No. 10- 10-10

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

PETITION FOR A WRIT OF CERTIORARI

DEREK J. ENDERLIN
ROSS & ENDERLIN, P.A.
330 East Coffee Street
Greenville, SC 29601

KATHRINE HAGGARD HUDGINS
SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
1330 Lady Street, Ste. 401
Columbia, SC 29201

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
CATHERINE M.A. CARROLL
SHIVAPRASAD NAGARAJ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Blank Page

QUESTION PRESENTED

Whether the Supreme Court of South Carolina erred in holding—in conflict with twenty-two federal courts of appeals and state courts of last resort—that an indigent defendant has no constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration.

PARTIES TO THE PROCEEDING

The petitioner is Michael D. Turner, the defendant and appellant in the courts below. Rebecca Price, the plaintiff and respondent in the courts below, is a respondent.

This petition draws into question the constitutionality of South Carolina's practice of denying the right to appointed counsel to indigent defendants at civil contempt proceedings that may result in the defendant's incarceration. In the child-support enforcement proceedings in the South Carolina Family Court, the South Carolina Department of Social Services ("DSS") was identified as the plaintiff on some orders and filings. Petitioner served a copy of his notice of appeal on the Attorney General of South Carolina, but the State declined to appear in the appellate court. As of May 2009, the minor child whose support was at issue below had been removed from the custody of respondent Price, and the family court ordered petitioner's child-support payments to be remitted to DSS through the clerk of the family court. For these reasons, petitioner has identified DSS as a respondent and served a copy of this petition on the Attorney General of South Carolina and the General Counsel of DSS. *Cf.* 28 U.S.C. § 2403(b); S. Ct. R. 29.4(c).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

RULES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael D. Turner respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 691 S.E.2d 470 (S.C. 2010). App. 1a-5a. The order of the South Carolina Family Court is unreported. App. 6a-9a.

JURISDICTION

The Supreme Court of South Carolina entered its judgment on March 29, 2010. This Court has jurisdic-

tion pursuant to 28 U.S.C. § 1257(a). Consistent with this Court's Rule 29.4(c), a copy of this petition has been served on the Attorney General of South Carolina. *See supra* p. ii.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT

This Court has held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense ... unless he was represented by counsel at his trial." *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). The Court has likewise interpreted the Due Process Clause to require that in proceedings that may result in incarceration, "the [defendant] has a right to appointed counsel even though those proceedings may be styled 'civil' and not 'criminal.'" *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 25 (1981). In this case, petitioner Michael Turner, who is indigent, was incarcerated for twelve months after a family court judge found him in civil contempt of an order to pay child support for respondent Rebecca Price's minor child. Turner

had no lawyer at the contempt hearing, and the family court never advised him of his right to counsel.

On appeal, Turner challenged his incarceration under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Turner argued that, as an indigent defendant, he had a constitutional right to appointed counsel in civil contempt proceedings that result in incarceration. The Supreme Court of South Carolina rejected that argument on the ground that the right to counsel applies only in criminal contempt proceedings. That holding is in direct conflict with the decisions of twenty-two federal courts of appeals and state courts of last resort. Moreover, it is irreconcilable with this Court's holding in *Lassiter* that the Constitution requires appointment of counsel in any proceeding that may result in the defendant's incarceration, regardless whether the proceeding is civil or criminal.

For indigent noncustodial parents, the practical consequences of the decision below are as unjust as its reasoning is baseless. Turner's case is illustrative. Because Price received public assistance, Turner was required to pay his support payments through the family court, and the child-support enforcement proceedings against him were therefore subject to certain automated procedures: Each time Turner's support account fell into arrears, the clerk of the family court automatically issued a rule to show cause why Turner should not be held in contempt of court. Notwithstanding his indigence, Turner has thus been repeatedly incarcerated for contempt without the assistance of counsel. These "civil" sanctions have become for Turner—and countless indigent parents like him who lack the financial ability to secure their release—a form of modern-day debtors' prison.

Indigent noncustodial parents are routinely incarcerated in similar circumstances in South Carolina and other States that do not recognize a right to counsel in civil contempt proceedings. These parents have no meaningful prospect of release because their indigence prevents them from paying the ordered support or hiring a lawyer to help defend against the contempt charges. The Court should grant certiorari to ensure that defendants in these circumstances are not incarcerated without the aid of counsel, and to resolve the conflict over the scope of the right to counsel in civil contempt proceedings.

1. *Legal Background.* This case arises out of efforts by Price and the South Carolina Department of Social Services ("DSS") to collect child-support payments from Turner for the support of Price's daughter. Child-support cases involving a child or custodial parent who receives public assistance are governed by a mix of state and federal requirements. At the federal level, Part D of Title IV of the Social Security Act, as amended, requires States that receive federal family assistance grants to establish child-support enforcement procedures that meet federal standards for locating noncustodial parents, establishing paternity, and collecting support payments. *See generally* 42 U.S.C. §§ 652, 654, 666. In particular, States must require, as a condition for receipt of federally funded public assistance, that custodial parents cooperate in identifying noncustodial parents and assign their support rights to the State, to be enforced until the support payments paid exceed the public assistance received. *See id.* §§ 608(a)(2), (3), 656(a), 657(a)(1), (2).

In South Carolina, child-support orders are enforced through contempt proceedings in the family court. Under South Carolina law, "[a]n adult who wil-

fully violates, neglects, or refuses to obey or perform a lawful order of the court," including an order to pay child support, "may be proceeded against for contempt of court." S.C. Code Ann. § 63-3-620; *see also id.* § 63-17-750(b).[1] Rule 24 of the South Carolina Rules of Family Court provides that in all cases in which support payments are made through the court—which includes all so-called "IV-D" cases subject to Part D of Title IV of the Social Security Act—the clerk of the court must review all child-support accounts monthly. Whenever the clerk finds that an account has fallen more than five days in arrears, Rule 24 requires the clerk *sua sponte* to issue an affidavit and rule to show cause why the child-support obligor should not be held in contempt of court.

Pursuant to the rule to show cause, the defendant is required to appear at a contempt hearing in family court, and the clerk's affidavit becomes the basis for establishing the defendant's noncompliance with the underlying child-support order. The affidavit "must identify the court order which the respondent has allegedly violated," and "the specific acts or omissions which constitute noncompliance." *Brasington* v. *Shannon*, 341 S.E.2d 130, 131 (S.C. 1986).

---

[1] The contempt statute does not differentiate between civil and criminal contempt. *See* S.C. Code Ann. § 63-3-620. An adult found in contempt of court "may be punished by a fine, a public work sentence, or by imprisonment in a local correctional facility, or any combination of them, in the discretion of the court, but not to exceed imprisonment in a local correctional facility for one year, a fine of fifteen hundred dollars, or public work sentence of more than three hundred hours, or any combination of them." *Id.*

Because South Carolina law defines contempt as the "wilful[] violat[ion]" of a court order, S.C. Code Ann. § 63-3-620, contempt may be found only where the defendant acts "'voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" *Spartanburg County Dep't of Soc. Servs.* v. *Padgett*, 370 S.E.2d 872, 874 (S.C. 1988). Where a defendant is unable to obey a court order without fault on his part, he is not to be held in contempt. In the child-support context, this means that a noncustodial parent who lacks the resources to make court-ordered child-support payments cannot be held in contempt. *Moseley* v. *Mosier*, 306 S.E.2d 624, 626 (S.C. 1983); *Hicks* v. *Hicks*, 312 S.E.2d 598, 599 (S.C. Ct. App. 1984). The defendant, however, bears the burden of proving that defense: Once the moving party has established a prima facie case of willful contempt by showing the existence of a court order and the defendant's noncompliance, the burden shifts to the defendant to establish his inability to comply with the underlying order. *See, e.g.*, *Brasington*, 341 S.E.2d at 131; *Widman* v. *Widman*, 557 S.E.2d 693, 705 (S.C. Ct. App. 2001).

The South Carolina contempt statute and family court rules are silent as to whether defendants have a right to counsel (appointed or otherwise) at contempt hearings.

2. *Factual Background.* Respondent Rebecca Price's daughter B.L.P. was born in 1996. Price received public assistance for a time, and she accordingly assigned her right to collect child support to the State,

as required by law.[2] In 2003, the South Carolina Department of Social Services ("DSS"), with Price's cooperation, established that petitioner Michael Turner was B.L.P.'s father and moved for a determination of financial responsibility in the Oconee County Family Court. On June 18, 2003, the court entered an Order of Financial Responsibility requiring Turner to make child-support payments of $51.73 per week. App. 19a, 22a. The court made Turner's support obligation retroactive to the date Price initiated the child-support proceedings. Consequently, from the day the court issued the child-support order, Turner was already in arrears on his payments by more than $200. App. 21a. The order recorded Turner's employment status at the time as "unemployed," but imputed to him a gross monthly income of $1,386 per month. App. 20a-21a.[3]

---

[2] *See* 42 U.S.C. § 608(a)(3); S.C. Code Ann. § 43-5-65(a). Documents in the family-court record thus bear the designation "IV-D," to reflect that the child-support enforcement proceedings are governed by Part D of Title IV of the Social Security Act and corresponding provisions of South Carolina law. On certain orders and filings in the family court, Price is identified as the plaintiff; on others, DSS is identified as the plaintiff. Initially, the clerk forwarded any payments Turner made to DSS. In March 2004, the clerk began remitting Turner's payments directly to Price, whose public-assistance benefits had terminated. The support order, however, continued to be administered as a IV-D case. By May 2009, B.L.P. had been placed in the custody of her maternal grandmother, Judy Price, and the court approved DSS's request that the clerk change the payee to Judy Price and forward any support payments to DSS.

[3] The imputed income was calculated according to a standardized formula set by DSS. App. 25a. This figure was reduced to $1,084 per month to reflect that Turner had two other minor children with Jennie Turner, whom Turner had married in 1999. *Id.*

Over the next few years, Turner struggled to maintain employment and failed to keep up with his child-support payments. Turner's arrearages—and with them, his weekly payment obligation—mounted. Pursuant to the automatic procedures required by Rule 24, the clerk of the family court issued at least four rules to show cause why Turner should not be held in contempt, with the first rule issuing just two months after the court entered the original support order. Turner was found in contempt of court on each occasion. On at least three of those occasions, Turner was jailed following the contempt hearing for terms of varying duration, with the prospect of early release if he paid his arrearage in full.[4] During each stint in jail, Turner's unpaid support obligations continued to accumulate. And each time Turner was released from jail, the clerk soon issued another rule to show cause, and the contempt cycle would begin again. Turner was not represented by counsel during any of these contempt proceedings.

3. *Proceedings Below.* In March 2006, less than two months after Turner's release from a prior contempt sentence, the court clerk issued another rule to show cause why Turner should not be held in contempt. At a hearing in April 2006, the court found that Turner owed more than $1,000 in child support and ordered wage withholding. Turner's account remained in arrears, however, and the court issued a bench warrant

[4] In some instances, Turner was released from jail after payments were made on his behalf. The record does not indicate who made those payments. According to family-court records, Turner occasionally found short-lived employment with various construction or auto repair companies, and the court was sometimes able to collect child support from those employers through automated wage withholding.

for his arrest. Turner was arrested in December 2007 and booked into the Oconee County jail.

On January 3, 2008, Turner appeared in family court for the contempt hearing. By this time, the court found, Turner was behind on his child support by $5,728.76. App. 6a. At the brief hearing, Turner attempted to explain that he had been unable to pay due to a combination of substance abuse problems and physical disability:

> Well, when I first got out [of jail], I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me.

App. 17a.[5]

Without making any findings of fact as to whether Turner was able to pay the $5,728.76 in arrears, the

---

[5] Turner had applied for Supplemental Security Income ("SSI") and disability insurance benefits in August 2007. In his application, Turner stated that he lived at the time with his wife and their three children and that B.L.P. was also his child; that he received no income other than Social Security and had no assets other than a vehicle valued at $1,500; and that his wife earned approximately $500 per month in unemployment compensation and owned no assets.

court sentenced Turner to a term of incarceration not to exceed twelve months. App. 6a-9a. The court's order provided that Turner could purge himself of the contempt and be released if he paid the balance on his account in full. App. 7a. The court also placed a lien on any Social Security disability or other benefits Turner might receive. *Id.* Turner was then committed to the Oconee County jail, where he remained incarcerated for the full twelve months. Turner was not represented by counsel at the hearing, and the court did not advise Turner that he had a right to counsel.

Represented by volunteer *pro bono* counsel, Turner filed a notice of appeal of the family court's order. The court of appeals waived Turner's filing fee. Turner argued on appeal that he had a right under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to have the assistance of counsel before the State could incarcerate him. App. 10a-15a. The Supreme Court of South Carolina rejected that argument and affirmed the family court's judgment.[6]

The state supreme court held that the constitutional right to counsel applies only in criminal contempt proceedings. App. 2a-4a. "[Imprisonment for] criminal

---

[6] Turner filed his appellate brief in the South Carolina Court of Appeals. Acting on its own initiative pursuant to South Carolina Appellate Court Rule 204(b), the Supreme Court of South Carolina certified Turner's appeal to itself before the intermediate appellate court could act. App. 1a. Although Turner's counsel had served the notice of appeal on both Price as respondent and the Attorney General of South Carolina as a necessary party, neither Price nor the Attorney General filed a brief on appeal. The state supreme court decided the case without their participation and without oral argument.

contempt triggers additional constitutional safeguards [including the right to counsel] not mandated in civil contempt proceedings," the court reasoned, because incarceration in criminal cases is "unconditional." App. 3a. In contrast, the court held, "[a] contemnor imprisoned for civil contempt is said to hold the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time," and therefore has no right to counsel. *Id.*

The state supreme court acknowledged that the majority of courts to have considered the issue have held that indigent defendants in civil contempt proceedings resulting in incarceration do have a constitutional right to appointed counsel. App. 3a n.2. It further recognized that "in holding [that] a civil contemnor is not entitled to appointment of counsel before being incarcerated we are adopting the minority position." *Id.*

REASONS FOR GRANTING THE PETITION

The Supreme Court of South Carolina's decision conflicts with the decisions of twenty-two federal courts of appeals and state courts of last resort. In contrast with the decision below, those courts have expressly rejected the view that when an individual faces incarceration, his right to counsel turns on whether the proceeding in question is "civil" or "criminal." The decision below also cannot be reconciled with this Court's right-to-counsel precedent, which recognizes a general rule that the Constitution requires appointment of counsel in *any* proceeding—civil or criminal—that results in incarceration.

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THE FEDERAL AND STATE COURTS

As the Supreme Court of South Carolina acknowledged, the decision below conflicts with the decisions of several federal courts of appeals and state courts of last resort. App. 3a n.2 (noting disagreement with four federal courts of appeals and eleven state supreme courts). In fact, the state supreme court understated the severity of the split: Seven federal circuit courts and fifteen state courts of last resort have held that indigent defendants in civil contempt proceedings have a right to appointed counsel if they face incarceration. Only a handful of state courts have ruled otherwise.

A. The Decision Below Conflicts With The Decisions Of Seven Federal Courts Of Appeals

The state supreme court's decision is squarely at odds with decisions from the U.S. Courts of Appeals for the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits. Each of those courts has held that an indigent defendant facing the prospect of incarceration in a civil contempt proceeding has a right to appointed counsel.

The leading federal decision is *Ridgway* v. *Baker*, 720 F.2d 1409 (5th Cir. 1983), which was factually similar to Turner's case. In *Ridgway*, an indigent defendant had been incarcerated for failing to pay child support without the assistance of counsel at his contempt hearing. The Fifth Circuit, relying on *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), granted habeas relief on the ground that the right to counsel "extends to every case in which the litigant may be deprived of his personal liberty if he loses," regardless whether the proceeding is civil or criminal. 720 F.2d at 1413.

The Sixth and Tenth Circuits, relying on *Lassiter*, have similarly concluded that indigent civil contemnors are entitled to counsel before they may be incarcerated. *See Sevier* v. *Turner*, 742 F.2d 262, 267 (6th Cir. 1984) ("Since [the defendant] was incarcerated for sixteen days as a result of the civil contempt hearing, he was entitled to have the assistance of counsel during that proceeding."); *Walker* v. *McLain*, 768 F.2d 1181, 1185 (10th Cir. 1985) ("an indigent defendant threatened with incarceration for civil contempt ... [must] be appointed counsel to assist him in his defense"). Like the Fifth Circuit, these courts stressed that there is no meaningful distinction between civil and criminal contempt proceedings when the outcome is incarceration:

> As indicated by the Supreme Court in *Lassiter*, the relevant question in determining if a defendant is entitled to counsel during [a civil] contempt proceeding is not whether the proceeding be denominated civil or criminal, but rather is whether the court in fact elects to incarcerate the defendant.

Sevier, 742 F.2d at 267; *see also Walker*, 768 F.2d at 1183 ("It would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used.").

Indeed, even before *Lassiter*, all the federal circuit courts that addressed the issue agreed that the right to counsel applies in civil contempt proceedings that could lead to incarceration. *See In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973); *United States* v. *Anderson*, 553 F.2d 1154,

1155-1156 (8th Cir. 1977); *In re Grand Jury Proceedings*, 468 F.2d 1368, 1369 (9th Cir. 1972).[7]

In these cases, the federal courts laid down three sensible markers—each of which the Supreme Court of South Carolina brushed aside or ignored. First, they understood that, for purposes of the right to counsel, there is no meaningful distinction between civil and criminal proceedings when the outcome is incarceration. "The right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or 'civil.'" *Ridgway*, 720 F.2d at 1413; *see also Anderson*, 553 F.2d at 1156 ("Deprivation of liberty has the same effect on the confined person regardless of whether the proceeding is civil or criminal in nature."); *Walker*, 768 F.2d at 1183. By contrast, the Supreme Court of South Carolina elevated form over substance, concluding that the civil label, rather than Turner's incarceration, determined the boundaries of the right to counsel. App. 2a-3a.

---

[7] Other circuits have acknowledged the issue in dicta. *See Wilson* v. *New Hampshire*, 18 F.3d 40, 41 (1st Cir. 1994) (per curiam) ("[w]hatever may be the rule in other contexts," no absolute right to counsel exists "where no order of incarceration has resulted"); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 939 F.2d 57, 68-69 (3d Cir. 1991) (finding Sixth Amendment right to counsel "inapposite" in civil contempt proceeding, but not addressing Due Process Clause); *Mann* v. *Hendrian*, 871 F.2d 51, 52 (7th Cir. 1989) (finding right to counsel in criminal contempt proceeding and noting other courts' holdings that the right applies also in civil contempt proceedings that actually "eventuate[] in imprisonment"); *United States* v. *McAnlis*, 721 F.2d 334, 337 (11th Cir. 1983) ("not disput[ing]" that a right to counsel exists at civil contempt proceedings where imprisonment is a possibility, but finding waiver of that right).

Second, the federal courts rejected the fiction that an indigent civil contemnor "holds the keys to his cell" because he may purge his contempt and gain release from jail by complying with the underlying court order. These courts recognized that although the defendant may end his sentence, his indigence will prevent him from doing so in fact. As the Tenth Circuit noted, "[i]f [the defendant] is truly indigent, his liberty interest is no more conditional than if he were serving a criminal sentence; he does not have the keys to the prison door if he cannot afford the price." *Walker*, 768 F.2d at 1184; *see also Ridgway*, 720 F.2d at 1413-1414. The Supreme Court of South Carolina, in contrast, believed that Turner needed no lawyer because he could "avoid [his] sentence altogether by complying with the court's previous support order," and thus was "not subject to a permanent or unconditional loss of liberty." App. 4a-5a.

Third, and most fundamentally, the federal courts have acknowledged that the assistance of counsel is indispensable to a civil contemnor facing incarceration. As the Fifth Circuit has explained, without the assistance of counsel, an indigent contempt defendant is at risk of "indefinite" confinement if the trial court erroneously determines that he "has the means to comply with the court's order." *Ridgway*, 720 F.2d at 1414. Because the burden is on the defendant to show his inability to comply, the absence of counsel heightens the risk of an erroneous judgment. "The indigent who appears without a lawyer can be charged neither with knowledge that he has such a burden nor with an understanding of how to satisfy it." *Id.* at 1415. Accordingly, "a civil contempt proceeding may pose an even greater threat to liberty than a proceeding labeled 'criminal,' with a correspondingly greater need for counsel." *Id.* at 1414.

B. The Decision Below Conflicts With A Substantial Number Of State Court Decisions

The decision below also conflicts with decisions from fifteen state courts of last resort that have held that indigent defendants in civil contempt proceedings have a right to appointed counsel if they are at risk of incarceration. Just four other States—Florida, Georgia, Maine, and Ohio—are in the same camp as South Carolina. Courts in three other States—Nevada, New Hampshire, and New Mexico—have adopted a third approach, requiring trial courts to determine on a case-by-case basis whether appointment of counsel is warranted.

1. Unlike the court below, fifteen state courts of last resort have concluded that an indigent person must be advised of his right to appointed counsel at a civil contempt proceeding that could lead to incarceration.[8] *Otton* v. *Zaborac*, 525 P.2d 537, 538-539 (Alaska 1974); *People* v. *Lucero*, 584 P.2d 1208, 1214 (Colo. 1978); *Black* v. *Division of Child Support Enforcement*, 686 A.2d 164, 168 (Del. 1996); *Sanders* v. *Shephard*, 645

---

[8] The Supreme Court of South Carolina incorrectly included Alabama, Kentucky, and Minnesota in this group. App. 4a n.2 (citing *Ex parte Parcus*, 615 So. 2d 78 (Ala. 1993); *May* v. *Coleman*, 945 S.W.2d 426 (Ky. 1997); and *Cox* v. *Slama*, 355 N.W.2d 401 (Minn. 1984)). Only the dissent in *Parcus* would have found a right to counsel. 615 So. 2d at 84 (Maddox, J., dissenting from order quashing writ as improvidently granted). Although *May* did recognize a right to counsel, it relied on *Lewis* v. *Lewis*, 875 S.W.2d 862 (Ky. 1993), which identified the right as arising under state statutory law, *id.* at 864; *see May*, 945 S.W.2d at 427. Similarly, although *Cox* also found a right to counsel, it relied on the court's supervisory powers rather than on the U.S. Constitution. 355 N.W.2d at 403.

N.E.2d 900, 906 (Ill. 1994) (approving *Sanders* v. *Shephard*, 541 N.E.2d 1150, 1156-1157 (Ill. Ct. App. 1989)); *McNabb* v. *Osmundson*, 315 N.W.2d 9, 11-14 (Iowa 1982); *Rutherford* v. *Rutherford*, 464 A.2d 228, 234-237 (Md. 1983); *Mead* v. *Batchlor*, 460 N.W.2d 493, 496-504 (Mich. 1990); *Allen* v. *Sheriff of Lancaster County*, 511 N.W.2d 125, 127 (Neb. 1994), *overruled on other grounds by Smeal Fire Apparatus Co.* v. *Kreikemeier*, 279 Neb. 661, 684 (Apr. 16, 2010); *Pasqua* v. *Council*, 892 A.2d 663, 671-674 (N.J. 2006); *McBride* v. *McBride*, 431 S.E.2d 14, 19 (N.C. 1993); *Peters-Riemers* v. *Riemers*, 663 N.W.2d 657, 664-665 (N.D. 2003); *Wold Family Farms, Inc.* v. *Heartland Organic Foods, Inc.*, 661 N.W.2d 719, 724-725 & n.3 (S.D. 2003); *Choiniere* v. *Brooks*, 660 A.2d 289, 289 (Vt. 1995); *Tetro* v. *Tetro*, 544 P.2d 17, 19 (Wash. 1975); *Ferris* v. *State ex rel. Maass*, 249 N.W.2d 789, 791 (Wis. 1977).[9]

The Supreme Court of New Jersey's decision in *Pasqua* illustrates the reasoning of these cases:

> When an indigent litigant is forced to proceed at [a civil contempt] hearing without counsel, there is a high risk of an erroneous determination and wrongful incarceration. However seemingly simple [such] proceedings may be for

---

[9] Intermediate appellate courts in eight other States have done the same. *County of Santa Clara* v. *Superior Court*, 5 Cal. Rptr. 2d 7, 10-12 (Ct. App. 1992); *Emerick* v. *Emerick*, 613 A.2d 1351, 1353-1354 (Conn. App. Ct. 1992); *In re Marriage of Stariha*, 509 N.E.2d 1117, 1119-1121 (Ind. Ct. App. 1987); *Johnson* v. *Johnson*, 721 P.2d 290, 294 (Kan. Ct. App. 1986) (dicta); *Hunt* v. *Moreland*, 697 S.W.2d 326, 328-330 (Mo. Ct. App. 1985); *Ullah* v. *Entezari-Ullah*, 836 N.Y.S.2d 18, 22 (App. Div. 2007); *Bradford* v. *Bradford*, No. 86-262-II, 1986 WL 2874, at *4-5 (Tenn. Ct. App. Mar. 7, 1986); *Ex parte Walker*, 748 S.W.2d 21, 22 (Tex. App. 1988).

> a judge or lawyer, gathering documentary evidence, presenting testimony, marshalling legal arguments, and articulating a defense are probably awesome and perhaps insuperable undertakings to the uninitiated layperson.

892 A.2d at 673.

2. Five state courts of last resort—in Florida, Georgia, Maine, and Ohio, as well as South Carolina—have held that there is no right to appointed counsel for indigent defendants facing incarceration in civil contempt proceedings. *Andrews* v. *Walton*, 428 So. 2d 663, 666 (Fla. 1983); *Adkins* v. *Adkins*, 248 S.E.2d 646, 646 (Ga. 1978); *Colson* v. *State*, 498 A.2d 585, 586-589 & n.4 (Me. 1985); *In re Calhoun*, 350 N.E.2d 665, 666-667 (Ohio 1976); App. 2a-3a.[10] Like the court below, these courts have held that the right to counsel applies only in criminal contempt proceedings. *See, e.g.*, App. 2a-3a.[11]

---

[10] The Supreme Court of Utah has held that no right to counsel applies in civil contempt, although its decision did not expressly consider the issue as a matter of federal constitutional law. *Bott* v. *Bott*, 437 P.2d 684, 685 (Utah 1968). The intermediate court in Virginia has also rejected a constitutional right to counsel in civil contempt proceedings leading to incarceration. *Krieger* v. *Commonwealth*, 567 S.E.2d 557, 563-564 (Va. Ct. App. 2002).

[11] Explaining its reliance on the distinction between civil and criminal contempt, for example, the Supreme Court of Florida reasoned in circular fashion that the assistance of counsel is unnecessary in civil cases because inability to pay is a defense to civil contempt. *Andrews*, 428 So. 2d at 666. Ignoring the possibility of error and the need for counsel's help in establishing that defense, the court held that any infringement on physical liberty in civil cases is merely conditional: "[T]here are no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt pro-

3. Three state supreme courts have taken a third approach, concluding that trial courts should determine the need for counsel on a case-by-case basis. *Rodriguez* v. *Eighth Judicial Dist. Ct.*, 102 P.3d 41, 51 (Nev. 2004); *Duval* v. *Duval*, 322 A.2d 1, 4 (N.H. 1974); *State ex rel. Dep't of Human Servs.* v. *Rael*, 642 P.2d 1099, 1103-1104 (N.M. 1982). These courts have made clear, however, that appointment of counsel will be warranted only in rare circumstances. As the Nevada Supreme Court reasoned, "it would be the exception, not the rule, for a case to present such legal and factual complexities so as to require the aid of counsel." *Rodriguez*, 102 P.3d at 51.

The decision below thus stands in sharp contrast to the vast majority of state and federal decisions on the issue. This Court should grant the petition to resolve this conflict and bring the court below into line with the majority view.

II. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S CASE LAW ON THE RIGHT TO COUNSEL

The Supreme Court of South Carolina's holding also conflicts with this Court's precedent. This Court has consistently held that the assistance of counsel is indispensable in any proceeding, criminal *or* civil, in which a person's physical liberty is at stake. As explained below, there is no merit to the state court's determination that there should be an exception to this general rule for civil contempt cases. As in every other context in which this Court has upheld the right to

---

ceeding for failure to pay child support because if the parent has the ability to pay, there is no indigency, and if the parent is indigent, there is no threat of imprisonment." *Id.*

counsel, a defendant in a civil contempt proceeding faces a significant risk that he will be erroneously deprived of his physical liberty and needs "the guiding hand of counsel" if he is to avoid that outcome. *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

A. This Court Has Held That The Right To Counsel Applies In Any Proceeding In Which A Person's Physical Liberty Is At Stake

"[This] Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel." *Lassiter*, 452 U.S. at 26. Across a wide range of proceedings—whether civil or criminal—the Court has held that the right to counsel is triggered whenever a person is in jeopardy of losing his physical liberty.

In the first place, the Court has determined that the Sixth Amendment's guarantee of "the Assistance of Counsel" in "all criminal prosecutions" confers a right to counsel for *any* criminal defendant who faces incarceration. Absent a valid waiver, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). Actual imprisonment is a unique penalty, "different in kind from fines or the mere threat of imprisonment." *Scott* v. *Illinois*, 440 U.S. 367, 373 (1979). Thus, "*any* amount of actual jail time has Sixth Amendment significance." *Glover* v. *United States*, 531 U.S. 198, 203 (2001) (emphasis added).

In criminal prosecutions, the right to counsel arises not only from the literal text of the Sixth Amendment, but also from the requirements of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. Thus, in *Gideon* v. *Wainwright*, 372 U.S.

335 (1963), the Court categorically extended the Sixth Amendment right to counsel to criminal prosecutions in state courts through the Due Process Clause, holding that the right to counsel is a "fundamental safeguard[] of liberty" that is "essential to a fair trial." *Id.* at 339-345.[12]

These cases have recognized "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). Without the "guiding hand of counsel," even a defendant who is not guilty "faces the danger of conviction because he does not know how to establish his innocence." *Powell*, 287 U.S. at 69. "That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." *Johnson*, 304 U.S. at 463. Indeed, the assistance of counsel "is often a requisite to the very existence of a fair trial," *Argersinger*, 407 U.S. at 31, because no defendant should "face[] incarceration on a conviction that has never been subjected to the crucible of meaningful adversarial test-

---

[12] The Court similarly recognized a right to counsel in criminal contempt proceedings as a matter of due process. *See Cooke* v. *United States*, 267 U.S. 517, 537 (1925) ("Due process of law ... requires that the accused [in a criminal contempt case] should be advised of the charges and have a reasonable opportunity to meet them," which "includes the assistance of counsel"); *see also In re Oliver*, 333 U.S. 257, 275 (1948). More recently, the Court has made clear that criminal contempt "is a crime in the ordinary sense," *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968), the imposition of which is subject to the strictures of the Sixth Amendment. *See International Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 826-827 (1994); *United States* v. *Dixon*, 509 U.S. 688, 696 (1993); *Muniz* v. *Hoffman*, 422 U.S. 454, 475-476 (1975).

ing," *Alabama* v. *Shelton*, 535 U.S. 654, 667 (2002) (internal quotation marks omitted).

The Court has thus held that the right to counsel applies also in *civil* cases in which a person's liberty is at stake. For example, the Court held in *In re Gault* that the right to counsel is "essential" in any juvenile delinquency hearing that could lead to the juvenile's commitment to state custody because such a proceeding "carr[ies] with it the awesome prospect of incarceration in a state institution" and is therefore "comparable in seriousness to a felony prosecution." 387 U.S. 1, 36-37 (1967). Given those stakes, a juvenile needs counsel "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.* at 36 (internal footnote omitted). Similarly, in *Vitek* v. *Jones*, a plurality of the Court concluded that a prisoner being considered for transfer to a mental institution must be afforded the right to counsel as a matter of due process because he retains a liberty interest in being free from involuntary psychiatric treatment. 445 U.S. 480, 493-494, 497 (1980) (plurality).

These decisions culminated in the Court's determination in *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), that the right to counsel applies in any proceeding, civil or criminal, that could lead to incarceration. In *Lassiter*, the Court considered whether a parent is categorically entitled to the right to counsel in a proceeding to terminate parental rights. The Court answered in the negative, contrasting such cases with proceedings that involve a deprivation of physical liberty. Surveying the Sixth Amendment decisions, as well as *Gault* and *Vitek*, the Court noted the special nature of the immediate threat of incarceration, explain-

ing that the "pre-eminent generalization that emerges from" decades of precedent "is that [the right to counsel] has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.* at 25. The Court explained that "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." *Id.* The Court thus "dr[e]w from [its precedents] the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27.

The arc of these decisions is clear: They reflect the Court's longstanding position that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel." *Shelton*, 535 U.S. at 661 (internal quotation marks omitted); *see also id.* at 675 (Scalia, J., dissenting) ("We have repeatedly emphasized actual imprisonment as the touchstone of entitlement to appointed counsel."). The Court has rejected formalistic distinctions between criminal and civil proceedings, between contempt hearings and prosecutions, and between the Sixth Amendment and the Due Process Clause. Instead, it has concluded that the right to counsel is triggered in any proceeding in which a litigant, if he loses, would be deprived of his physical liberty.[13]

---

[13] *Middendorf* v. *Henry*, 425 U.S. 25 (1976), is not inconsistent with these cases. In *Middendorf*, the Court concluded that the right to counsel was not warranted in summary court-martial proceedings leading to confinement. But it did so because of the "particular deference [the Court owes] to the determination of Congress ... that counsel should not be provided in summary courts-

B. The Decision Below Cannot Be Squared With This Court's Precedent

The state supreme court departed from this Court's settled understanding of the right to counsel by upholding Turner's incarceration even though he was neither represented by counsel nor advised of his right to counsel. Although Turner's appellate brief relied heavily on *Lassiter*, *Argersinger*, and related cases, App. 11a-15a, the state supreme court neither acknowledged those cases nor offered any explanation for its break from this Court's decisions. Instead, the state court relied solely on the fact that this case involved civil, rather than criminal, contempt. App. 2a-3a. To justify its reliance on that distinction, the court explained that in its view, a civil contemnor is "not subject to a permanent or unconditional loss of liberty," and is therefore not entitled to counsel before being incarcerated. App. 4a-5a. That analysis is wrong and

---

martial." *Id.* at 43. Subsequent decisions confirmed that the due-process analysis is uniquely limited in the military setting. *See Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981); *Weiss* v. *United States*, 510 U.S. 163, 176-179 (1994).

Nor does *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), detract from the general rule that an indigent litigant facing incarceration is entitled to appointed counsel. In *Gagnon*, the Court decided that a probationer who was previously convicted and sentenced does not have a categorical right to counsel at a subsequent probation revocation hearing. *Id.* at 789-790. As the Court recently recognized, *Gagnon* merely stands for the proposition that "the [right to counsel] inquiry trains on the stage of the proceedings" where "guilt was adjudicated, eligibility for imprisonment established, and prison sentence determined." *Shelton*, 535 U.S. at 665. In this case, there can be no doubt that the relevant proceeding was the family court contempt hearing.

conflicts with this Court's precedent for at least three reasons.

First, this Court has already determined that actual imprisonment is the line demarcating the scope of the right to counsel. *Supra* Part II.A.[14] That rule makes sense: Whether civil or criminal, "the jail is just as bleak no matter which label is used." *Walker*, 768 F.2d at 1183. The state supreme court's focus on whether the loss of liberty is "conditional" or "unconditional" ignores the risk that a civil contempt defendant will be *erroneously* incarcerated for coercive purposes even though he is unable to comply with the underlying court order.[15] When such an error occurs, the sanction

---

[14] Some courts, like the Tenth Circuit in *Walker*, have reached this conclusion only after conducting the balancing test described in *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976). *See Walker*, 768 F.2d at 1183-1185. Such an analysis is unnecessary in light of this Court's settled holdings that actual imprisonment triggers the right to counsel. *See, e.g., Shelton*, 535 U.S. at 661; *see also Lassiter*, 452 U.S. at 27-31 (applying *Mathews* to determine existence of a right to counsel only after concluding that the proceeding in question would *not* result in the litigant's actual incarceration). Even applying *Mathews*, however, the balance of factors tips sharply in favor of finding a right to counsel whenever a litigant faces actual incarceration. *See Walker*, 768 F.2d at 1183-1185.

[15] Because civil contempt differs from criminal contempt principally by its coercive character and purpose, *see Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441-442 (1911), its justification "depends upon the ability of the contemnor to comply with the court's order," *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966). "Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action." *United States* v. *Rylander*, 460 U.S. 752, 757 (1983). As the Court has recognized, "to jail one for a contempt for omitting an act he is powerless to perform would ... make the proceeding

of imprisonment—even if theoretically conditional—in reality is not conditional at all. It is, in effect, an absolute and punitive deprivation of "the most elemental of liberty interests—the interest in being free from physical detention by one's own government." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality).

Second, the state supreme court ignored that a defendant facing a civil contempt sanction has just as great a need for the assistance of counsel as a defendant facing incarceration in any other proceeding. The assistance of counsel is necessary for a defendant to establish his defenses to contempt, including any present inability to comply with the court order. Mounting such a defense is hardly straightforward. For example, in the child-support context, a defendant might attempt to testify as to his inability to pay, but, as this case illustrates, such testimony alone is unlikely to rebut the presumption of willful nonpayment. Rather, to carry his burden, the defendant may need to present proof of his inability to comply, potentially including competent evidence not only of his employment (or unemployment), but also of his subsistence needs, assets, and, in some jurisdictions, inability to borrow the funds.[16] He

---

purely punitive, to describe it charitably." *Maggio* v. *Zeitz*, 333 U.S. 56, 72 (1948); *see also Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 638 n.9 (1988) ("Our precedents are clear ... that punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order."). Consistent with this Court's cases, South Carolina law precludes the incarceration of a contemnor who cannot comply with the underlying court order. *See supra* p. 6.

[16] *See, e.g.*, Tex. Fam. Code Ann. § 157.008(c) (inability-to-pay defense is available only if the obligor has "attempted unsuccessfully to borrow the funds needed" and "kn[ows] of no source from which the money could have been borrowed or legally obtained").

may need to call and examine witnesses. And an obligor with some limited income or assets available might be required to demonstrate what portion of the arrearage he could pay and what portion is beyond his means.

A defendant is unlikely to be able to make this showing or establish other defenses without a lawyer's help.[17] As this Court has noted, a defendant facing incarceration often "lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Powell*, 287 U.S. at 69; *see also Gault*, 387 U.S. at 36. The Court has thus recognized the right to counsel as uniquely important:

> 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. ... If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel ... it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

---

[17] Other defenses requiring the assistance of counsel might include, for example, deficiencies in the rule to show cause, *see Brasington* v. *Shannon*, 341 S.E.2d 130, 131 (S.C. 1986); errors in the amount claimed to be owed; invalidity of the underlying support order (due to lack of jurisdiction in the court that entered the order or fraud in obtaining the order); or the defendant's substantial compliance or good-faith efforts to comply, *see Tracy* v. *Tracy*, 682 S.E.2d 14, 18 (S.C. Ct. App. 2009); *Abate* v. *Abate*, 660 S.E.2d 515, 519 (S.C. Ct. App. 2008). In addition, a lawyer may play a critical role in persuading the court to consider a suspended sentence or alternatives to incarceration, such as job training, job placement, or vocational rehabilitation programs. *See* S.C. Code Ann. §§ 63-17-490, 63-17-500.

Powell, 287 U.S. at 68-69.[18] That reasoning applies with equal force in the civil contempt context.

Third, drawing a line between civil and criminal proceedings for purposes of applying the right to counsel, as the decision below would do, is unlikely to prove workable in the contempt context. As this Court has acknowledged, the line between criminal and civil contempt is not easy to divine. *See International Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 827 (1994); *id.* at 845 (Ginsburg, J., concurring); Dudley, *Getting Beyond the Civil/Criminal Distinction: A New Approach to Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1033 (1993) (the distinction is "conceptually unclear and exceedingly difficult to apply"). Most contempt proceedings "are neither wholly civil nor altogether criminal," and "'it may not always be easy to classify a particular act as belonging to either one of those two classes.'" *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). Distinguishing the two requires examination not only of the terms of the contempt order and sentence, but of the essential "charac-

---

[18] While some protections that would be available in a criminal contempt proceeding would not apply in civil contempt proceedings, *see Bagwell*, 512 U.S. at 827 (right to a jury trial; right to proof beyond a reasonable doubt), the right to counsel is uniquely indispensable for a civil contemnor facing incarceration. *See Custis* v. *United States*, 511 U.S. 485, 496 (1994) ("failure to appoint counsel for an indigent defendant [is] a unique constitutional defect"). As this Court has observed, no defendant should "face[] incarceration on a conviction that has never been subjected to the crucible of meaningful adversarial testing." *Shelton*, 535 U.S. at 667 (internal quotation marks omitted). In particular, the assistance of counsel is uniquely helpful in guarding against the erroneous incarceration of a civil contemnor who is unable to comply with the court's order.

ter and purpose" of the sanction. *Id.*; *see also Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 635-641 (1988). While the determination is one of federal law, *Hicks*, 485 U.S. at 630, features of the applicable state contempt law may muddy the water.[19] And as this case illustrates, even when the contempt sentence is in theory a "classic civil contempt sanction" (App. 3a), the circumstances may render a conditional and coercive sentence purely punitive in fact when the defendant cannot comply with the court's order.[20]

The Supreme Court of South Carolina's decision is thus irreconcilable with this Court's precedent, and the Court should grant the petition and reverse the judgment below.

---

[19] The South Carolina contempt statute does not distinguish between civil and criminal contempt. *See supra* n.1. Under state law, the nature and purpose of the sanction are dispositive. *Poston* v. *Poston*, 502 S.E.2d 86, 88 (S.C. 1998).

[20] Thus, even if this Court were to recognize an exception to the right to counsel for contempt proceedings that are truly civil in character and purpose, Turner should still have been afforded counsel on the facts of this case because his sentence was wholly punitive. There was no coercive force to Turner's incarceration because he had no ability to pay. Not only had Turner previously been jailed on several occasions on the same child-support order, but it is undisputed that he was indigent. The sentence was thus purely punitive and criminal—effectively a sentence to twelve months in debtors' prison. *See Maggio*, 333 U.S. at 72. Turner was therefore entitled to counsel. *See Cooke*, 267 U.S. at 537.

III. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE, AND THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING IT

The right-to-counsel question at issue in this case was squarely presented to and passed upon by the Supreme Court of South Carolina. App. 2a-5a, 11a-15a. And because the question arises on direct review of a contempt judgment, this case presents none of the extraneous issues that might prevent the Court from deciding the issue if the case arose in habeas or in a suit for injunctive relief under 42 U.S.C. § 1983.[21] The decision below is thus a particularly appropriate vehicle for clarifying the scope of the right to counsel in civil contempt proceedings.

---

[21] Although Turner was released from jail after serving the full sentence imposed by the family court, his right-to-counsel claim is not moot. Turner remains indigent and faces a substantial risk of again being held in contempt and incarcerated without appointed counsel. By law, he cannot be incarcerated on any one contempt order for more than twelve months, and many of his jail terms have been shorter than that. Contempt orders of such short duration could easily escape appellate review. This case therefore fits squarely within the "capable of repetition, yet evading review" exception to mootness. *See, e.g., Leonard* v. *Hammond*, 804 F.2d 838, 842-843 (4th Cir. 1986); *Walker*, 768 F.2d at 1182; *Bradford*, 1986 WL 2874, at *3; *Mead*, 460 N.W.2d at 496. Indeed, Turner's incarceration was not merely *capable* of repetition, but in fact has been repeated. In early 2009, shortly after his release from the contempt sentence imposed in the order under review, Turner was again brought before the family court, without counsel, and jailed for several more months on civil contempt charges. Contempt proceedings recurred in early 2010. (On that occasion, however, Turner was assisted by volunteer *pro bono* counsel, who was able to negotiate a suspended jail sentence contingent on Turner's completion of a substance abuse treatment program.)

Moreover, the question presented in this case is not only of significant legal importance, but of great practical urgency as well. In 2005, in South Carolina alone, approximately 1,500 people were incarcerated at any given time for nonpayment of child support.[22] Incarceration of indigent noncustodial parents for nonpayment of child support in proceedings similar to those conducted in South Carolina is a common practice.[23]

Moreover, child-support arrears are disproportionately owed by parents with low or no reported earnings, and such parents are routinely incarcerated for contempt. One recent study concluded that 70 percent of unpaid child-support obligations in nine States was owed by obligors who earned either no income or income of $10,000 per year or less.[24] Another report similarly found that "most of the [arrears] are owed by extremely poor debtors."[25] Indeed, in IV-D cases, the

---

[22] Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95, 117 (2009).

[23] *See* May & Roulet, Ctr. for Family Pol'y & Prac., *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices* 10-38 (2005), *available at* http://www.cffpp.org/publications/pdfs/noncompliance.pdf.

[24] Sorensen et al., Urban Inst., *Assessing Child Support Arrears in Nine Large States and the Nation* 3 (2007), *available at* http://www.urban.org/url.cfm?ID=1001242; *see also* Office of Child Support Enforcement, *Child Support Enforcement FY 2007 Annual Report to Congress*, *available at* http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/fy2007_annual_report/ (last visited June 23, 2010).

[25] Office of Child Support Enforcement, *Child Support Enforcement FY 2002 Preliminary Data Report* (2003), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/prelim_

very fact of an arrearage is often evidence that the obligor lacks sufficient income or assets to cover the child-support payments, because automated enforcement tools otherwise would likely have detected them. Accordingly, the civil contemnors most affected by the state supreme court's decision denying a right to appointed counsel are those who could most likely establish a successful inability-to-pay defense if only they had the assistance of a lawyer to present it.

Absent this Court's intervention, indigent contempt defendants in South Carolina and the other states that have rejected the right to counsel will continue to face incarceration without a lawyer's assistance in violation of this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

datareport/. Other studies have documented the reason for that debt: A substantial proportion of obligors face significant barriers to employment. Many have only a high school education or less, and only one in five work full-time in a given year due to many factors, including health problems, criminal records, and substance abuse issues. Patterson, *supra* n.22, at 106; Sorensen, Urban Inst., *Obligating Dads: Helping Low-Income Noncustodial Fathers Do More For Their Children* 4 (1999), *available at* http://www.urban.org/publications/309214.html.

Respectfully submitted.

DEREK J. ENDERLIN
ROSS & ENDERLIN, P.A.
330 East Coffee Street
Greenville, SC 29601

KATHRINE HAGGARD HUDGINS
SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
1330 Lady Street, Ste. 401
Columbia, SC 29201

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
CATHERINE M.A. CARROLL
SHIVAPRASAD NAGARAJ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

JUNE 2010

Blank Page