JUL 29 2010

No. 10-10

In the Supreme Court of the United States

MICHAEL D. TURNER, *Petitioner*,
v.
REBECCA PRICE AND SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, *Respondent*.

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

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE BRENNAN CENTER FOR JUSTICE, AND THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 11,000 members nationwide – joined by ninety state, local, and international affiliate organizations with another 30,000 members. Its membership, which includes private criminal defense lawyers, public defenders, and law professors, is committed to preserving fairness within America's criminal justice system.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. The parties were notified ten days prior to the filing of this brief of our intention to file and consent to file was obtained.

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center's work is its efforts to close the "justice gap" by strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Brennan Center's Access to Justice Project works to ensure that low-income individuals, families, and communities in this country are able to obtain effective legal representation.

The National Legal Aid and Defender Association ("NLADA") is a nonprofit corporation that seeks to secure equal justice by supporting excellence in the delivery of public defense and civil legal aid services to those who can not afford counsel. NLADA has approximately 700 program members, including nonprofit organizations, government agencies, and law firms, representing 12,000 lawyers. Created in 1911, NLADA is a recognized expert in public defense services and a leader in the development of national public defense standards.

Although NACDL, the Brennan Center, and NLADA (collectively the "amici curiae") all have different missions, all have a significant interest in guaranteeing – and urge this Court to consider – that indigents have a right to counsel in contempt hearings when they face imprisonment.

SUMMARY OF ARGUMENT

Indigent individuals who face imprisonment for nonpayment of child support lack the basic skills necessary to defend themselves against contempt charges. Such defendants face unique obstacles that make it difficult for them to represent themselves in court, such as under-education and lack of literacy skills.

Accordingly, for indigent alleged contemnors, representation by counsel is necessary to adjudicate a contempt hearing fairly and effectively. The burden is placed on alleged contemnors to show that they are unable to meet their child support obligations; however, the inability-to-pay defense is a complex one to present. The assistance of counsel is essential to establish that an indigent defendant's nonpayment was in fact not willful. Without ensuring that a contemnor actually has the ability to pay, the courts risk wrongful imprisonment and the creation of debtors' prisons.

Significant evidence suggests that alleged contemnors frequently have inability-to-pay defenses. In the absence of counsel, it appears that this defense often goes ignored. The imprisonment of these indigent defendants does not result in deterrence of future nonpayment, but does pose serious and harmful consequences to the contemnor, the contemnor's family, and the state.

The contrasting experiences of indigent contemnors who have counsel and those who do not demonstrate the necessity of counsel. For instance,

in North Carolina, where counsel is provided to indigent alleged contemnors facing incarceration, counsel is helpful to both the court and the contemnor, and ensures that only those who willfully have not paid support are sentenced to jail time.

This Court should provide clear guidance to the states through a constitutional rule stating that the appointment of counsel is required whenever a defendant's liberty is at stake, regardless of whether the hearing is technically categorized as "civil." While a substantial number of states provide counsel and thus would not be affected by such a decision, a clear ruling from this Court would bring uniformity to the enforcement of the right to counsel across the country.

In sum, amici curiae urge this Court to grant the petition for a writ of certiorari and reinforce the constitutional mandate that individuals should not face the threat of imprisonment without being provided the assistance of counsel.

ARGUMENT

I. EMPIRICAL EVIDENCE DEMONSTRATES THE NECESSITY OF PROVIDING COUNSEL TO INDIGENT DEFENDANTS IN CONTEMPT HEARINGS IN WHICH THEY FACE POTENTIAL INCARCERATION.

No indigent defendant should be unrepresented when his or her freedom is at stake. In the criminal context, this Court has recognized that indigent defendants facing the potential loss of

liberty need lawyers because of "the obvious truth that the average defendant does not have the professional legal skills to protect himself." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). Thus, "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." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

This Court should recognize what its precedents already implicitly acknowledge: our legal system's commitment to fairness and equal justice requires that indigent defendants have a right to appointed counsel at any contempt hearing at which they face loss of their liberty.

A. Indigent Contemnors Face Unique Obstacles Necessitating the Assistance of Counsel.

Most individuals do not have the skills to represent themselves successfully in a court of law. As this Court recognized long ago, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also Johnson*, 304 U.S. at 462-63 (noting "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself .... That which is simple, orderly and necessary to the lawyer – to the untrained layman – may appear intricate, complex, and mysterious."). Indigent defendants are at an even

greater disadvantage when it comes to understanding the legal system and defending themselves.

1. Alleged contemnors are frequently indigent.

First, contemnors are frequently indigent. According to the federal Office of Child Support Enforcement, 70% of child support debt is owed by non-custodial parents with no quarterly income or with annual earnings of less than $10,000. *See* Office of Child Support Enforcement, Dep't of Health and Human Servs., *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* 4 (July 2004). *See also* Rebecca May & Marguerite Roulet, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, Center for Family Policy & Practice 9 (Jan. 2005) (analyzing data on child support debtors). Only 4% of child support arrears are owed by non-custodial parents with annual incomes of more than $40,000. *Id.*

Indigent non-custodial parents, unfortunately, tend to remain indigent and therefore unable to meet their child support obligations. A primary reason for the continuing state of indigence is lack of employment opportunities. According to one study, low-income non-custodial fathers worked an average of less than thirty hours per week in 1998. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J. L. & Pub. Pol'y 95, 106 (2008).

These fathers earned an average of $4,221 annually. *Id.*

Another study found that in 1999, about half of indigent fathers were working at the time of the survey, while 92% of non-indigent fathers were working. Elaine Sorensen & Helen Oliver, *Policy Reforms are Needed to Increase Child Support from Poor Fathers*, The Urban Institute 6 (Apr. 2002), *available at* http://www.urban.org/UploadedPDF/410477.pdf ("Sorenson & Oliver"). This study also found that in addition to low levels of education, incarceration and lack of recent work experience, poor health conditions were also a significant obstacle to employment. *Id.* at 6-7. Over half of indigent non-resident fathers lacked health insurance. *Id.* at 9. Among the indigent non-custodial fathers who were not employed, half indicated that poor health was the reason for not working. *Id.* at 6-7.

Finding and maintaining employment in the current economy is especially challenging, and the last hired are the first fired. Without meaningful employment, indigent, non-custodial parents face significant challenges to meeting payment obligations.

2. Indigent contemnors lack the basic skills necessary to defend themselves in court.

Second, indigent contemnors are often under-educated and lack the necessary skills to represent themselves in court. Extensive research confirms

that indigent defendants in general tend to be among the least educated and least literate members of society. *See generally*, U.S. Dep't of Educ., *Literacy Behind Bars* 45 (2007), *available at* http://nces.ed.gov/pubs2007/2007473.pdf ("Literacy Report").[2] For example, 63% of the state prison inmates whose personal income in the month before arrest was less than $1000 had failed to graduate from high school. *See* Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Justice, *Education and Correctional Populations* 10 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf.[3]

Indigent parents with child support obligations are similarly disadvantaged relative to the general population. A 2002 study of fathers with child support obligations found that 41% of indigent fathers did not have a high school diploma – double the rate for those whose income was not below the poverty threshold. Furthermore, non-indigent fathers were three times as likely as indigent fathers to have attended school beyond twelfth grade. Sorenson & Oliver at 7; *see also* Patterson, *supra*, at 106.

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[2] The Literacy Report summarizes results from the 2003 National Assessment of Adult Literacy Survey. Literacy Report, *supra,* at iii. The survey examined three types of literacy: prose literacy, document literacy, and quantitative literacy. *Id.* at iv. For each literacy type, the survey grouped respondents into four literacy levels, including below basic, basic, intermediate, and proficient. *Id.*

[3] By contrast, only 18% of the general population has failed to complete high school. Sorenson & Oliver, *supra*, at 1.

Burdened with under-education and illiteracy, indigent defendants suffer from a lack of practical skills and abilities. For such an individual, understanding what a judge is asking and articulating his or her case persuasively is a nearly impossible task. Requiring indigent contemnors to proceed alone poses a serious threat to their right to be heard. Without legal counsel, indigent contemnors facing the threat of imprisonment are bereft of necessary procedural safeguards.

B. Representation by Counsel is Necessary to Effectively Adjudicate a Contempt Proceeding.

When a defendant is haled into court for failure to meet child support obligations, he or she often faces the risk of being found in contempt of a court order and being incarcerated as a result. Indigent defendants facing such incarceration are precisely the type of litigant for whom court-appointed counsel is necessary.

A normal contempt proceeding for failure to pay consists of many intricate steps, all of which present challenges for the layman. Litigants must spot issues, prioritize issues, develop facts and arguments, conform to the rules of evidence, obtain documents and testimony, and challenge the evidence presented by their opponents. All of these steps are difficult enough for trained attorneys to handle, to say nothing of uneducated laymen.

1. The defense of a contempt charge is complex.

To find a non-custodial parent in contempt of the court order setting forth child support obligations, the failure to pay must be willful. *See* S.C. Code Ann. § 63-3-620 (2009) ("An adult who willfully violates, neglects, or refuses to obey or perform a lawful order of the court ... may be proceeded against for contempt of court."); *see also* Patterson, *supra,* at 104-105. For a contempt finding to be appropriately applied, the alleged contemnor must have known about the court order and willfully disobeyed it. These safeguards are in place to prevent the incarceration of those who simply are unable to comply with the court order.

Willfulness, or intentionality, is a critical criterion for a finding of contempt. Without the component of willfulness, contempt charges would fall on all those who failed to meet their child support obligations, whether or not they were in fact able to make those payments. *See, e.g., In re Warner*, 905 A.2d 233, 243 (D.C. 2006) (Schwelb, J., concurring) (warning that unrestrained use of the contempt power in child support cases "present[s] a significant risk that a non-custodial parent will face imprisonment on account of poverty"). Only by ensuring that the failure to pay leading to contempt and imprisonment is something the contemnor could have prevented can we avoid the effective return to debtors' prisons.

The burden is on the alleged contemnor to prove that his or her noncompliance was not willful.

The basic rule, as set forth in state contempt statutes and elucidated by this Court in *United States v. Rylander* is that, after the state demonstrates noncompliance with a payment order, the contemnor may assert an inability to comply with the order in question as a defense, but the contemnor bears the burden of proof. 460 U.S. 752, 757 (1983). Providing sufficient proof to meet this burden can be very difficult for an indigent alleged contemnor trying to represent himself or herself.

Key to this analysis is the question of whether the defendant's inability to pay is caused by some voluntary action on the part of the defendant. *See, e.g., Smith v. Smith*, 427 A.2d 928, 931-32 (D.C. 1981) (in determining whether defendant was able to pay the child support debt owed, the trial court must consider all the circumstances of the case, "including whether the defendant's asserted inability to pay is due to involuntary financial straits or a voluntary decision to reduce his or her income").

Indeed, some courts have placed a heavy burden on non-custodial parents seeking to establish that their inability to pay child support was involuntary. For instance, the New Mexico Supreme Court has ruled that "[t]he duty rests upon appellant to exhaust his every reasonable resource .... It is not enough that he offer mere possible excuses for his failure to meet this obligation; he must offer good and reasonable ones." *Wilson v. Wilson*, 114 P.2d 737, 739 (N.M. 1941) (finding that because an unemployed and physically unfit father was still receiving rents from property, he failed to prove inability to pay his child support obligations). *See*

also Niemyjski v. Niemyjski, 646 P.2d 1240, 1241 (N.M. 1982) (finding sufficient evidence of financial ability to comply with support order where a father had used all of his funds for business and personal living expenses, stating that "it was bad judgment on his part and clearly a willful violation of his obligation .... [h]e ignored *his most important single obligation*, namely the support of his minor child"); *Shippen v. Shippen*, 693 S.E.2d 240, 243-4 (N.C. Ct. App. 2010) (basic finding of present ability to pay is minimally sufficient to defeat inability-to-pay defense; findings that defendant was able to work but voluntarily quit his job and refused to take another were also sufficient to establish willfulness); *Faught v. Faught*, 312 S.E.2d 504, 509 (N.C. Ct. App. 1984) ("[A] failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests himself or herself of assets or income after entry of the support order.").

Present lack of resources is often not sufficient in itself to establish the inability-to-pay defense. The courts frequently place a heavy burden on non-custodial parents to excuse themselves from their "most important single obligation" to provide child support. In the face of this heavy burden, a pro se defendant has little chance of prevailing on an inability-to-pay defense.

2. Significant evidence suggests that alleged contemnors frequently have inability-to-pay defenses.

The indigence and employment levels of alleged contemnors, as discussed above, strongly suggest that many of them are not able to meet their child support obligations. There is also evidence that support payments are frequently set beyond the ability of the non-custodial parent to pay. For example, a Department of Health and Human Services report issued in February 2002 stated that non-custodial parents with earnings below the poverty line were ordered to pay 69% of their reported earnings. *See* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 No. 1 Judges' J. 5, 5 (2004). *See also* Dep't of Health and Human Servs., Child Support for Children on TANF ii (2002), *available at* http://www.oig.hhs.gov/oei/reports/oei-05-99-00392.pdf. Federal law permits payments of only 50% to 65% of income. *See* Pearson, *supra*, at 5.

The inability of a defendant to meet his or her obligation would be the obvious defense to be raised in the context of a contempt proceeding for nonpayment of child support. Nevertheless, in the absence of counsel, it appears that the inability-to-pay defense often goes ignored. Large numbers of indigent contemnors are imprisoned for failure to meet child support obligations every year. There are no compiled statistics on the total number of Americans imprisoned for nonpayment of child support, yet "the limited existing data suggest that the number is substantial." Patterson, *supra* at 117.

For example, in 2003, experts estimated that in New Jersey, 300 persons were imprisoned without being provided counsel.[4] *See* May & Roulet, *supra*, at 29. A study of one county in New Mexico revealed that over a two-year period, 131 civil contemnors went to jail for nonpayment. *See* Michelle Hermann & Shannon Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M. L. Rev. 275, 277 (1984). That was in just one of 33 counties in New Mexico. In Indiana, a child support prosecutor estimated that between 1900 and 2700 individuals were jailed in civil contempt hearings for nonpayment in 2002. *See* May & Roulet, *supra*, at 20 (citing Ind. Child Custody and Support Advisory Comm., Meeting Minutes, Sept. 30, 2002, *available at* http://www.in.gov/legislative/interim/committee/2002/committees/minutes/CCSA59U.pdf). These levels of incarceration, combined with the unemployment and indigence data noted above, strongly suggest that large numbers of non-custodial parents are incarcerated not for willful failure to pay, but simply because they lack the ability to pay their support obligations.

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[4] In 2006, New Jersey changed its practice and now requires counsel to be appointed for indigent civil contemnors facing possible imprisonment. *See Pasqua v. Council*, 892 A.2d 663, 666 (N.J. 2006) (holding that indigent contemnors were entitled to appointed counsel).

3. Wrongfully incarcerating non-custodial parents who simply cannot pay does not serve the goals of contempt and visits serious and harmful consequences on the contemnor, his family, and the state.

Serious problems arise when indigent parents are wrongfully jailed for nonpayment of child support. The coercive imprisonment of indigent contemnors without evidence of willful nonpayment is counterproductive to the goals of child support enforcement – it is neither a just punishment nor is it an effective deterrent.

Sentencing indigent contemnors to imprisonment when they are simply unable to pay does not serve any coherent policy. Indeed, it can worsen the payment situation. It neither provides contemnors the means to fulfill their obligations, nor is it a deterrent for future nonpayment.

The New Jersey Supreme Court recently examined the case of three indigent contemnors who were sentenced to jail time. *Pasqua v. Council*, 892 A.2d 663, 666 (N.J. 2006) (holding that indigent contemnors were entitled to appointed counsel). The court observed at the outset that the three indigent contemnors in the case had not been helped at all by spending time in jail. *Id.* Anne Pasqua spent fifteen days in jail, was released without making any payment, and as of January 2003 still owed nearly $13,000. *Id.* Ray Tolbert spent seventy-one days in jail, was released without making a payment, and as of January 2003 still owed nearly $135,000 in child

support. *Id.* Michael Anthony spent twenty-four days in jail and was released after paying merely $125 towards his obligation of nearly $50,000. *Id.* at 667. As of January 2003, he remained unable to make his weekly $145 payments. *Id.* As these examples make clear, indigent contemnors often are imprisoned although they do not have the ability to pay because they have been unable to prove that defense without the assistance of counsel.

The improper imprisonment of an indigent contemnor also has serious effects on the contemnor's children, self, and family relationships. *See generally* Patterson, *supra*, at 126. The contemnor is often unable to generate income while in prison, thus preventing him or her from making any payments. *See, e.g.*, *Peterson v. Roden*, 949 So. 2d 948, 950 (Ala. Civ. App. 2006) (noting that although work release programs are available, contemnors' participation may be ended for rule violations). The contemnor is also unable to provide any other sort of support or assistance to his or her children and often loses his or her job as a result of the imprisonment. *See, e.g.*, *Sevier v. Turner*, 742 F.2d 262, 265-66 (6th Cir. 1984); *Wilson v. Holliday*, 774 A.2d 1123, 1127 (Md. 2001).

When faced with the prospect of imprisonment, many parents "go underground" in an attempt to hide their income from child support enforcement agencies. Patterson, *supra*, at 126. Turning to the underground economy often worsens payment prospects by leading to criminal activity, exploitation by employers, and less stability and growth in future earnings. *See* Ann Cammett,

Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents, 13 Geo. J. Poverty L. & Pol'y 313, 327 (2006).

Most critically of all, the specter of imprisonment can damage the relationship between the indigent parent and his or her child. Imprisonment or "going underground" may sever the parent-child relationship and result in the lack of emotional and psychological benefits that children gain from their parental relationships. *See, e.g.*, Jeffrey Rosenberg & W. Bradford Wilcox, U.S. Dep't of Health & Human Servs., *The Importance of Fathers in the Healthy Development of Children* 11-13 (2006), *available at* http://www.childwelfare.gov/pubs/usermanuals/fatherhood/fatherhood.pdf.

This sad state of affairs also imposes a substantial burden on the states. For example, imprisoning three thousand individuals costs the state of Indiana approximately $186,000 *per day*. *See* State Prison Expenditures, Bureau of Justice Statistics, Dep't of Justice, 1 (2001), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf. If the costs of imprisonment increase at the same rate as between 1986 and 2001, then in 2016 it will cost Indiana almost $280,000 per day to incarcerate these individuals.

In sum, the consequences of the wrongful imprisonment of indigent contemnors extend far beyond the prison term of the contemnor. The family, the children, and society all pay a price.

4. Evidence demonstrates that the presence of counsel helps to ensure that only appropriately willful contemnors are deprived of their liberty and sentenced to jail.

The experience in jurisdictions that provide counsel to alleged contemnors facing incarceration demonstrates that counsel is helpful to both the court and the contemnor, and ensures that only those who willfully have not paid support are sentenced to jail time. In North Carolina,[5] for example, alleged contemnors are represented through the Office of Indigent Defense Services, which has a Department of Parental Representation.[6] The office coordinates the provision of representation across the state, although the mechanisms through which counsel are provided and the contempt processes in each county differ. Training is offered to lawyers across the state on how to handle cases of alleged contempt, which addresses the law regarding willfulness and how to gather evidence of appropriate efforts to obtain or retain employment. The attorneys who represent alleged contemnors also have an active email list where they can ask each other questions and share helpful precedent.

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[5] In North Carolina, the right to counsel for contemnors facing incarceration was developed through case law. *See McBride v. McBride*, 431 S.E.2d 14 (N.C. 1993).

[6] The Department's web address is http://www.ncids.org/ChildSupport/ChildSupportHome.htm.

In Durham County, North Carolina, a contempt case for failure to pay begins with the issuance of an order to show cause why the individual should not be held in contempt, which must be supported by an affidavit setting forth a factual basis for the assertion that the failure to pay is willful. Counsel is assigned to indigent defendants at the first appearance after the issuance of an order to show cause. A pretrial conference is then scheduled for two to four weeks thereafter, giving counsel time to meet with the alleged contemnor and evaluate the case.

According to one Durham County public defender who represents alleged contemnors, the attorneys meet with their clients before the pretrial hearing to review work history, disability status, previous incarcerations, history of child support orders, pay history and ability to pay. She noted that the primary service an attorney provides in these cases is to help the client gather the relevant documentation and appropriate evidence, which generally concerns whether the failure to pay is willful. For example, she noted that she asks clients to document their job search by going back to places where they have applied, obtaining copies of their applications, and following-up on their prospects. At the pretrial hearing, the attorneys often raise the issue of willfulness. They also raise procedural issues, including the existence of multiple or conflicting orders for support and any problems with the affidavit in support of the order to show cause.

Most cases are resolved at the pretrial hearing stage. If a case does proceed to an adversarial

hearing on the order to show cause, the hearing generally takes 10-20 minutes. Typically, the alleged contemnor will testify about his or her living situation, work history, job search, if applicable, and the explanations for unpaid support. Occasionally, where relevant, a case manager, probation officer or community support officer are called upon to testify. The opposing party does not generally offer evidence beyond the history of non-payment.

The public defender noted that, in this system, a very small percentage of alleged contemnors are incarcerated. A larger percentage of alleged contemnors are held in contempt, but the system is fairly effective at collecting arrearages from those who can pay. The system is also fairly effective at determining when the alleged contemnor's failure to pay was not willful and making appropriate adjustments to avoid unwarranted incarcerations.

In other counties, the process works differently, but the outcome appears to be similar. For example, a number of more rural North Carolina counties with fewer alleged contempt cases use a lawyer-for-the-day system. A number of orders to show cause are set for the same day. At the start of the proceeding, a general announcement is made about the alleged contemnors' right to counsel if they cannot afford to hire an attorney. The alleged contemnors are then given the option of requesting counsel or waiving their right to counsel. Those that exercise their right to counsel are assigned to a lawyer who is present and a recess is granted to permit the lawyer to speak the client and ascertain, initially, the issues in the particular case. Where

necessary, a hearing can be rescheduled to allow the attorney to gather more evidence.

Regardless of the type of system, there was considerable agreement that the presence of defense attorneys increases the efficiency of the system, by ensuring that only those issues relevant to failure to pay are raised during the contempt proceedings. A number of attorneys who represent alleged contemnors noted that their clients frequently want to focus on some other issue in the underlying case, such as the custody arrangement or what the other spouse did wrong. Without attorney assistance such clients would appear before the court with the intention of trying to change the issue in the contempt hearing. They likely would be unprepared to even address the issue of the willfulness of the failure to pay. By explaining the narrowness of the proceedings to their clients and focusing solely on the issues and evidence related to failure to pay and willfulness, the presence of defense attorneys streamlines the process, in addition to improving the accuracy of its outcomes.

When the process fails, the presence of counsel also ensures that the client knows about and can avail himself or herself of the right to appeal. The Office of Indigent Defense Services in North Carolina, for example, has a process for appointing attorneys to represent individuals who wish to appeal contempt orders. According to an attorney in that office, most often appeals are based on due process rights and the failure of the trial court to address evidence of whether the failure to pay was willful.

The North Carolina example demonstrates that the presence of attorneys increases efficiency and accuracy.

II. THIS COURT SHOULD PROVIDE CLEAR GUIDANCE TO THE STATES THAT THE CONSTITUTION REQUIRES THE APPOINTMENT OF COUNSEL WHENEVER PERSONAL LIBERTY IS THREATENED.

A substantial number of federal and state courts have ruled in favor of a right to counsel for indigent defendants in contempt proceedings where incarceration is a potential outcome.[7] But even in states where the law requires that counsel be provided to alleged contemnors facing incarceration, at times the mandate is not uniformly enforced.

For example, the Pennsylvania Supreme Court has ruled that there is a presumption that an indigent defendant is entitled to counsel in any proceeding where "he may be deprived of his physical liberty." *Commonwealth v. $9,847.00 U.S. Currency*, 704 A.2d 612, 615 (Pa. 1997) (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 26 (1981)). Likewise, the Pennsylvania Superior Court has explicitly recognized that an indigent contemnor facing imprisonment for nonpayment is entitled to the assistance of counsel. *See Commonwealth ex rel.*

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[7] We do not review these precedents here as they are covered in detail by the Petition for Writ of Certiorari. Pet. 12-19.

Brown v. Hendrick, 283 A.2d 722, 723-24 (Pa. Super. Ct. 1971).

Yet some indigent contemnors in Pennsylvania are not being provided with counsel when they face imprisonment for nonpayment. For example, in Berks County, eighteen individuals were denied access to counsel and were forced to petition the Pennsylvania Supreme Court for relief. *See* Application for Extraordinary Relief Under Pa. R.A.P. § 3309 and King's Bench Powers, *Cepeda v. Court of Common Pleas for the County of Berks*, No. 128 MM 2009 (Pa. 2010). The Pennsylvania Supreme Court recently denied the petition after the county agreed to provide counsel to all "present and future indigent litigants facing incarceration for nonpayment." *Cepeda v. Court of Common Pleas for the County of Berks*, No. 128 MM 2009 (Pa. 2010) (order denying relief). But lawyers for the petitioners noted that other counties in Pennsylvania fail to appoint counsel for such litigants and expressed concern that such practices may indeed be widespread. *See id.* at 2. Thus, even for those states that appear to provide counsel for indigent contemnors, the system sometimes fails.[8]

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[8] Over the years, despite the existence of clear precedent, this issue has come up in a number of Pennsylvania counties. While efforts to address it at the county level are sometimes successful, the litigation has not successfully addressed the recurrence of the issue in other locales. *See ACLU Applauds Pennsylvania Court Decision to Appoint Lawyers for Poor People Facing Prison*, June 9, 2004, *available at* http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/aclu-applauds-Pennsylvania-court-d

A ruling from this Court adopting a constitutional requirement that indigent defendants facing incarceration for contempt receive appointed counsel would not impose a heavy burden on the states. As demonstrated by the Petitioner, many states already have statutory or court-made rules that provide counsel to indigent contemnors facing imprisonment. Pet. 16-18. These states will be unaffected by a constitutional ruling from this Court. Such a ruling would result in changes only in the small minority of states that have rejected the right to counsel in this context or that have failed to enforce the right uniformly.

Even those states with the minority view would not be unduly burdened by a new constitutional rule, as they would have several options as to how to approach such a ruling from this Court. Most obviously, they could simply provide counsel as they do to criminal defendants. However, another option would be to take imprisonment off the table. If a court is not interested in imprisoning the contemnor, then counsel would not be required.

(*Cont'd*)
(describing the ACLU's success in getting one Pennsylvania county to change policy and provide lawyers in child support hearings, but noting that other counties still do not provide lawyers); Larry Lewis, *Montco Revises Policy at Prison*, Philadelphia Inquirer, Dec. 12, 2003 (same). Pennsylvania is not alone in this respect. There are narrative accounts of similar practices in other states where the precedents state the appointment of counsel is required. It is for this reason that a pronouncement by the United States Supreme Court on the constitutionally required process is necessary.

See Pasqua, 892 A.2d at 678 (noting that if counsel is not provided, then "incarceration may not be used as an option"). Different states can experiment differently, yet no individual will be sent to prison without the assistance of counsel.

While many states provide counsel and would not be affected, a clear ruling from this Court would help make uniform the enforcement of the right to counsel across the country. Wherever personal liberty is at stake, indigent defendants deserve court-appointed counsel, regardless of whether the hearing is technically categorized as "civil" or "criminal."

This Court has an obligation to ensure that the process by which these alleged contemnors are jailed complies with constitutional norms. Amici curiae respectfully request that the Court address this grave problem by implementing a constitutional rule to ensure that all indigent contemnors, in all states, are afforded the right to counsel in the face of potential incarceration. Such a solution would protect the rights of many of the most vulnerable without imposing an overwhelming burden on the states.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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JULY 2010