earnings decline.<sup>21</sup> These practices result in child support orders that often exceed 50% of reported earnings among low-income fathers.<sup>22</sup>

These practices do not realistically take account of the large number of noncustodial parents who are as poor as the custodial parents and children, who are themselves receiving welfare benefits, and who have problems getting and keeping jobs. Most of the fathers who do not pay child support payments are poor and unable to find jobs that would enable them to pay child support.<sup>23</sup> About 35% of nonresidential fathers (about 3.6 million) are poor, and the vast majority of this group (over 90%) does not pay any child support.<sup>24</sup> These fathers earned an average of \$4,221 annually, compared to \$34,967 annually for non-poor noncustodial fathers.<sup>25</sup> Only one-quarter of noncustodial fathers with incomes less than 130% of the poverty line worked full-time year round, and their average income was just \$6,989 (just above the

---

<sup>21</sup> Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95 (2008).

<sup>22</sup> Sorensen, Sousa, & Schaner, *Assessing child support arrears in nine large states and the nation*. Washington, DC: Urban Institute (July 11, 2007).

<sup>23</sup> Sorenson, *Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program*, 29 J. POL'Y ANALYSIS & MGMT. 604 (2002).

<sup>24</sup> Sorensen E, Zibman C., *Getting to know poor fathers who do not pay child support*. 75 SOC. SERV. REV. 420, 420-34 (2001).

<sup>25</sup> Levine, THE ECONOMIC STATUS OF NONCUSTODIAL FATHERS OF CHILDREN ON WELFARE 4-5, 13 (2002).

\$6,800 poverty level for a single adult).<sup>26</sup> Further, one study found that 60% of poor fathers who do not pay child support are racial and ethnic minorities, and 29% were institutionalized (mostly in prison) at the time of the interview.<sup>27</sup> Only 43% of the men not in prison were currently working, and those employed at all in 1996 worked an average of just 29 weeks and earned \$5,627 that year.<sup>28</sup> Their barriers to employment<sup>29</sup> were also considerable: 43% were high-school dropouts, 39% had a health problem, and 32% had not worked in three years.<sup>30</sup> Generally, there are few employment opportunities for nonresident parents with weak work histories and limited education or training who live in neighborhoods of poverty.

---

<sup>26</sup> Sorensen E, Lerman R., *Welfare reform and low-income noncustodial fathers*. 41 CHALLENGE 101 (1998).

<sup>27</sup> Sorensen E, Zibman C., *Getting to know poor fathers who do not pay child support*. 75 SOC. SERV. REV. 420, 420–34 (2001).

<sup>28</sup> *Id.*

<sup>29</sup> Welfare program administrators classify certain welfare recipients as “hard to employ” because of characteristics which act as “barriers to employment.” Barriers to employment include: limited education, limited work skills, addictions, criminal records, and physical and mental health problems. *See, e.g.,* LOPREST *et al.*, *Policies For The Hard To Employ: Understanding State Approaches And Future Directions* (2007), available at [http://www.urban.org/UploadedPDF/411501\\_hardtoemploy.pdf](http://www.urban.org/UploadedPDF/411501_hardtoemploy.pdf).

<sup>30</sup> *Id.*

**C. The poorest noncustodial parents are the most likely to face incarceration for nonpayment through the civil contempt process, even though such harsh enforcement measures were developed with “deadbeat dads” in mind**

The accumulation of unrealistic and excessive child support debts results in large part from subjecting impoverished noncustodial parents to an “automatic and inescapable” child support system that has reimbursement of welfare benefits as its primary focus and far too often does not account for the parents’ inability to pay. The low-income nonresident parent who lacks attorney representation experiences the child support system as a virtually unstoppable chain of events that leads inevitably to unfathomable levels of debt that they have no hope of ever paying off. First, many parents are not even aware of the initial proceedings and fail to appear in court because, due to their poverty and unstable housing situations, they did not receive a copy of the summons directing them to appear.<sup>31</sup> If they fail to appear, the court will enter default paternity establishment and child support orders.<sup>32</sup> Second, when establishing child support orders involving low- or no-income noncustodial parents, it is common for courts to base the support amount on an imputed minimum wage that exceeds the parent’s actual earnings.<sup>33</sup> Third, in addition to

---

<sup>31</sup> May and Roulet, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, CENTER FOR FAMILY POLICY & PRACTICE 40 (2005) available at <http://www.cffpp.org/publications/index.html>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

the monthly child support amount set by the court, the very poorest nonresident parents (those who have children with a parent who receives government benefits) have even more costs imposed on them.<sup>34</sup> Finally, given these circumstances, it is not surprising that many low-income noncustodial parents experience the full weight of the child support enforcement process. The least severe enforcement tools (such as wage garnishment, property liens and tax refund intercepts) will simply not be effective in collecting past due child support from noncustodial parents who lack stable, consistent employment and assets. Having failed to collect support by utilizing these lesser sanctions, the child support system turns to more aggressive enforcement measures. Though such tools were established to collect unpaid support from deadbeat dads—those able but unwilling to pay—it is the low-income parent who most likely faces the threat of incarceration through the civil contempt process. Consequently, the most aggressive child support enforcement policies tend to have the greatest impact on the poorest parents who are unable to pay.

The Center for Family Policy and Practice (CFFPP), which has been studying the challenges and barriers faced by low-income fathers since 1995, examined the intersection of child support and incarceration (civil contempt and criminal charges for non-

---

<sup>34</sup> “Many states charge fees such as the cost for the birth of the child, or start arrearages climbing immediately with the imposition of retroactive child support that dates back as far as the birth of the child in some states, or in others, to the beginning of welfare receipt.” *Id.* at 9. The accrual of interest (as high as 12% in some states) on the debt leads to yet higher arrearages. *Id.*

payment of child support) in several publications.<sup>35</sup> In its studies of this issue, CFFPP found that in most states there were reports of civil contempt arrests and incarcerations for nonpayment of child support.<sup>36</sup> CFFPP's studies examining data at the local level in Wisconsin confirmed that the most aggressive child support enforcement policies tend to have the greatest impact on the poorest parents who are unable to pay. The study revealed that in Madison and Milwaukee there is a higher rate of arrests for nonpayment of child support for low-income minority parents than for other parents.<sup>37</sup>

---

<sup>35</sup>In addition to highlighting the issues of civil and criminal charges for non-payment of child support, CFFPP publications have highlighted the consequences of incarceration on these men such as the loss of employment. The publications include the following; Financial Literacy and Low-Income Noncustodial Parents, Child Support Handbook, Fatherhood Programs and Public Policy, Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers, and Children, Negotiating the Child Support System: Report from a Discussion of Policy and Practice, Negotiating the Child Support System, Recommendations from a Discussion of Policy and Practice, and the Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents.

<sup>36</sup> May and Roulet, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, CENTER FOR FAMILY POLICY & PRACTICE 40 (2005) available at <http://www.cffpp.org/publications/index.html>.

<sup>37</sup> May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, Center for Family Policy & Practice 14-15 (2004) (the data in this study groups together felony, misdemeanor and civil contempt proceedings for nonpayment of child support) available at [http://www.cffpp.org/publications/effect\\_child.html](http://www.cffpp.org/publications/effect_child.html).



While an efficient and justifiable tool for able-to-pay parents, when such practice is applied to all noncustodial parents regardless of ability to pay, primarily poor parents will end up in jail. For a destitute person, civil contempt is an inappropriate remedy to secure payment of a child support obligation: the party cannot be coerced into paying child support that instant, because they have no funds to pay it. Because the goal of civil contempt is to obtain compliance with the trial court's orders, the justification for imprisonment is lost when that compliance is impossible.

## **II. ADMINISTRATION OF SOUTH CAROLINA'S CIVIL CONTEMPT SYSTEM IN CHILD SUPPORT CASES CREATES A HIGH RISK THAT INDIGENT PARENTS WILL BE "COERCIVELY" INCARCERATED DESPITE THEIR INABILITY TO PAY THE ORDERED SUPPORT**

That the civil contempt system for enforcing child support does in fact erroneously incarcerate persons who lack the ability to pay the ordered support is illustrated by the facts of Michael Turner's case, which are replicated in numerous other cases in South Carolina and other states. Michael Turner at his contempt hearing stated that his non-payment was due to drug addiction and physical disability, both of which limited his earning potential. The judge's only reaction to Turner's statement was to say "okay" and change the subject. Without any further discussion of Turner's ability to pay—whether at the time the support payments were due or at the time of the contempt hearing—the court found him in "willful contempt" and sentenced him to twelve months'

incarceration subject to a purge amount of \$5,728.76 (the total amount of the arrearage).

**A. South Carolina imprisons large numbers of child support obligors on civil contempt charges**

The Turner case typifies the administration of the child support contempt process in South Carolina, where on any given day there are approximately 1,500 civil contemnors confined for nonpayment of child support.

In 2005 and again in 2009 Professor Elizabeth Patterson of the University of South Carolina School of Law surveyed county sheriffs and jail administrators in the state to determine the number of child support contemnors confined in the state's jails on civil contempt charges.<sup>38</sup> Responses were received from 31 of the state's 46 counties in 2005 and from 35 counties in 2009. Only three small counties failed to respond to either survey.

In 2005 the sheriffs reported a total jail population of 8,251 in 31 counties, with 1,335 of these being child support contemnors. The figures were similar in 2009: a total jail population of 9,624 in 35 counties, 1,413 being child support contemnors. In both surveys, child support contemnors constituted approximately 15% of the total jail population statewide.

Individual county jails had substantially higher proportions of child support contemnors. In ten counties, child support contemnors made up at least 20%

---

<sup>38</sup> The numbers reported are classified by the jails as "family court detainees," which includes a very small number of contemnors other than child support obligors. Only civil contemnors are included in the category of "family court detainees."

of the jail population. In four, they constituted 25% or more.

**B. Observations of civil contempt hearings involving nonpayment of child support in South Carolina confirm that a large number of indigent obligors are being incarcerated despite their inability to comply with the court order**

Preliminary data from an ongoing study of child support contempt hearings in South Carolina<sup>39</sup> suggest that many of those sentenced to jail for contempt are unable to pay the court-ordered child support, and thus cannot constitutionally be jailed in civil proceedings. Family courts in South Carolina hold contempt hearings on specific days that are set aside for that purpose. Researchers conducting the study observe these hearings and record specified information about the contemnor and the hearing. To date researchers have observed 230 hearings in 11 counties. These counties represent a cross section of the state in regard to geographical region, county population and demographics, and judicial districts. Although data collection and analysis are still in process, the information gathered to date supports the following observations.

Of the 211 obligors who appeared before the court in civil contempt hearings observed by the researchers, 97 persons or 46% were held in contempt. None of these contemnors was represented by counsel.

---

<sup>39</sup> This study, which commenced in June 2010, is being conducted by Professor Elizabeth G. Patterson of the University of South Carolina School of Law.

There is compelling evidence that a large proportion of those held in contempt were indigent. Almost two-thirds of the obligors who were held in contempt stated that they were or had been unemployed. Twenty percent of those held in contempt stated that they had a disability or injury that limited their employability. Others had been in jail—some on a previous civil contempt sentence—or were impaired by addictions.

The conclusion that a large proportion of incarcerated child support contemnors in South Carolina are indigent receives further support from a study of 1,027 contemnors in eight South Carolina counties who were ordered to participate in a fatherhood program in lieu of a jail sentence during the years 2006-2008. The Center for Fathers and Families, which administers the fatherhood program, found that 40% of contemnors ordered into the program had less than a high school education and 78% lived with their mothers.

The average length of hearings that led to a finding of contempt was less than four minutes. Only in four of the eleven counties did any hearing exceed eight minutes.

Despite the factors indicating that obligors held in contempt are likely to be indigent, according to the researchers the South Carolina judges observed tended to be either skeptical or uninterested in assertions of inability to pay. The only evidence taken of such defense was generally a brief assertion by the obligor. Half of the judges observed asked no or few follow-up questions before declaring the obligor in contempt. The researchers indicated that judges who did ask questions appeared to be looking for some minor flaw in the obligor's story that could justify

their rejection of it. When judges made findings related to the obligor's employability, they appeared to the researchers to give no consideration to the job market, but only to the obligor's capacity to work.

In the majority of cases, no attempt was made to determine a reasonable purge amount. In one county the judge set the same purge amount (\$500) for every obligor who was held in contempt. In another, the purge amount in each case was set at the full amount owed.

Occasionally judges indicated an awareness that they were incarcerating persons who were unable to pay. One judge stated to the researcher: "We probably shouldn't be holding these people in contempt. It's supposed to be willful contempt, which means they have the ability to pay. Most people here are probably telling the truth that they can't pay. There's a lot of unemployment down here."

**C. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not burden the effectiveness of the child support enforcement system, the legal profession or state budgets**

**1. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not burden the effectiveness of the child support enforcement system**

There is no reason for believing that provision of an attorney for child support obligors who face impri-

sonment for nonpayment would impair achievement of the important goal of obtaining economic support for children of nonresident parents. Although assistance of counsel would undoubtedly reduce the number of indigent persons imprisoned for civil contempt, imprisonment of these persons is counterproductive to the goals of the program in any event. Civil incarceration can further the goals of the child support enforcement program only if it produces support payments that were otherwise unavailable to the child and his or her custodial parent. If the obligor is unable to pay, this goal cannot be achieved. Instead, imprisonment will have a variety of effects antithetical to program goals. Most fundamentally, few obligors will generate income while incarcerated,<sup>40</sup> and incarceration may have a deleterious effect on their employment prospects upon release. Thus imprisonment will further disable them from paying the required support.<sup>41</sup> While imprisoned, the contemnor is also disabled from providing any other form of support or assistance to the child or the custodial parent, including the social relationship between parent and child with its varied emotional and psychological benefits for the child. Moreover, the prospect of imprisonment causes some indigent parents to “go underground,” subsisting through sources of income that will not reveal the individual to the child support enforcement system. As a result,

---

<sup>40</sup> Some child support contemnors are able to engage in compensated work release while incarcerated.

<sup>41</sup> There are reported cases in which imprisonment caused contemnors to lose jobs from which wage withholding was providing or could have provided some level of support. *E.g.*, *Sevier v. Turner*, 742 F.2d 262, 265-66 (6th Cir. 1984); *Wilson v. Holliday*, 774 A.2d 1123, 1127 (Md. 2001).

the child is deprived of both the social relationship with the parent and whatever economic support might have been obtainable from him or her.

The federal child support enforcement legislation integrates a wide variety of mechanisms to enhance the state's ability to collect child support from nonresident parents and include automated tools for locating parents, administrative tools for expediting establishment of paternity and entry of support orders, and legal tools for withholding wages, seizing financial assets, and coercing compliance through, *e.g.*, revocation of driver's licenses. In laying out this comprehensive system, however, the statute makes no reference to civil contempt.<sup>42</sup> Congress's failure to mention this mechanism supports the contention that civil contempt sanctions play no central role in assuring that children receive economic support from nonresident parents.

To the extent that assistance of counsel prevents incarceration of those unable to pay, therefore, it merely avoids effects counterproductive to the goals of the program.

Moreover, assistance of counsel can have the sanguine effect of promoting the development of a reasonable payment plan for the obligor, a much more effective mechanism for achieving the goals of the program. Indeed, one South Carolina judge

---

<sup>42</sup> See, *e.g.*, 42 U.S.C § 666 (outlining the array of enforcement tools a state must have in place, and providing in subsection 15 for court-ordered payment plans or work activities where obligor is in arrears, but making no mention of contempt or incarceration). See *generally* Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 Fam. L. Q. 519 (1996).

stated to a researcher that he is more likely to “work with” obligors who have attorneys.

**2. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not unduly burden the legal profession or state budgets**

Recognition of a right to counsel for child support obligors facing imprisonment should not be unduly burdensome on the legal profession or on the budgets of states that compensate appointed counsel. A variety of mechanisms can administratively screen obligors who are in arrears to identify those who are candidates for coercive judicial sanctions, thus reducing the number who appear before the court and the number who are considered for incarceration. In at least two South Carolina counties, obligors who are ruled in are first assessed by administrative personnel who attempt to negotiate payment plans or some other consensual resolution of the case. Only those whose cases cannot be resolved administratively and who are deemed appropriate for coercive judicial sanctions are referred for a contempt hearing. Administrative triage of this sort can dramatically reduce the number of cases in which appointed counsel would be necessary.



### III. THERE IS A HIGH RISK OF ERRO- NEOUS INCARCERATION IN CIVIL CONTEMPT PROCEDURES INVOLVING INDIGENT CHILD SUPPORT OBLIGORS WHO ARE UNREPRESENTED BY COUNSEL

Michael Turner was deprived of his liberty pursuant to a civil proceeding in which he was not accorded a right to counsel and the court appeared to make little effort to assure accuracy in the finding of critical facts before depriving him of his liberty. The justification for the absence of procedural protections in civil contempt proceedings is said to rest on the conditional nature of the imprisonment. *See Price v. Turner*, 387 S.C. 142, 691 S.E.2d 470 (2010). Imprisonment for civil contempt is not punitive, but rather is intended to coerce compliance with an order of the court. The contemnor can obtain his release at any time by complying with the court order, and hence is said to “hold the keys to his prison in his own pocket”. *Id.* It is this conditional nature of civil contempt imprisonment that has caused courts to treat it as having less due process significance than criminal imprisonment and to tolerate the use of a minimalist civil process in imposing this sanction. *See International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994).

This justification becomes mere verbiage if the purge condition is one with which the contemnor is unable to comply. *See Shillitani v. United States*, 384 U.S. 364, 371(1966); accord *Hicks v. Feiock*, 485 U.S. 624, 637 n.9 (1988). In such a case the sanction loses its conditional nature and can only be characterized as punitive. *See Bagwell*, 512 U.S. at 831. It is likely that a substantial portion of those threatened with

jail for nonpayment of child support are in fact unable to pay the ordered support.<sup>43</sup> Accurate determination of whether or not they are able to comply is critical to the validity of the coercive incarceration which is the only type of incarceration that can validly be imposed in a civil proceeding. The risk of an erroneous determination on this issue is substantial for the alleged contemnor who is without the assistance of counsel. *See, e.g., Pasqua v. Council*, 892 A.2d 663, 673 (N.J. 2006).

The risk that an unrepresented indigent defendant will be erroneously incarcerated is increased by the potential for abuse by the trial court of its considerable discretion in a civil contempt proceeding. This Court has noted on multiple occasions the high risk of abuse in a proceeding where the judge who was offended against has such broad, discretionary, and virtually unreviewable authority.<sup>44</sup> The emotional component of a contempt proceeding may lead even the most conscientious judge to an abuse of discretion: "Contumacy often strikes at the most vulnerable and human qualities of a judge's temperament and its fusion of legislative, executive, and judicial powers summons forth the prospect of the most tyrannical licentiousness." *Bagwell*, 512 U.S. at 831 (citations

---

<sup>43</sup> Because civil contempt is the "last resort" in child support collection, those facing jail in a contempt proceeding are persons as to whom wage withholding and other enforcement tools have been unavailing. Thus normally only those without accessible resources would end up before the court on a contempt charge.

<sup>44</sup> A deferential "abuse of discretion" standard is used in appellate review of civil contempt cases. *See Patterson, Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J. L. & Pub. Pol. 95, 135-36 (2008).

omitted). That this potential is often realized is evidenced in a number of reported cases.<sup>45</sup>

Michael Turner and many other child support obligors have been deprived of liberty pursuant to civil proceedings in which they were not accorded the vital right to assistance of counsel. These low-income and no-income parents have been confined under the guise of coercing them to pay child support when they lack the means to comply. Available information concerning the conduct of civil contempt proceedings against indigent child support obligors demonstrates that these persons cannot obtain a fair hearing without counsel to insist upon regularity of the proceedings and to assist the obligor in presenting the defense of inability to pay.

### CONCLUSION

The Court should grant the petition for the writ of certiorari.

Respectfully submitted,

JOHN C. MOYLAN, III  
*Counsel of Record*  
ALICE W.W. PARHAM  
WYCHE BURGESS FREEMAN  
& PARHAM, P.A.  
801 Gervais Street, Suite B  
Columbia, SC 29201  
(803) 254-6542  
jmoylan@wyche.com

July 29, 2010

---

<sup>45</sup> *See Id.*

**Blank Page**