

No. 10-10

IN THE
Supreme Court of the United States

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA L. ROGERS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. 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.

2. Whether this Court has jurisdiction to review the decision of the Supreme Court of South Carolina.

PARTIES TO THE PROCEEDING

The petitioner is Michael D. Turner, the defendant and appellant in the courts below.

Rebecca L. Rogers (formerly Rebecca Price), was a plaintiff and respondent in the courts below, and is a respondent in this Court.

Larry E. Price, Sr. is a respondent in this Court. Price did not appear in the courts below. On November 1, 2010, this Court granted Price's motion to intervene.

The petition named the South Carolina Department of Social Services (DSS) as a respondent. *See* Pet. ii. DSS identified itself as the plaintiff in this case in documents it filed in the South Carolina Family Court, *see* JA 26a, 92a, 101a, and was named as plaintiff or petitioner on the family court docket and several other family court orders and filings, *see, e.g.*, JA 2a, 14a, 17a, 20a, 23a, 28a, 33a, 35a, 38a, 40a, 49a, 52a, 56a, 78a, 81a, 85a, 89a, 94a, 98a, 103a. Although Turner's counsel served the notice of appeal on the Attorney General of South Carolina, *see* JA 66a-67a, DSS declined to appear in the state appellate courts, *see* JA 68a, 72a. DSS filed a brief in opposition to the petition for certiorari in this Court, in which it asserted that it is not a party to this case; however, DSS is listed as a respondent on this Court's electronic docket sheet.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Supreme Court of South Carolina is reported at 691 S.E.2d 470 (S.C. 2010). Pet. App. 1a-5a. The order of the South Carolina Family Court is unreported. JA 60a-63a.

JURISDICTION

The Supreme Court of South Carolina entered its judgment on March 29, 2010. The petition for a writ of certiorari was filed on June 25, 2010, and granted on November 1, 2010. As discussed below, this Court has jurisdiction pursuant to 28 U.S.C. §1257(a). *See infra* pp. 18-27.

RELEVANT CONSTITUTIONAL PROVISIONS

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.

PRELIMINARY STATEMENT

Petitioner Michael Turner was incarcerated for twelve months after a South Carolina family court held him in civil contempt of a court order to pay child support for respondent Rebecca Price's (now Rogers') minor child. The contempt order provided that Turner could purge his contempt and gain release from jail if he paid his arrearage in full (nearly \$6,000), but Turner, who is indigent, was unable to pay, and he served the full sentence.

Turner was not represented by counsel at the contempt hearing, nor did the court advise him of his right to counsel. Had counsel been appointed, Turner could have made the evidentiary demonstration and legal arguments necessary to establish that he could not pay the thousands of dollars he owed, which, under South Carolina law and this Court's decisions addressing civil contempt, would have been a complete defense precluding his incarceration. Instead, Turner was left to

defend himself (to no avail) and was jailed, in effect, for being too poor to pay.

This twelve-month sentence was neither the first time nor the last that Turner has been incarcerated for failure to pay child support without the aid of counsel. Because Price had received public assistance benefits, she assigned her right to child support to the South Carolina Department of Social Services (DSS), and the child-support enforcement proceedings against Turner became subject to automatic procedures carried out by DSS and the family court. Each time Turner's account fell into arrears, the court was required by law automatically to issue a rule to show cause why Turner should not be held in contempt. Turner has been incarcerated in this manner several times, and so long as he continues to owe unpaid child support, he will continue to face automatic contempt proceedings and the threat of incarceration. Indeed, Turner is presently in jail again for failure to pay child support.

In the decision below, the Supreme Court of South Carolina rejected Turner's argument that he was constitutionally entitled to appointment of counsel at the contempt hearing. Notwithstanding this Court's decisions that have found a right to counsel in both criminal *and* civil proceedings that carry with them the "awesome prospect of incarceration," *In re Gault*, 387 U.S. 1, 36-37 (1967), the court held that the right to counsel applies only in *criminal* contempt proceedings. In reaching that conclusion, the court relied on the assumption that a civil contempt sanction is "conditional" and may be avoided through compliance with the underlying court order. But whether Turner *in fact* had the ability to avoid incarceration by complying with the child-support order—and thus whether he could be sentenced to jail for coercive purposes in a civil proceeding

at all—was the precise question before the family court. As a matter of fundamental fairness, Turner should have been afforded the assistance of counsel to show that he could not. The state court’s contrary decision cannot be reconciled with this Court’s teachings on the right to counsel, the special character and purpose of civil contempt, or the requirements of due process. This Court should reverse the judgment below.

STATEMENT OF THE CASE

A. Legal Background

This case arises out of efforts by Rebecca Price (now Rebecca Rogers) and the South Carolina Department of Social Services (DSS) to collect child-support payments from petitioner Michael Turner for the support of Turner’s and Price’s minor child. Child-support enforcement cases, like this one, that involve a child or custodial parent who has received 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 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). Once a State’s enforcement program meets baseline federal requirements, the State enjoys substantial flexibility in choosing how to enforce compliance with child-support

orders. Common enforcement mechanisms include withholding support payments from an obligor's wages, intercepting state or federal tax refunds or public assistance benefits otherwise payable to the obligor, revoking licenses, and levying liens on obligors' property.

Consistent with federal law, South Carolina requires, as a condition of eligibility, that families applying for public assistance cooperate in locating noncustodial parents and assign to the State any rights to support from a noncustodial parent. *See* S.C. Code Ann. §43-5-65(a)(1), (2). By accepting benefits through the Temporary Aid to Needy Families program (TANF), a custodial parent is deemed to have assigned any such rights to the State, *id.* §43-5-65(a)(1), and the parent is automatically referred to DSS for child-support enforcement services, *id.* §43-5-220(a). In such cases—known as “IV-D” cases because they are subject to Part IV-D of the Social Security Act—DSS takes charge of locating the non-custodial parent, establishing paternity, and obtaining and enforcing a support order through the South Carolina Family Court. Any support payments the non-custodial parent makes are paid to DSS through the clerk of the family court; DSS forwards some or all of the payments to the custodial parent, but may retain a portion as reimbursement for public assistance benefits previously provided by the State. *Id.* §43-5-222.¹

¹ Custodial parents who do not receive public assistance may also apply to DSS for “IV-D” services. As in TANF cases, assignment of any right to support is a condition of the application for assistance. The application form alerts applicants that DSS represents the State of South Carolina, not the individual parent. *See* Custodial Parent's Application for Child Support Services 2, <http://www.state.sc.us/dss/csed/forms/cp-app.pdf>.

Among other enforcement measures, DSS enforces child-support orders in IV-D cases through contempt proceedings in the family court. Under South Carolina law, “[a]n adult who wilfully 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).² Rule 24 of the South Carolina Rules of Family Court provides that the clerk of the court must review child-support accounts in all IV-D cases 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. As assignee of the support rights, DSS may also request the clerk to take various actions to enforce the support order, including by issuing a rule to show cause. *See, e.g.*, JA 64a-65a; *infra* p. 15 n.10.

When the family court issues a rule to show cause, the obligor is required to appear at a contempt hearing, and the clerk’s affidavit becomes the basis for establishing the obligor’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

² 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 detention facility, or any combination of them, in the discretion of the court, but not to exceed imprisonment in a local detention 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.*

constitute noncompliance.” *Brasington v. Shannon*, 341 S.E.2d 130, 131 (S.C. 1986). If the obligor does not appear at the hearing, the court may issue a warrant for his arrest. S.C. Code Ann. §63-17-390; *see, e.g.*, JA 38a-39a, 81a-84a.

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 Cnty. Dep’t of Soc. Servs. v. Padgett*, 370 S.E.2d 872, 874 (S.C. 1988). Where an obligor 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 genuinely 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 obligor, 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 obligor’s noncompliance, the burden shifts to the obligor 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 obligors have a right to counsel (appointed or otherwise) at contempt hearings.

B. Factual Background

B.L.P., a minor child, was born to Rebecca Price in 1996. Price received public assistance for a time, and she accordingly assigned her right to collect child support to DSS, as required by law.³ In 2003, with Price's cooperation, DSS established that 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. Pet. App. 19a, 22a.⁴ Although the order recorded Turner's employment status as "unemployed," the court imputed to Turner a gross income of \$1,386 per month. Pet. App. 20a-21a.⁵ The

³ See 42 U.S.C. §608(a)(3); S.C. Code Ann. §43-5-65(a). Documents in the family court record in this case 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. While Rebecca Price was identified as the plaintiff on some orders and filings in the family court, DSS is identified as the plaintiff or petitioner on most of the record documents. See *supra* p. ii (citing documents). Counsel for DSS filed motions in the family court on behalf of DSS as "plaintiff," JA 26a, 92a, 101a, and appeared as the plaintiff at a family court contempt hearing at least once, JA 40a.

⁴ The Order of Financial Responsibility explains that Turner's child-support obligation "shall continue until the child support/arrears are fully paid" and that he "shall pay the amount as ordered until the minor child[] reach(es) the age of emancipation; or, until ... determined by the Court." Pet. App. 22a (emphasis omitted). B.L.P. will turn eighteen in 2014.

⁵ The imputed income was calculated according to a standardized formula set by DSS. Pet. App. 25a. This figure was reduced to \$1,084 per month to reflect that Turner had other children with Jennie Turner, whom Turner had married in 1999. *Id.* Jennie and Michael Turner have since divorced, and a default Order of

court made Turner's support obligation retroactive to the date of the original child-support negotiation conference. Consequently, from the day the court issued the child-support order, Turner was already more than \$200 in arrears. Pet. App. 21a.

For approximately two years, Turner struggled, with some success, to maintain employment and keep up with his child-support payments. Pursuant to the automatic procedures of Rule 24, the family court issued four rules to show cause during this period why Turner should not be held in contempt, and Turner was briefly jailed twice for contempt of court. JA 14a-19a, 20a-25a, 28a-32a, 33a-34a. Turner was not represented by counsel during any of these proceedings. As a result of wage-withholding and other payments made on his behalf, Turner's arrearage during those first two years remained below \$1,000 and fell to zero on a few occasions. JA 123a-132a.⁶

Financial Responsibility requiring Turner to pay \$134.24 per week, including court costs, for the support of Jennie Turner's three children was entered in Turner's absence in November 2009. See S.C. Family Court Case No. 2009-DR-37-730.

⁶ According to family court records, Turner held a series of jobs, and the court was able to collect child support from some of his employers through automatic wage-withholding. Other payments were also made on Turner's behalf. The record does not indicate who made those payments. See JA 123a-132a. Initially, the clerk of the family court forwarded payments made on Turner's behalf to DSS. In March 2004, at DSS's request, the clerk began remitting Turner's payments directly to Rebecca Price, whose public-assistance benefits had terminated. JA 26a-27a. 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 Rebecca Price's mother, Judy Price, and the court approved DSS's request that the clerk change the payee to Judy Price and forward

In September 2005, however, after Turner had failed to appear for a prior hearing, the court found Turner in contempt and sentenced him to six months' incarceration. JA 47a-48a; *see also* JA 35a-39a. The sentence was to be suspended if Turner achieved a zero balance on or before his release, JA 48a, but Turner was not able to make the payments. As on all previous occasions, Turner was not represented by counsel at the hearing that led to this six-month sentence. While Turner was in jail, his arrearage mounted. By the time Turner was released in late January 2006 after serving the full six months, his arrearage exceeded \$1,900. JA 121a.

C. Proceedings Below

In March 2006, two months after Turner's release from jail on the prior contempt order, the clerk of court issued another rule to show cause why Turner should not be held in contempt. JA 49a-51a. Although Turner's arrearage had been substantially reduced after DSS intercepted certain federal and state tax refunds and benefit payments payable to Turner, *see* JA 57a, Turner still owed about \$1,000 in child support. After a hearing in April 2006, the court ordered wage-withholding, JA 52a-55a, but Turner's account remained in arrears, and the court subsequently issued a bench warrant for his arrest, *see* JA 51a. Turner was

any support payments to DSS. JA 92a-93a. After Judy Price passed away in June 2010, B.L.P. was placed in the custody of respondent Larry E. Price, Sr. At DSS's request, if the family court receives any payments, they are to be forwarded to DSS for Larry Price. JA 101a-102a. Rebecca Price now has child-support obligations for the support of B.L.P. *See* IFP Aff. of Rebecca L. Rogers.

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, Turner was behind on his child support by \$5,728.76. JA 60a; *see also* JA 115a. Turner was not represented by counsel at the hearing, and the court did not advise Turner that he had a right to counsel. At the brief hearing, Turner attempted to explain to the court that he had been unable to meet his support obligation due to a combination of prior incarceration, substance abuse problems, and physical disability:

The Court: Is there anything you want to say?

Turner: 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.

Pet. App. 17a.⁷

⁷ 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 Jennie Turner and their three children; that B.L.P. was also his child; that he received no income other than Social Security and

Without making any findings of fact as to whether Turner was able to pay the \$5,728.76 in arrears, the court sentenced Turner to a term of incarceration not to exceed twelve months, the statutory maximum. JA 60a-62a; *see also* S.C. Code Ann. §63-3-620. The court's order provided that Turner could purge himself of the contempt and be released if he paid the balance in full. JA 61a. The court also placed a lien on any Social Security disability or other benefits Turner might receive. *Id.*⁸ Turner was committed to the Oconee County jail, where he remained incarcerated for the full twelve months.

Represented by volunteer *pro bono* counsel, Turner filed a notice of appeal from the family court's order. *See* JA 66a-67a. 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. Pet. App. 10a-15a. The Supreme Court of South Carolina, which certified Turner's appeal to itself

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. Jennie Turner provided these documents to the family court prior to Turner's January 3, 2008 hearing. JA 135a-136a.

⁸ The contempt order provided that Turner was "work release eligible." JA 62a. Nonetheless, Turner could not and did not participate in work release. Under South Carolina law, the court's notation of eligibility is merely a prerequisite to participation in work release and does not bind the detention center, which conducts additional screening consistent with Department of Corrections regulations. S.C. Code Ann. §24-13-910. Turner did not pass that screening process.

before the intermediate appellate court could act, JA 97a, rejected that argument and affirmed the family court’s judgment. Pet. App. 1a-5a.⁹

The state supreme court held that the constitutional right to counsel applies only in criminal contempt proceedings. Pet. App. 2a-4a. “[Imprisonment for] criminal 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.” Pet. App. 3a. By contrast, civil contempt sanctions are “conditioned on compliance”: “A contemnor imprisoned for civil contempt ... hold[s] the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time.” Thus, the court held, civil contemnors may be incarcerated without the appointment of counsel. Pet. App. 3a-4a. 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. Pet. App. 3a n.2.

By the time the court issued its judgment in late March 2010—over two years after Turner’s counsel filed the notice of appeal—Turner had completed his

⁹ Turner’s counsel had served the notice of appeal on both Price and the Attorney General of South Carolina, JA 67a, but neither filed a brief in Turner’s appeal. Despite DSS’s participation as a “plaintiff” in the family court, *see supra* pp. ii, 8 n.3, the Attorney General took the position that the State was not a party to the case and declined to participate in the appeal, JA 72a. The state supreme court decided the case without the State’s or Rebecca Price’s participation and without oral argument.

twelve-month jail sentence and again been held in civil contempt and jailed. JA 78a-80a, 85a-88a. At that April 2009 contempt hearing, Turner again tried to explain why he could not meet his support obligation:

The Court: Anything you want to say?

Mr. Turner: No Sir. I just got out [of jail] – I done a year '07 to '08, got out for like four months. I've tried to find a job. I, honest to God, have tried this time. There's no work out there hardly for carpenters. I couldn't find anything, so I been putting in applications in grocery stores, you name it. I've got in applications. I have tried. I've honestly tried this time. That's all I can say. I can't find no work[.]

...

The Court: Okay. All Right. If there's nothing further, I find the Defendant in willful contempt.

JA 90a. The court sentenced Turner to six months in jail, which Turner could avoid through payment of \$2,500, plus 5% of that amount in court costs. JA 86a-87a. Unable to pay, Turner served the six-month sentence—all while awaiting decision on his appeal from the preceding contempt order.

Meanwhile, DSS and the family court instituted proceedings to enforce an Order of Financial Responsibility obligating Turner to pay child support for the children of his former wife, Jennie Turner. *See supra* p. 8 n.5. Days after the Supreme Court of South Carolina issued its decision on Turner's appeal in this case, the family court issued a bench warrant after Turner failed to appear for a show-cause hearing on Jennie

Turner's child-support order. Turner is presently incarcerated on a contempt order arising from those proceedings.¹⁰ As of December 9, 2010, Turner owed \$7,114.72 to Jennie Turner. His arrearage as of that date on Rebecca Price's support order was \$13,814.72. JA 104a. A rule to show cause issued on May 26, 2010 for failure to pay support to Rebecca Price remains outstanding. JA 98a-100a.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction under 28 U.S.C. §1257 to review the decision of the Supreme Court of South Carolina. That decision constituted a final judgment of the State's highest court conclusively resolving Turner's right-to-counsel claim under the U.S. Constitution.

Although Turner has completed the twelve-month sentence that the family court imposed in the order under review, the case is not moot. Turner faces a reasonable expectation that he will again be incarcerated for civil contempt without appointment of counsel. Indeed, the controversy has already repeated, and given

¹⁰ DSS had previously requested that the family court issue a rule to show cause in Jennie Turner's support case. *See* Letter from Clay F. Cook, DSS, to Oconee County Family Court, Case No. 2009-DR-37-730 (filed S.C. Fam. Ct. Mar. 22, 2010). Turner failed to appear for the initial hearing on that rule, resulting in the bench warrant. At the hearing on the bench warrant, Turner was represented *pro bono* by the attorney who had filed the appeal on Turner's behalf. Turner's counsel persuaded the court and DSS to impose a suspended jail sentence contingent on Turner's completion of a substance abuse treatment program. Turner did not complete the program, however, and the court issued a warrant for his arrest, leading to his present incarceration.

Turner's indigency, the amount he owes, and the automatic enforcement procedures that apply, it is virtually certain to recur. The contempt sanctions, however, are too short in duration to be subject to complete judicial review before their expiration. Turner's claim is therefore "capable of repetition, yet evading review."

II. Turner was entitled to appointment of counsel at the civil contempt hearing that led to his incarceration. In a wide range of contexts—both civil and criminal—this Court has held that a defendant facing incarceration is entitled to be informed of his right to counsel and, if he cannot afford his own lawyer, to have counsel appointed. These decisions reflect both the profound deprivation of liberty that occurs when an individual is committed to state custody and 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, 462-463 (1938). These considerations apply with equal force in the civil contempt context, where Turner needed counsel's assistance to show that he could not pay the court-ordered child support and thus could not be incarcerated.

The Supreme Court of South Carolina nonetheless held that the right to counsel applies only in criminal contempt proceedings. Civil contempt sanctions, the court reasoned, are "conditional" sanctions that (in theory) may be avoided through compliance with the underlying court order. But that reasoning holds only where the accused contemnor *in fact* has the ability to comply. Where the defendant lacks the ability to comply, a sentence of incarceration serves no coercive purpose, but becomes purely punitive. And it is well settled that a punitive sanction cannot be imposed in a proceeding that lacks the procedural safeguards

applicable to criminal prosecutions, including the right to counsel. Accordingly, whether Turner *in fact* could comply with the child-support order—and whether the sanction was truly conditional—was the precise issue before the family court. Counsel’s assistance was thus necessary not only to show that Turner could not pay, but also to ensure that the proceeding remained appropriately *civil*.

For these reasons, even if this Court’s right-to-counsel precedent left any doubt, familiar principles of procedural due process would compel the conclusion that Turner was entitled to appointment of counsel. Turner’s interest in freedom from incarceration is unquestionably of profound weight. That interest is not diminished by the purported “conditional” nature of the civil contempt sanction. Where an accused contemnor lacks the ability to comply with the court’s order, a civil sentence is in no way “conditional,” but results in an absolute deprivation of physical liberty. The risk of such an outcome is heightened by the fact that the civil contempt defendant bears the burden of presenting evidence and legal argument demonstrating his inability to comply, and meeting that burden is far from straightforward. Without counsel’s assistance, the risk of an erroneous outcome is indeed high. The State, by contrast, has only a minimal financial interest in refusing to provide counsel, and no interest at all in maintaining a *de facto* debtors’ prison for child-support obligors who genuinely cannot pay.

ARGUMENT**I. THIS COURT HAS JURISDICTION TO REVIEW THE SUPREME COURT OF SOUTH CAROLINA'S DECISION**

This Court has jurisdiction under 28 U.S.C. §1257(a) to review a “[f]inal judgment ... rendered by the highest court of a State in which a decision could be had,” provided that the case presents a “substantial federal question[],” *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1952) (per curiam). There is no doubt here that the Supreme Court of South Carolina’s decision affirming the family court’s order incarcerating Turner was a “final” judgment: no further review or correction is available in any other state tribunal, and no further proceedings are necessary in the state court system for final resolution of Turner’s contempt case. See *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997); *New York Times Co. v. Jasclevich*, 439 U.S. 1317, 1319 (1978) (White, J., in chambers) (“[civil contempt] judgment[s] are ‘final’ ... for purposes of this Court’s jurisdiction ... if they have been rendered by the highest court of the State”).

Turner’s federal claims were also properly pressed before, and passed upon by, the state court. Turner argued in the state appellate court that he had a right to appointed counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution. Pet. App. 10a-15a. The Supreme Court of South Carolina squarely addressed that federal issue. Pet. App. 2a-5a. These facts are sufficient to establish jurisdiction under §1257(a). See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991); *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

In their brief in opposition, respondents suggested only two reasons why this Court might lack jurisdiction. First, respondents argued (Rogers Opp. 22) that

Turner failed to present the federal right-to-counsel question properly in the state courts. This contention clearly fails. Although Turner did not assert a right to counsel before the family court, the state supreme court addressed his federal constitutional claim on the merits and never suggested that Turner had waived his claim as a matter of state law; it also cited no independent state-law ground for its judgment. *See Cohen*, 501 U.S. at 667; *Burch v. Louisiana*, 441 U.S. 130, 133 n.5 (1979). Moreover, a defendant does not forfeit his constitutional right to appointment of counsel by failing to ask for a lawyer at the hearing that results in his incarceration. Rather, where the right applies, “it is the duty of the court, whether requested or not, to assign counsel for [an indigent defendant].” *Powell v. Alabama*, 287 U.S. 45, 71 (1932); *see Miranda v. Arizona*, 384 U.S. 436, 473 n.43 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Nor is it reasonably disputable that Turner squarely presented the federal constitutional question to the state appellate court. *See* Pet. App. 10a-15a. Having presented that right-to-counsel claim, Turner is not “limited to the precise arguments [he] made below,” but may “make any argument in support of that claim.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Second, respondents asserted (Rogers Opp. 21-22) that there is no longer a live case or controversy because Turner has served the twelve-month sentence imposed by the order under review. For the reasons discussed below, this fact does not deprive the Court of jurisdiction. Rather, Turner’s case is a classic example of a controversy that is capable of repetition, yet evading review.

A. It Would Be Virtually Impossible To Litigate The Validity Of Turner's Contempt Order Before Expiration Of His Jail Sentence

In suits invoking the authority of the federal judiciary, “[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy.” *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). The absence of judicial authority “to review moot cases derives from [this] requirement of Article III.” *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); see *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000). In general, “a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal quotation marks omitted). It is well settled, however, that a case does not become moot “simply because the order attacked has expired, if the underlying dispute between the parties is ‘capable of repetition, yet evading review.’” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 546 (1976); see *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-515 (1911); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (“*WRTL*”). That standard is met where “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *WRTL*, 551 U.S. at 462 (internal quotation marks omitted).

The controversy here is a paradigmatic example of a dispute that is “capable of repetition, yet evading review.” It involves a short-term order that is “virtually impossible to litigate the validity of ... prior to its expiration,” and Turner will, “in all probability[,] be subject to the same kind of order in the future.” *Weinstein v.*

Bradford, 423 U.S. 147, 149 (1975); see also *Southern Pac.*, 219 U.S. at 515. The progress of this case amply demonstrates why the prospect of reaching a final decision on the constitutionality of contempt procedures before the sentence is served is remote. Even though the Supreme Court of South Carolina certified Turner’s appeal to itself on its own motion, bypassing the intermediate appellate court, Turner still completed his twelve-month sentence—and a subsequent six-month sentence—before the state supreme court issued its decision. And while that court’s decision may speed the process of review in a future case raising the same issue, it is unrealistic to believe that in any such case, this Court could also receive briefing, hear argument, and render an opinion before the contempt sentence expired. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (eighteen months too short for “complete judicial review” including “plenary review by this Court”). Where, as here, the challenged action is almost certain to run its course before the Court can give the case full consideration, and the evasion of review results from unavoidable circumstances like the passage of time, the controversy “evades review” for purposes of the mootness analysis.¹¹

¹¹ Orders of less than two years’ duration are ordinarily deemed to “evade review.” See, e.g., *Southern Pac.*, 219 U.S. at 514-516 (two-year order was a “short-term order, capable of repetition yet evading review”); *Wisconsin Dep’t of Indus. v. Gould Inc.*, 475 U.S. 282, 285 n.3 (1986) (expiration of three-year debarment did not render controversy moot); *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 186 n.9 (1982) (“[j]udicial review invariably takes more than nine months to complete”).

This case is thus similar to *Nebraska Press Ass'n*, where this Court reviewed an order restricting media access during a criminal trial, even though the trial was over and the defendant had been convicted and sentenced by the time the case reached this Court. The Court held that the dispute was capable of repetition because the defendant's conviction could be reversed and a new trial ordered, at which the trial court might enter another order restricting media access. 427 U.S. at 546. The Court further noted that the decision under review would authorize prosecutors to seek similar orders in other cases. *Id.* at 546-547. And the dispute would "evade review" because such orders "are by nature short-lived." *Id.* at 547. The family court's contempt order and resulting incarceration at issue here is similarly short-lived.

In sum, Turner could not have obtained complete judicial review of his constitutional claim prior to the expiration of his jail sentence. Turner's sentence following the contempt order under review here lasted twelve months. By state statute, contempt sentences can last no longer than that, but may be—and in Turner's case, have been—considerably shorter. S.C. Code Ann. §63-3-620; *see, e.g.*, JA 18a, 24a, 32a (90-day sentences); JA 48a, 87a (six-month sentences). Under no reasonably foreseeable circumstances could Turner have obtained plenary review by this Court before those twelve months elapsed, nor will Turner reasonably be able to obtain such review in the future.

It is no answer to contend, as respondents have argued (Rogers Opp. 21-22), that Turner could have requested a stay of his contempt order to prevent the case from becoming moot. In the first place, Turner had no lawyer in the family court to assist him with presenting arguments for a stay to that court—even

assuming a stay might have been available under state law. Turner should not be penalized merely because the state courts did not recognize the very constitutional right that might have assisted him in maintaining a live controversy to secure that right.

Second, this Court has never held that the mere availability of a stay precludes a controversy from satisfying the “capable of repetition, yet evading review” standard. The sole circumstance in which the Court has attached significance to the availability of a stay for mootness purposes has been where a criminal defendant’s diligent prosecution of an appeal *saves* a case from mootness notwithstanding expiration of the sentence. *See, e.g., Sibron v. New York*, 392 U.S. 40, 51-52 (1968) (case not moot where petitioner had no opportunity to perfect his appeal before completing his sentence). And although the Court once suggested that a defendant who does not move for bail or apply for a stay does not diligently prosecute his appeal, *see St. Pierre v. United States*, 319 U.S. 41, 43 (1943) (per curiam) (“petitioner could[] have brought his case to this Court for review before the expiration of his sentence”), that fact does not bear on whether a case evades review. *Cf. Pennsylvania v. Mimms*, 434 U.S. 106, 109 n.3 (1977) (per curiam) (“this Court has long since departed from the rule announced in *St. Pierre*”). And Turner could not have sought this Court’s review prior to the expiration of his sentence because the state court had not yet issued a final judgment when his sentence expired; thus, no supersedeas could have issued. *See Sibron*, 392 U.S. at 53 n.13 (distinguishing *St. Pierre* on this basis).

B. The Violation Of Turner’s Constitutional Right To Appointed Counsel Is Highly Likely To Recur

In a case where the initial controversy has expired, the critical element for Article III purposes is whether there is a “reasonable expectation” that the petitioning party himself “will be subjected to the same action again.” *Weinstein*, 423 U.S. at 149; *see WRTL*, 551 U.S. at 463 (“capable of repetition” requires “a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party” (internal quotation marks omitted)).¹² In this case, that standard is more than satisfied, because it is virtually certain that Turner will again be incarcerated for civil contempt without appointment of counsel.

Turner is subject to a continuing Order of Financial Responsibility for the support of B.L.P. until B.L.P. turns eighteen. *See* Pet. App. 19a-25a. Turner owes a substantial arrearage on that order—over \$13,000, JA 104a—and he is unable to pay that amount.

¹² *See also Olmstead v. L.C.*, 527 U.S. 581, 594 n.6 (1999) (“in view of the multiple institutional placements L.C. and E.W. have experienced, the controversy they brought to court is ‘capable of repetition, yet evading review’”); *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 436 n.4 (1987) (parties “reasonably likely” to find themselves in future disputes); *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987) (“likely” that respondent would again be subject to challenged state regulation); *Press-Enterprise Co. v. Superior Ct. of Cal.*, 478 U.S. 1, 6 (1986) (“[i]t can reasonably be assumed” that newspaper publisher “will be subjected to a similar closure order”); *Globe Newspaper Co. v. Superior Ct. of Norfolk Cnty.*, 457 U.S. 596, 603 (1982) (same).

Moreover, taking Jennie Turner’s support order into account, Turner presently owes over \$20,000 in unpaid child support. *See supra* p. 15.¹³ In South Carolina, under Rule 24, that arrearage automatically requires the clerk of the family court to issue a rule to show cause why Turner should not again be held in contempt.¹⁴

¹³ Although the time Turner most recently spent in jail resulted from his failure to comply with a different child-support order—in Jennie Turner’s case instead of Rebecca Price’s—that does not alter the mootness analysis. It is the same controversy, not the precise underlying facts, that must be “capable of repetition.” *See WRTL*, 551 U.S. at 463 (rejecting narrow concept of identity and finding that WRTL had “credibly claimed that it planned on running ‘materially similar’ ... ad[vertisement]s” and there was no reason to believe FEC would “refrain from prosecuting violations of BCRA” (internal quotation marks omitted)). Thus, in *SEC v. Sloan*, when the SEC said it would no longer issue certain challenged orders against the respondent and that the case was therefore moot, the Court held the case was capable of repetition because there was a “reasonable expectation” that the respondent would be subject to *similar* orders in the future. 436 U.S. 103, 108-110 (1978). In numerous cases concerning restrictions on media access to criminal trials, this Court has similarly held that such situations qualify as “capable of repetition” because the media could be excluded from similar future cases. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (in light of the state supreme court judgment under review, “it is reasonably foreseeable that other trials may be closed by other judges”); *see also Nebraska Press Ass’n*, 427 U.S. at 546; *Gannett Co. v. DePasquale*, 443 U.S. 368, 377-378 (1979); *Globe Newspapers*, 457 U.S. at 603; *Press-Enterprise Co.*, 478 U.S. at 6.

¹⁴ The likelihood of recurrence does not depend on any “misconduct” on Turner’s part. *Cf. Honig v. Doe*, 484 U.S. 305, 320 (1988). An arrearage alone is not a willful violation of a support order. If Turner is genuinely unable to pay, that is a complete defense to any finding of willful contempt. *See supra* p. 7. This case is thus easily distinguished from those in which this Court has found that the complaining party would have to repeat his

Thus, there is not only a reasonable expectation, but a virtual certainty that Turner will again face the prospect of incarceration without having counsel appointed to assist in his defense.

South Carolina's practice of incarcerating child support obligors for failure to pay child support following civil contempt hearings at which they are denied appointment of counsel is a "fixed and definite" policy in which Turner has a concrete and cognizable interest. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 124 (1974); *see also id.* at 125-127. There is no "reason to believe that [the State] will refrain from" the automatic enforcement of child-support orders through rules to show cause and contempt proceedings. *Bellotti*, 435 U.S. at 775. Nor is there any reason to doubt that the State will continue to wield incarceration as a coercive sanction at show-cause hearings. Indeed, in Oconee County, where Turner is incarcerated, jail time is the default consequence for an obligor held in contempt: The pre-printed Oconee County form, "Order for Contempt of Court," specifically prompts the judge to check either a box for "Defendant is not in contempt of this court," or a box for "Defendant is in contempt of court, and I order that Defendant be confined to the Oconee County Detention Center." JA 53a, 61a, 82a,

"misconduct" for the circumstances to be "capable of repetition." Indeed, those cases have overwhelmingly involved the commission of crimes. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 15, 17-18 (1998); *Los Angeles v. Lyons*, 461 U.S. 95, 105-106 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974).

86a (emphasis added); *see also* JA 18a, 24a, 31a-32a, 34a, 38a-39a, 47a-48a.¹⁵

Accordingly, there is ample basis for finding that the violation of Turner’s constitutional rights that occurred in the family court below is capable of repetition, but will evade complete judicial review before the expiration of any sentence. Where the requirement of a live “personal stake” is thus met, the case lies within this Court’s Article III jurisdiction. *See Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting).

II. TURNER WAS ENTITLED TO APPOINTED COUNSEL

A. This Court’s Precedent Establishes That The Right To Appointed Counsel Applies When An Indigent Defendant Faces Incarceration

In *Powell v. Alabama*, 287 U.S. 45 (1932), this Court recognized that “[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.” *Id.* at 68-69. In a range of proceedings, both criminal and civil, this Court has accordingly held that an indigent defendant facing incarceration is entitled to be advised of his right to counsel and, if he cannot afford an attorney, to have counsel appointed to assist in his defense.

¹⁵ That Turner was represented on a voluntary, *pro bono* basis in the South Carolina appellate courts by an attorney who thereafter agreed to appear on Turner’s behalf at a later contempt hearing on a different support order does not render the case moot. The particular constitutional violation that Turner challenges in this case is the failure of the family court to *appoint* counsel, which neither the family court nor the state appellate courts have done. *See* JA 75a.

In the criminal context, the right to appointed counsel stems in part from the Sixth Amendment’s textual guarantee of “the Assistance of Counsel” in “all criminal prosecutions.” U.S. Const. amend. VI. The Court has construed this provision to confer a right to appointed counsel in any proceeding that “may end up in the actual deprivation of a person’s liberty.” *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (internal quotation marks omitted). This understanding of the Sixth Amendment right to counsel reflects “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, 462-463 (1938). Thus, 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). Rather, “*any* amount of actual jail time has Sixth Amendment significance.” *Glover v. United States*, 531 U.S. 198, 203 (2001) (emphasis added); *see also Scott v. Illinois*, 440 U.S. 367, 373 (1979).

This Court has recognized, however, that the right to the assistance of counsel for persons facing incarceration arises not only from the Sixth Amendment, but also from the requirement of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. Thus, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court extended the Sixth Amendment right to counsel to all criminal prosecutions in state courts in which the defendant faced a loss of liberty 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. As the Court had recognized in *Powell*, 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.” 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, and, accordingly, 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).

Thus, long before this Court held that the Sixth Amendment applies in criminal contempt proceedings, it 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); *see also In re Oliver*, 333 U.S. 257, 275 (1948).¹⁶ In *Cooke*, which addressed a criminal contempt proceeding in federal court, the Court held that “[d]ue process of law ... requires that an accused [criminal contemnor] should be

¹⁶ In several cases considering whether the right to a jury trial applied in criminal contempt proceedings, the Court had rejected the view that criminal contempt constituted a “criminal prosecution” within the meaning of the Sixth Amendment. *See, e.g., Myers v. United States*, 264 U.S. 95, 104-105 (1924); *Green v. United States*, 356 U.S. 165, 183-187 (1958); *see also United States v. Barnett*, 376 U.S. 681, 694-695 & 696 n.12 (1964). Only much later did the Court hold that criminal contempt is to be categorically classified as a criminal prosecution and that accused criminal contemnors thus have a constitutional right to trial by jury for contempts resulting in incarceration of six months or more. *Bloom v. Illinois*, 391 U.S. 194, 201-211 (1968); *see also Muniz v. Hoffman*, 422 U.S. 454, 475-476 (1975).

advised of the charges and have a reasonable opportunity to meet them,” which “includes the assistance of counsel.” 267 U.S. at 537.

As these cases demonstrate, the Court’s decisions under the Sixth Amendment and the Due Process Clause have focused the right-to-counsel inquiry in criminal cases on both the seriousness of the stakes for the defendant and the defendant’s critical need for the “guiding hand of counsel.” *Powell*, 287 U.S. at 69. Guided by these same considerations, the Court has held that the right to appointed counsel applies not only to “criminal prosecutions” within the meaning of the Sixth Amendment, but also to proceedings denominated as “civil” where an individual nonetheless faces the prospect of confinement to state custody.

In *In re Gault*, 387 U.S. 1 (1967), the Court relied on the Due Process Clause to require that “in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel, retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.” *Id.* at 41. The Court found appointment of counsel “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—despite its civil label—“comparable in seriousness to a felony prosecution.” *Id.* at 36-37.¹⁷ Given those stakes, a juvenile needs

¹⁷ Although respondents have contended (Rogers Opp. 32) that *Gault* “is better understood as resting on the Sixth

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); *see also id.* at 36-37 & 38-40 n.65.

Similarly, in *Vitek v. Jones*, 445 U.S. 480 (1980), a plurality of the Court concluded that counsel must be appointed as a matter of due process for a prisoner being considered for transfer to a mental institution because the prisoner retains a liberty interest in being free from involuntary psychiatric treatment. *Id.* at 493-494, 497 (plurality). The Court recognized that “commitment to a mental hospital produces ‘a massive curtailment of liberty’” for the “ordinary citizen,” *id.* at 491-492, and would constitute a significant deprivation of liberty even for a convicted criminal already serving

Amendment,” the Court expressly grounded its decision in the requirements of due process. *Gault*, 387 U.S. at 14, 41; *see also id.* at 30-31 (delinquency hearing need not “conform with all of the requirements of a criminal trial,” but requirements of due process must be satisfied). Thus, in *In re Winship*, 397 U.S. 358 (1970), the Court rejected the dissent’s suggestion that *Gault* or the majority’s own holding in *Winship* rested on any “assumption that all juvenile proceedings are criminal prosecutions.” *Id.* at 359 n.1 (internal quotation marks omitted); *see also id.* at 375-376 (Burger, C.J., dissenting). And in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court further clarified that juvenile court proceedings are not “criminal prosecutions” within the meaning of the Sixth Amendment, but are subject instead to the fundamental fairness requirement of the Due Process Clause. *Id.* at 541 (plurality) (citing *Gault*); *see also id.* at 551 (White, J., concurring); *id.* at 553 (Brennan, J., concurring in part and dissenting in part). Under that fundamental fairness standard, the Court in *McKeiver* found no right to a jury trial in juvenile delinquency adjudications. *Id.* at 543-551 (plurality); *id.* at 553-555 (Brennan, J., concurring in part and dissenting in part).

a prison sentence, *id.* at 493-494. The Court further noted that prisoners, especially those facing commitment to a mental institution, would likely require the assistance of counsel to protect and exercise their rights. *Id.* at 496-497.¹⁸

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 presumptively 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. In answering that question in the negative, the Court contrasted such cases with proceedings that involve

¹⁸ Providing the fifth vote for the judgment in *Vitek*, Justice Powell agreed that the State must provide "qualified and independent assistance" to inmates threatened with involuntary commitment, but disagreed as to whether the assistance thus provided must always include appointment of a licensed attorney. 445 U.S. at 497 (Powell, J., concurring). Following *Vitek*, Congress enacted legislation requiring appointment of counsel for the involuntary commitment of federal inmates. See 18 U.S.C. §4247(d); *United States v. Frierson*, 208 F.3d 282, 283-284 (1st Cir. 2000). Many States also provide for appointment of counsel in any proceeding that results in involuntary civil commitment, and several courts have recognized that due process requires appointment of counsel in such circumstances. See, e.g., *Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983) (upholding New York's civil commitment scheme); *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) ("[I]nvoluntary incarceration—whether for punishment ... or treatment ... commands ... the guiding hand of counsel[.]"); see also, e.g., *In re Barnard*, 455 F.2d 1370, 1375-1376 (D.C. Cir. 1971); *United States v. Budell*, 187 F.3d 1137, 1141 (9th Cir. 1999); *Lynch v. Baxley*, 386 F. Supp. 378, 389 (M.D. Ala. 1974); *Jenkins v. Director of the Va. Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 460 (Va. 2006); *In re S.L.*, 462 A.2d 1252, 1256 (N.J. 1983).

incarceration or other commitment to state custody. *Id.* at 25-27. Surveying the Sixth Amendment decisions, as well as *Gault* and *Vitek*, the Court found that its “precedents speak with one voice about what ‘fundamental fairness’ has meant when the Court has considered the right to appointed counsel.” *Id.* at 26. In particular, the “pre-eminent generalization that emerge[d] 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; *see also id.* at 26-27. In cases involving the threat of incarceration, there is a “presumption” in favor of appointment of counsel, *id.* at 26, because “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.* at 25.

Thus, at least where the potential for commitment to state custody is at stake, the Court has soundly rejected formalistic distinctions between criminal and civil proceedings, instead concluding that incarceration or other confinement triggers the right to counsel.¹⁹

¹⁹ *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 in light of the special considerations uniquely applicable to the military and because of the “particular deference [the Court owes] to the determination of Congress ... that counsel should not be provided in summary courts-martial.” *Id.* at 43. Moreover, the Court emphasized that servicemembers had the right to refuse trial by summary court-martial and be tried instead at a special or general court-martial at which counsel would be provided. *Id.* at 28-29, 46-48.

Nor does *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), detract from the general rule that an indigent litigant facing incarceration

And in both the criminal and civil contexts, the Court has repeatedly premised its decisions on two essential considerations: the weight of the defendant's interest in freedom from incarceration, and the high likelihood that without counsel's assistance, the defendant will be unable to identify, develop, or prove any defense.

As Turner's case illustrates, these two considerations compel the conclusion that civil contempt defendants facing the prospect of incarceration should also be entitled to appointment of counsel. At the contempt hearing, Turner faced "the awesome prospect of incarceration in a state institution," *Gault*, 387 U.S. at 36-37, and indeed served a full year before his statutory-maximum sentence expired. The contempt proceeding,

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. While recognizing that counsel would be required in some cases, *id.* at 786-787, 790-791, the Court reasoned that the grounds for revocation would most often be straightforward, such as conviction of another crime, and that introduction of counsel would transform the revocation proceeding from an informal hearing before an administrative board to something more akin to a formal judicial proceeding, *id.* at 787-788. In addition, the Court emphasized that its decision applied only to probationers and parolees whose liberty interests were limited because they had already been convicted of a crime and remained subject to state control. *Id.* at 789 & n.12. Thus, 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 (holding right to counsel applicable at proceeding to impose suspended sentence). In this case, there can be no doubt that the relevant proceeding was the family court contempt hearing.

although civil, was accordingly “comparable in seriousness to a felony prosecution” in terms of its consequences for Turner’s physical liberty. *Id.*; see also *Vitek*, 445 U.S. at 491 (plurality).

Moreover, Turner (like other accused contemnors in similar circumstances), surely needed “the guiding hand of counsel” to navigate the legal proceedings and assert his defenses and other rights. *Powell*, 287 U.S. at 69. The defense of inability to comply was available to Turner—if he were able to establish it. See *supra* p. 7. As the accused contemnor, however, he bore the burden of proof on the inability-to-comply defense, and mounting that defense is by no means straightforward.

Counsel could have assisted Turner by obtaining and introducing documentary evidence of his employment (including his efforts to obtain employment), his subsistence needs, health, assets, ability to borrow funds, or other evidence relevant to the defendant’s ability to comply with the support order.²⁰ Moreover,

²⁰ In some jurisdictions, the obligor is required to demonstrate not only his income, or lack of income, but also that he could not sell assets, obtain credit, or borrow funds from any source. See, e.g., *In re Gawerc*, 165 S.W.3d 314, 315 (Tex. 2005) (contemnor must demonstrate that he had “no source from which he might be expected to obtain [the money required to purge himself of contempt]” (internal quotation marks omitted)); *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678-679 (Iowa 1998) (obligor is “not free to prioritize [his] financial obligations so as to prefer [his] own creditors over [his] court-ordered obligation”); *In re Powers*, 653 N.E.2d 1154, 1158 (N.Y. 1995) (contemnor must offer “credible evidence” of necessity for his alleged expenses); *Lampert v. Lampert*, 388 N.W.2d 899, 903 (S.D. 1986) (to establish inability to pay, contemnor must provide to the court a “complete detailed financial [statement]”). The Supreme Court of South Carolina has similarly rejected as unpersuasive an inability-to-pay defense based on lack

unlike the lay defendant, counsel is trained in the calling and examining of witnesses. And counsel could have assisted Turner in demonstrating what portion of a child-support arrearage he could pay and what portion is beyond his means. *See also, e.g., Ridgway v. Baker*, 720 F.2d 1409, 1415 (5th Cir. 1983); *Pasqua v. Council*, 892 A.2d 663, 673 (N.J. 2006). Such an evidentiary showing is critical because the court is not required to credit mere assertions, and if the defendant “offers no evidence as to his inability to comply ... or stands mute,” he has not met his burden. *Maggio v. Zeitz*, 333 U.S. 56, 75 (1948).

In addition to evidentiary issues, legal issues may arise concerning the scope of the inability-to-comply defense or its application to particular facts. Under South Carolina law, for example, the scope and application of the defense may depend on the meaning of a “wilfull[] violat[ion].” S.C. Code Ann. §63-3-620.²¹

of income where the obligor held valuable real assets and enjoyed a “substantial’ lifestyle.” *Thornton v. Thornton*, 492 S.E.2d 86, 90-91, 94-95 (S.C. 1997).

²¹ Some courts have held that a defendant’s actual inability to comply does *not* provide a defense to coercive civil contempt if the defendant could be said to have induced his own inability to comply or failed to make reasonable efforts to comply. *See, e.g., Electric Works Pension Trust Fund of Local Union #58 v. Gary’s Elec. Serv. Co.*, 340 F.3d 373, 383 (6th Cir. 2003); *In re Power Recovery Sys., Inc.*, 950 F.2d 798, 803 (1st Cir. 1991); *Combs v. Ryan’s Coal Co.*, 785 F.2d 970, 984 (11th Cir. 1986). Whether such decisions accurately characterize the inability-to-comply defense—and whether they can be reconciled with this Court’s case law holding that an ostensibly coercive sanction *cannot* be imposed on a defendant whose present inability to comply negates any coercive effect—are complex legal questions that a lay defendant cannot be expected to address. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 638 n.9 (1988) (“Our precedents are clear ... that punishment

Counsel would understand how to identify the relevant legal questions and frame them for the court’s consideration, how to argue the application of law to the facts, and how to create and preserve a proper record. When Turner inartfully referred to his economic circumstances at the contempt hearing, in contrast, the family court judge paid no attention and undertook no further inquiry into Turner’s ability to pay his child-support arrearage or the willfulness of Turner’s contempt. Pet. App. 17a-18a; *see also* JA 90a. The assistance of a lawyer to identify, develop, and establish that defense and present it effectively to the court could have made a significant difference. *See, e.g., Walker v. McLain*, 768 F.2d 1181, 1184 (10th Cir. 1985) (assistance of counsel is especially needed where defendant is “attempting to prove his indigency as a defense to willfulness”); *Ridgway*, 720 F.2d at 1415 (“indigent who appears without a lawyer can[not] be charged ... with knowledge that he has [the burden to show inability to comply] nor with an understanding of how to satisfy it”); *McBride v. McBride*, 431 S.E.2d 14, 19 (N.C. 1993) (*pro se* contemnors “[do] not know how to prove their inability to pay”).

Thus, consistent with this Court’s right-to-counsel precedent, the assistance of appointed counsel for an alleged civil contemnor facing incarceration is “requisite to the very existence of a fair trial.” *Argersinger*, 407 U.S. at 31.

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.”); *see also United States v. Rylander*, 460 U.S. 752, 757 (1983); *Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Maggio*, 333 U.S. at 72; *infra* pp. 39-41.

B. Appointment Of Counsel Is Necessary In Civil Contempt Proceedings To Ensure That The Sanction Maintains Its Civil Character And Purpose

Without acknowledging this Court's decisions requiring appointment of counsel for indigent individuals facing incarceration, the Supreme Court of South Carolina thought a different rule should apply because Turner was nominally incarcerated pursuant to an order of *civil* contempt. Pet. App. 2a-3a. This reasoning was flawed.

As an initial matter, this Court has recognized that the line between civil and criminal contempt can be "somewhat elusive," *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 830-831 (1994), and often difficult to apply in practice. *See id.* at 827; *id.* at 845 (Ginsburg, J., concurring). While the distinction between the two classes of contempt is "sound in principle," *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632-633 (1988), most contempts "are neither wholly civil nor altogether criminal," *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). "[I]t may not always be easy to classify a particular act as belonging to either one of those two classes," *id.* (internal quotation marks omitted), particularly at the outset of a contempt proceeding when appropriate procedural safeguards must be put into place. The state supreme court in this case thus placed excessive reliance on a categorical distinction that may not reflect actual practice or prove workable in many cases.

Moreover, the fact that there is a constitutionally significant distinction between civil and criminal contempt cuts sharply in *favor* of a right to appointed counsel in both situations. The assistance of counsel is

needed in a civil contempt proceeding that could lead to incarceration precisely to ensure that the proceeding remains civil—*i.e.*, to ensure that the accused is not subjected to a sanction that effectively becomes punitive but that lacks the procedural safeguards that would otherwise apply in a criminal prosecution (including for criminal contempt).

Civil contempt differs from criminal contempt principally in the “character and purpose” of the sanction. *Gompers*, 221 U.S. at 441; *see also Hicks*, 485 U.S. at 631; *Shillitani v. United States*, 384 U.S. 364, 368-370 (1966). The gravamen of civil contempt is its remedial and coercive character: incarceration is remedial, and thus civil, if it coerces the defendant to do the thing required by the underlying court order, for the benefit of the complainant. *Gompers*, 221 U.S. at 441; *Maggio*, 333 U.S. at 67-68; *see also United States v. United Mine Workers*, 330 U.S. 258, 302-304 (1947). Criminal contempt sanctions, in contrast, are punitive, intended to vindicate the authority of the court. *Gompers*, 221 U.S. at 441.

The Court has emphasized that sanctions that are punitive in character and purpose may not be imposed in a civil contempt proceeding that lacks the safeguards required in criminal prosecutions, *Bagwell*, 512 U.S. at 826-827, 831, including the right to counsel.²² Rather, a

²² As discussed, this Court has long held that the right to counsel applies in criminal contempt proceedings under the Due Process Clause. *See Cooke*, 267 U.S. at 537; *Oliver*, 333 U.S. at 275. A variety of other procedural protections also apply to non-summary criminal contempt proceedings. *See, e.g., United States v. Dixon*, 509 U.S. 688, 696 (1993) (double jeopardy); *Hicks*, 485 U.S. at 632 (proof beyond a reasonable doubt); *Bloom*, 391 U.S. at 201-202 (jury trial).

contempt sanction that has a punitive character may be “properly imposed only in a proceeding instituted and tried as criminal contempt.” *Gompers*, 221 U.S. at 444; *see also Hicks*, 485 U.S. at 632-635, 638 n.9; *Shillitani*, 384 U.S. at 371; *cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-167, 184 (1963).

Although a court may order incarceration in a civil contempt proceeding that lacks the protections applicable to criminal contempts, it may do so only because, and only when, civil contempt sanctions are coercive and conditional and may in fact be avoided through obedience to the underlying court order. *Bagwell*, 512 U.S. at 826-827. The “conditional” character of civil contempt, on which the Supreme Court of South Carolina based its decision (Pet. App. 3a), thus hinges on the premise that the contemnor actually has the ability to comply with the court order and thereby avoid the sanction. As this Court has recognized, “the justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court’s order.” *Shillitani*, 384 U.S. at 371 (citing *Maggio*, 333 U.S. at 76); *see also McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 251 (1972). If the contemnor cannot “do the thing required by the order for the benefit of the complainant,” the sanction in practice is neither conditional nor coercive. *Gompers*, 221 U.S. at 442. Rather, where a defendant lacks the ability to comply, a sanction of incarceration sounds in criminal contempt—it becomes “purely punitive.” *Maggio*, 333 U.S. at 72.

Thus, “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.” *Hicks*, 485 U.S. at 638 n.9. An alleged contemnor’s inability to comply with the court

order therefore not only provides a substantive defense to the charge of willful contempt; it also determines whether the proceeding is appropriately civil, or whether instead the sentence is effectively punitive and therefore may be imposed only in a proceeding that satisfies all the procedural requirements of criminal contempt. Providing counsel to assist an alleged contemnor who faces incarceration to establish his ability or inability to comply is necessary both to ensure a more accurate result, and to ensure that the proceeding is in fact not punitive, but appropriately *civil* in the first instance.²³

²³ An erroneous judgment in civil contempt—*i.e.*, incarcerating a contemnor for coercive purposes when coercion is impossible due to the contemnor’s inability to comply—thus imposes the precise sanction that could not, by law, be imposed in criminal contempt without the assistance of counsel. This point distinguishes civil contempt from other types of proceedings in which the government proceeds against an individual but which have traditionally been designated as “civil.” In the immigration context, for example, appointment of counsel for an indigent respondent facing removal could arguably help him establish his eligibility to remain in the United States; but an erroneous outcome—in which the respondent is found removable on mistaken grounds—does not effectively convert the proceeding from a civil matter to a criminal case where the right to counsel would concededly apply, or render the removal or any associated detention an impermissible criminal punishment. *Cf. Demore v. Kim*, 538 U.S. 510, 523 (2003); *Carlson v. Landon*, 342 U.S. 524, 537-538 (1952). Moreover, the unique role that appointed counsel can play in preserving the civil character of a contempt proceeding also distinguishes the right to appointment of counsel from other constitutional safeguards the Court has found unnecessary to the adjudication of civil contempts. *See, e.g., Shillitani*, 384 U.S. at 370-371 (conditional nature of the sanction “justifies holding civil contempt proceedings absent the safeguards of indictment and jury”).

It is thus no answer to rely, as the Supreme Court of South Carolina did, on the adage that a civil contemnor “hold[s] the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do.” Pet. App. 3a. This reasoning ignores the risk that the defendant will be *erroneously* incarcerated for coercive purposes despite his inability to comply with the court order. When such an error occurs, the defendant does not “hold the keys to his cell” because he has no means of complying with the order to obtain release. Appointment of counsel reduces the risk of such error. *See supra* pp. 35-37; *infra* pp. 45-48. Moreover, the state court’s reasoning is fatally circular: the court relied on the defendant’s presumed ability to purge his contempt to justify the absence of an essential procedural safeguard at the contempt hearing, the very purpose of which was to determine whether the defendant had the ability to purge his contempt. A contempt defendant’s ability to comply is essential to the “civil” or “conditional” character of the proceeding and sanction; where that ability is the very thing at issue, the “civil” or “conditional” character of the proceeding cannot be invoked to justify denying the right to counsel to assist the defendant in establishing his inability to comply.

C. Fundamental Principles Of Due Process Confirm That An Alleged Contemnor Facing Possible Incarceration Is Entitled To Appointment Of Counsel

As the foregoing discussion shows, it is the weight of the civil contempt defendant’s interest in physical liberty and his need for the assistance of counsel in defending himself—both to ensure a factually correct determination of his ability to comply and to preserve the

“civil” character of the proceeding—that warrant appointment of counsel in civil contempt proceedings that may lead to incarceration. No further analysis is required to resolve the question. Even if the Court were writing on a blank slate, however, balancing those same considerations against the relevant state interests under the familiar rubric of procedural due process would confirm that the State may not incarcerate an indigent civil contemnor without appointing counsel to assist in his defense.

There can be no doubt that an individual has a profound liberty interest in his own physical freedom, and that the guarantee of due process therefore applies to any deprivation of that freedom. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause[.]”). To determine what process is due—here, whether appointment of counsel is required before an alleged civil contemnor may be incarcerated—the Court generally considers three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of [the liberty] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

As this Court has recognized, “the interest in being free from physical detention by one’s own government”

is “the most elemental of liberty interests.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-530 (2004); *see also Jones v. United States*, 463 U.S. 354, 361 (1983) (“[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection” (internal quotation marks omitted)). Incarceration for civil contempt is just as substantial a deprivation of liberty as it is in any other context. Like the proceedings at issue in *Gault* and *Vitek*, the fact that contempt procedures may be labeled “civil” does not diminish the deprivation. *See Gault*, 387 U.S. at 36-37; *Vitek*, 445 U.S. at 491 (plurality). “[T]he jail is just as bleak no matter which label is used.” *Walker*, 768 F.2d at 1183; *see also United States v. Anderson*, 553 F.2d 1154, 1156 (8th Cir. 1977) (“Deprivation of liberty has the same effect on the confined person regardless of whether the proceeding is civil or criminal in nature.”).

Nor does the “conditional” nature of the civil contempt sanction diminish the weight of the accused contemnor’s liberty interest. *Cf.* Pet. App. 3a. “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The due process inquiry therefore focuses on the “interest of the *erroneously* detained individual.” *Hamdi*, 542 U.S. at 530. In the civil contempt context, erroneous deprivation occurs when a “conditional” sentence is imposed for coercive purposes on an alleged contemnor who in fact lacks the ability to comply with the underlying court order and thus cannot effectively be coerced. *See supra* pp. 40-41. When a civil contemnor is *erroneously* jailed—that is, when he lacks the ability to comply—“his liberty interest is no more conditional than if he

were serving a criminal sentence.” *Walker*, 768 F.2d at 1184. Rather, the deprivation of his liberty is absolute.

The second *Mathews* factor likewise supports the conclusion that due process requires appointment of counsel for an indigent defendant facing incarceration for civil contempt. The risk that a defendant will erroneously be found in civil contempt and incarcerated without the assistance of counsel—even if he lacks the ability to comply with the court order—is substantial. While it is generally straightforward for a complainant to establish a prima facie case of civil contempt, it can be quite difficult for the alleged contemnor to establish his inability to comply.

The complainant typically needs only to show the existence of a court order and the defendant’s failure to comply to establish a prima facie case of civil contempt. *See Brasington v. Shannon*, 341 S.E.2d 130, 131 (S.C. 1986); *see also, e.g., Glover v. Johnson*, 138 F.3d 229, 244 (6th Cir. 1998). That burden is easily met, as it was in Turner’s case, by nothing more than an affidavit provided by the clerk of the court. *See supra* pp. 6-7. The defendant, by contrast, bears a heavy burden to establish his inability to comply. *Brasington*, 341 S.E.2d at 131; *see also Rylander*, 460 U.S. at 757-758, 760-761; *Maggio*, 333 U.S. at 75-76. As this Court has described it, the defendant generally must “clearly establish[]” his inability to comply. *Hicks*, 485 U.S. at 638 n.9. In many jurisdictions, even more sweeping requirements apply. *See, e.g., FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1242 (9th Cir. 1999) (alleged contemnor must meet his burden “categorically and in detail” (internal quotation marks omitted)); *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995) (alleged contemnor must “establish his inability clearly, plainly, and unmistakably”); *Forest Guardians v. Babbit*, 174 F.3d 1178,

1192 (10th Cir. 1999) (burden requires “clear and convincing evidence” (internal quotation marks omitted)).

Moreover, as discussed, establishing the inability-to-comply defense may involve complex factual and legal issues and procedural hurdles, mastery of which may prove difficult for even the most intelligent layman. *See supra* pp. 35-37. Without counsel to assist in establishing that defense, there is a greater likelihood that the outcome of the proceeding will be incorrect, and a defendant will be jailed despite lacking any means to make the court-ordered payments. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (self-representation “usually increases the likelihood of a trial outcome unfavorable to the defendant”); *Faretta v. California*, 422 U.S. 806, 838 (1975) (Burger, C.J., dissenting) (“The fact of the matter is that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself.”).

In the child-support context, alleged contemnors are especially likely to be unable to comply with underlying court orders, unable to afford their own lawyers, and unable to establish any defense without the assistance of counsel. “[M]ost [child support] debt is owed by extremely poor debtors.” Office of Child Support Enforcement (OCSE), U.S. Dep’t of Health & Human Servs., *Child Support Enforcement FY 2002 Preliminary Data Report* (2003), http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/prelim_datareport/; *see also* Sorensen et al., Urban Inst., *Assessing Child Support Arrears in Nine Large States and the Nation* 3, 22 (2007) (70 percent of unpaid support in nine States was owed by obligors earning less than \$10,000 per year). And few such individuals are likely to be able to understand, let alone anticipate and satisfy, their burden of

proof. See Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95, 121 (2009); NACDL Cert. Amicus Br. 8-9 (noting that 41% of indigent fathers lack a high school diploma). Their chances of mustering evidence and argument demonstrating their inability to comply are limited. These indigent and undereducated obligors are likely to be “overwhelm[ed]” by the “distressing and disorienting situation” of the contempt hearing. *Lassiter*, 452 U.S. at 30; see also *Vitek*, 445 U.S. at 496 (plurality).

The Court has long recognized the “special value” of the right to counsel in such circumstances as a safeguard against the erroneous deprivation of liberty. *United States v. Cronin*, 466 U.S. 648, 653-654 (1984). “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” *Id.* (internal quotation marks omitted); cf. *Maine v. Moulton*, 474 U.S. 159, 169 (1985) (“the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding”); *Argersinger*, 407 U.S. at 33-34. As the Court explained in *Powell*:

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. Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... He is unfamiliar with the rules of evidence. ... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the

danger of conviction because he does not know how to establish his innocence.

287 U.S. at 68-69. Here, as discussed, *see supra* pp. 35-37, appointed counsel could assist the alleged contemnor by assembling and introducing evidence and legal argument in support of an inability-to-comply (or other) defense, thereby significantly enhancing the “fairness and reliability” of civil contempt procedures and reducing the risk that an alleged contemnor will be jailed for coercive purposes when there is no prospect of effective coercion. *Mathews*, 424 U.S. at 343. Just as in other contexts where physical liberty is at stake, “the guiding hand of counsel” is indispensable in civil contempt proceedings that could lead to incarceration.

Weighed against Turner’s interest in his physical liberty and the assistance that counsel could provide in ensuring a more accurate outcome, the countervailing government interests in refusing appointment of counsel are minimal. State and federal courts surely have an interest in enforcing compliance with their orders. Likewise, in the child-support context, state and federal governments have an important interest in ensuring the support of minor children and strengthening families. *Little v. Streater*, 452 U.S. 1, 14 (1981); *see also* OCSE, *Strategic Plan FY 2005-2009*, at 6, http://www.acf.hhs.gov/programs/cse/pubs/2004/Strategic_Plan_FY2005-2009.pdf. Nonetheless, neither DSS nor any other state or federal entity has an interest in imposing an ostensibly coercive sanction that has no coercive force. Imprisoning a child-support obligor who is too poor to pay in no way advances the State’s interest in securing payment of child support. Indeed, incarcerating child-support obligors who genuinely cannot pay their arrearages is counterproductive to the goal of improving child-support enforcement, as few obligors will

earn income while incarcerated; and incarceration of noncustodial parents may well hinder their efforts to obtain employment upon release and impose a serious strain their children and families. Center for Family Pol’y & Prac., et al. Cert. Amicus Br. 20; cf. Levingston & Turetsky, *Debtors’ Prison—Prisoners’ Accumulation of Debt as a Barrier to Reentry*, Clearinghouse Review J. of Poverty L. & Pol’y 190 (July-Aug. 2007).

Nor does the government’s financial and administrative interest in declining to provide counsel outweigh the significant private interests at stake. The State’s “pecuniary interest” is “hardly significant enough to overcome private interests as important as those here.” *Lassiter*, 452 U.S. at 28; see also *Mathews*, 424 U.S. at 348 (“[f]inancial cost alone is not a controlling weight”). Indeed, South Carolina and other States that deny the right to counsel in civil contempt proceedings unnecessarily spend substantial amounts from the public fisc, with much of the burden falling on municipalities and local law enforcement, to incarcerate individuals ostensibly for coercive purposes even where coercive incarceration is a futile exercise. See South Carolina Dep’t of Corrections, *Cost Per Inmate, Fiscal Years 1988-2009* (Nov. 19, 2009), <http://www.doc.sc.gov/research/BudgetAndExpenditures/PerInmateCost1988-2009.pdf> (noting that South Carolina spent \$14,545 per inmate operating prisons in 2009). Moreover, providing counsel for indigent child-support obligors may *advance* the State’s interest in reducing the costs and burden of enforcement proceedings, as counsel can more efficiently “steer a defendant through the basic procedures” and “relieve the judge of the need to explain and enforce basic rules of courtroom protocol.” *McKaskle*, 465 U.S. at 184; see also NACDL Cert. Amicus Br. 21. Finally, numerous other States have

long and successfully provided for appointment of counsel to indigent defendants in civil contempt proceedings where incarceration is at stake, belying any assertion of prohibitive costs or administrative burden.

The result dictated by this Court's right-to-counsel precedent and the nature of civil contempt is thus borne out by the *Mathews* analysis: in civil contempt proceedings the State may not incarcerate the accused contemnor without advising him of his right to representation by counsel and appointing him an attorney if he is unable to afford his own.²⁴

²⁴ Civil contempt defendants who face the prospect of incarceration have a *categorical* right to appointment of counsel, not merely a case-by-case right that depends on the merit or complexity of the case or the defendant's capacity to speak effectively for himself. *Cf. Gagnon*, 411 U.S. at 787-789. In a civil contempt proceeding that leads to incarceration, the weight of the liberty interest at stake and the need for counsel's assistance are substantial and generally will not vary from one case to the next. By contrast, in *Gagnon*, the Court reasoned that the assistance of counsel would be of limited value in most cases because the grounds for probation revocation is frequently straightforward: either the defendant has admitted the charges against him or been convicted of a separate crime. *Id.* at 787. If the facts of a particular case gave rise to issues that were more complex or difficult to present, however, the Court held that counsel "[p]resumptively ... should be provided." *Id.* at 790-791.

CONCLUSION

The decision of the Supreme Court of South Carolina should be reversed.

Respectfully submitted.

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