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 OF *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Constitution Project[1] is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. The Constitution Project achieves this goal through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and reports, including practical material designed to make constitutional issues a part of ordinary political debate. The Constitution Project frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest state courts, in support of the protection of constitutional rights.

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[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' (Mr. Turner, Ms. Rogers, and Mr. Price) general consent for *amicus curiae* to submit a brief in this proceeding are on file with the Court. The South Carolina Attorney General's office denies that the State of South Carolina is a party to these proceedings and has asserted that it has no authority therefore to consent.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system.[2] Established in 2004, the

[2] The Committee members are as follows (affiliations listed for identification purposes only): **Hon. Rhoda Billings** (Co-Chair), Professor Emeritus, Wake Forest Law School; Justice, North Carolina Supreme Court, 1985-1986, Chief Justice, 1986; Judge, State District Court, 1968-1972; **Robert M. A. Johnson** (Co-Chair), District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; **Hon. Timothy K. Lewis** (Co-Chair), Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992-1999; Judge, United States District Court for the Western District of Pennsylvania, 1991-1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania; **Hon. Walter Mondale** (Honorary Co-Chair), Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977-1981; United States Senator (D-MN), 1964-1977; former Minnesota Attorney General, who organized the *amicus* brief of 22 states in favor of Gideon in *Gideon v. Wainwright*; **Hon. William S. Sessions** (Honorary Co-Chair), Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974; **Shawn Marie Armbrust**, Executive Director, Mid-Atlantic Innocence Project; former Northwestern journalism student who helped exonerate death row inmate Anthony Porter; **Hon. Jay W. Burnett**, Former Judge, 351st Criminal District Court, Harris County Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986-1998; Visiting Criminal District Judge, 2nd Judicial Administrative

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Right to Counsel Committee's mission was to

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Region of Texas, 1999-2000; **Alan Crotzer**, Senior Clerk, Department of Juvenile Justice; 2006 DNA exonoree; **Dr. Tony Fabelo**, Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council; **Hon. Norman S. Fletcher**, Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis; Justice, Supreme Court of Georgia, 1989-2005, Chief Justice, 2001-2005; **Monroe Freedman**, Professor of Law and Former Dean, Hofstra University School of Law; **Susan Herman**, Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime; **Bruce Jacob**, Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*; **Abe Krash**, Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented Clarence Gideon in *Gideon v. Wainwright*; **Charles J. Ogletree, Jr.**, Founding and Executive Director, Jesse Climenko Professor of Law, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School; **Bryan Stevenson**, Director, Equal Justice Initiative of Alabama; Professor of Law, New York University School of Law; **Larry D. Thompson**, General Counsel, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001-2003; former United States Attorney, Northern District of Georgia; **Hubert Williams**, President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission; **Norman Lefstein** (Reporter and Member), Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis; **Robert Spangenberg** (Reporter), President, The Spangenberg Group.

examine, across the country, whether criminal defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with the United States Constitution, decisions of the United States Supreme Court, and rules of the legal profession, and to develop consensus recommendations for achieving lasting reforms.

The Right to Counsel Committee spent several years examining the ability of state courts to provide adequate counsel to individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its seminal report, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, which included the Committee's findings on the right to counsel nationwide, and based on those findings, made 22 substantive recommendations for reform. The Committee's recommendations urged States to provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief on behalf of a class of indigent defendants when States fail to comply with those requirements.

The Committee also made recommendations for the federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation. JUSTICE DENIED has been cited in a wide variety of national news outlets, state newspapers, and state court opinions, and publicly praised by a

wide array of public figures including U.S. Attorney General Eric Holder.

In 2010, due to concern over the imprisonment of indigent individuals as a result of non-criminal proceedings, the Right to Counsel Committee reconvened to issue a new recommendation to add to the existing recommendations in JUSTICE DENIED. Recognizing that a handful of States have created "*de facto* 'debtor's prisons' in which individuals too poor to pay their fines or court-ordered obligations are incarcerated based on their inability to pay, without being afforded the opportunity to be represented by counsel," the Right to Counsel Committee added the following recommendation to its seminal work:

> Except in direct summary contempt proceedings, States should ensure that, in the absence of a valid waiver of counsel, quality representation is provided to all persons unable to afford counsel in proceedings that result in a loss of liberty regardless of whether the proceeding is denominated civil or criminal in nature.

Report of Right to Counsel Committee, The Constitution Project, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, Recommendation 23 (June 28, 2010), http://www.constitutionproject.org/manage/file/416.pdf.

SUMMARY OF ARGUMENT

> [T]he Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.
>
> *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 26-27 (U.S. 1981)

This case calls for a narrow decision that will further elucidate the Court's prior pronouncements that in *any* proceeding resulting in the defendant's loss of liberty, the defendant is constitutionally entitled to be advised of the right to counsel and, if indigent, to have counsel appointed. A defendant should never be prevented from enjoying this fundamental constitutional protection simply because a proceeding is denominated as "civil." Indeed, the vast majority of States recognize the overarching principle that it is the loss of liberty that triggers the right to counsel, not the nature of the proceedings. Nevertheless, at least three States, including South Carolina, Georgia, and Florida, do not recognize such a right despite the Court's pronouncements to the contrary. A handful of other

States, including New Hampshire, New Mexico, and Nevada, permit courts to decide the need for counsel on a case-by-case basis. It is time to draw all of these States under the constitutional umbrella.

The Court should not be concerned that an express recognition of a defendant's right to counsel when his liberty interest is invoked will create a waterfall effect requiring counsel to be appointed to indigent defendants in every civil proceeding. Rather, this case raises a discrete question that most States already recognize as a settled point of law: indigent defendants to a civil contempt charge must be appointed counsel when their liberty interest is jeopardized; to do otherwise, risks a defendant being jailed without due process.

The burden placed on civil contemnors to prove their inability to comply with a court order coupled with their financial inability to "purge" the contempt by paying the court-ordered amount often makes it impossible for indigent defendants in civil contempt proceedings to avoid serving sentences of as long as a year. Upon release, an indigent contemnor remains at risk of being re-arrested on a similar charge and returned to jail. This places indigent contemnors on a treadmill where they are unable to work because they are in jail, unable to purge their contempt because they are indigent, and unable to prove their indigence in the first instance because they are neither informed of a right to counsel nor provided court-appointed counsel.

Mr. Turner's case is illustrative, although regrettably not unusual in the minority of States

that have held defendants are not entitled to counsel in civil proceedings when their liberty is at stake. Mr. Turner's entire "evidentiary" hearing makes up three pages of the record. (Pet. App. 16a-18a.) He spoke a total of 169 words at his hearing, 120 of which were intended as an explanation to the court of his inability to pay. (Pet. App. 17a.) The court never advised Mr. Turner of his right to counsel nor did it give Mr. Turner any assistance beyond asking, "Is there anything you want to say?" (*Id.*) Even when Mr. Turner asked why he would not receive statutory work or good time credits during his incarceration, the court replied only, "Because that's my ruling." (*Id.*) Having received less than a minute of the court's time, Mr. Turner was incarcerated for one year in the Oconee County, South Carolina Detention Center for his "willful contempt." (*Id.*)

The fact that Mr. Turner and thousands like him are provided no constitutional due process protection is extraordinary given the Court's pronouncements to the contrary. Reversing the South Carolina Supreme Court will clarify once and for all that the risk of loss of liberty triggers a constitutional right to counsel no matter whether the case is denominated "civil" or "criminal."

ARGUMENT

I. The Court Has Already Recognized That Indigent Defendants In A Civil Action Have A Right To Appointed Counsel When Loss Of Liberty Is At Stake; Resolving This Case In Favor Of Mr. Turner's Position Will Clarify The Standard To The Minority States

No more is needed here than a narrow decision clarifying to the States that the standard for a constitutional right to counsel is based not on whether the hearing is designated as "civil" or "criminal," but rather on whether the defendant's physical liberty interest is jeopardized.

The Court already recognized this standard in *Lassiter v. Department of Social Services*, where it set forth that it is "the defendant's interest in personal freedom, *and not simply the special Sixth and Fourteenth Amendment right to counsel in criminal ca*ses, which triggers the right to appointed counsel." 452 U.S. 18, 26 (1981) (establishing that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel") (emphasis added). More recently, the Court emphasized that "no person may be imprisoned for *any offense* . . . unless he was represented by counsel at his trial." *Alabama v. Shelton*, 535 U.S. 654, 664-65 (2002) (emphasis in original) (citing *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)); *see also Glover v. United States*, 531 U.S. 198, 203 (2001) (recognizing that "any amount of actual jail time has Sixth Amendment significance").

The clarification that Mr. Turner seeks is logical and needed given the Court's precedents in both the civil and criminal contexts, which the vast majority of States have already implemented. Only a minority of States, including South Carolina, continue to permit indigent defendants to be banished to modern day debtors' prisons under the pretext that the indigent have ready funds available to purge their contempt and unlock their cell doors. Under the Court's prior guidance, there can be no proper outcome other than that a defendant in any proceeding that results in loss of liberty (other than summary contempt proceedings) must be advised of his right to counsel and, if indigent, be appointed counsel unless the right is knowingly and intelligently waived, no matter whether the proceeding is "civil" or "criminal" in nature. Any other outcome will result in fundamental unfairness.

A. "Fundamental Fairness" Requires Counsel To Be Made Available Absent The Defendant's Specific Waiver Of The Right In Any Proceeding That Results In Loss Of Liberty

A long line of cases leads us to this moment. As the Court itself has stated, its precedents "speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel," which is "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter*, 452 U.S. at 26-27.

The Sixth Amendment to the United States Constitution states that "[i]n all criminal

prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." This right to counsel is recognized as a fundamental right of life and *liberty* extended to the States by the Due Process Clause of the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property without due process of law"). *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936)); *see also Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)). Under that standard, no indigent defendant whose liberty is at stake can be "assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. *See also Shelton,* 535 U.S. at 664-65 (recognizing the right to counsel before a suspended sentence may be imposed); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (recognizing the right to counsel if the trial leads to actual imprisonment); *Argersinger*, 407 U.S. at 37 (recognizing the right to counsel in any criminal prosecution "whether classified as petty, misdemeanor or felony" that actually leads to imprisonment, even if only briefly). *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 787-89 (1973) (denying a right to appointed counsel in revocation of probation proceedings).

These and other Sixth Amendment cases have helped to inform the Court's decisions applying the right to counsel in civil matters as a fundamental due process right when a defendant's liberty interest is at stake. Indeed, the Court has said that it would be "extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'" in cases invoking a defendant's liberty interest. *In re Gault*, 387 U.S.

1, 27-28 (1967) (recognizing a right to counsel for juveniles in delinquency proceedings); *see also Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (plurality) (recognizing a prisoner as having a due process right to counsel before he can be involuntarily sent to a psychiatric institution). In sum, the Court's decisions reveal that whether an individual case is decided under the Sixth Amendment for criminal matters (*e.g.*, *Shelton*) or the Due Process Clause for civil matters (*e.g.*, *Gault*), it is the defendant's liberty interest that is the universal standard for determining when a defendant has a constitutional right to counsel.

B. Each Of The Minority States Has Either Barred Any Right To Appointed Counsel In Civil Contempt Actions Entirely Or Has Established A Case-By-Case Procedure That Effectively Bars The Right To Appointed Counsel

Mr. Turner's concerns were dismissed by the South Carolina Supreme Court under the rubric that this was civil contempt under which a defendant is not entitled to the "additional constitutional safeguards" that would have been Mr. Turner's had he been charged with criminal contempt. *Price v. Turner*, 691 S.E.2d 470, 472 (S.C. 2010), *cert. granted*, 141 S. Ct. 504 (2010) (describing Mr. Turner's twelve-month sentence as a "classic civil contempt sanction") (citing *Miller v. Miller*, 652 S.E.2d 754, 761 (S.C. Ct. App. 2007)). South Carolina does not distinguish between "civil" and "criminal" contempt under its statute with respect to potential penalties. S.C. Code Ann. § 63-3-620

(2010). The differentiation between "civil" and "criminal" in contempt proceedings, in practice, however, often favors criminal contemnors who are afforded a right to counsel, given the opportunity to present a true defense and, if found guilty, penalized a set period of time that is often far less than the time served by an indigent civil contemnor whose sentence may be open-ended. *See, e.g.*, *Poston v. Poston*, 502 S.E.2d 86, 89 (S.C. 1998) (discussing different burdens for civil and criminal contempt defendants); *Miller*, 652 S.E.2d at 761 (same).

In Georgia—another minority state—a criminal contemnor by statute may not be sentenced to more than 20 days, Ga. Code Ann. § 15-6-8 (2010), whereas a civil contemnor may be "imprisoned for an unspecified period" until he "performs a specified act." *Ensley v. Ensley*, 238 S.E.2d 920, 921-22 (Ga. 1977) (explaining that incarceration for criminal contempt is punitive, whereas incarceration for civil contempt is remedial).

The story of Georgia's Frank Hatley illustrates the danger of indefinite "civil" incarceration. Jailed for more than a year for non-payment of child-support, Frank Hatley was released only after attorneys with the Southern Center for Human Rights ("SCHR") became involved. SCHR Press Release, *South Georgia Man Released from Year-Long Incarceration; Jailed For Being Too Poor To Support A Child That Is Not His* (July 15, 2009), http://www.schr.org/action/resources/falsepaternity; *see also* Bill Rankin, *Court knew man jailed for a year for non-support was not child's father*, Atlanta Journal Constitution, July 14, 2009, *available at*

http://www.ajc.com/news/court-knew-man-jailed-910 36.html. A paternity test in 2000 showed that Mr. Hatley was not the father of the child he had been helping to support for eleven years, but the court continued to hold Mr. Hatley responsible for back payments. For the next eight years, Mr. Hatley paid. Then Mr. Hatley lost his job, lost his home, and moved into his car. Still, he made payments when he could. When his money ran out, the court stepped in and charged him with contempt. Without legal representation at his contempt hearing, Mr. Hatley was unable to show the court that his failure to pay was not willful but rather based on indigence. More than a year later, he was still incarcerated. At the time of Mr. Hatley's incarceration, 45 of the 140 inmates at the jail were also incarcerated for nonpayment of support. SCHR Press Release.

Another Georgia man is presently in prison waiting for an end to his 90-to-120-day incarceration. Randy Miller, a father of three and an Iraq War veteran who fell behind on his support payments after losing his job, was incarcerated on November 15, 2010, when a court ordered him either to pay $3,000 he did not have or go to jail. See SCHR Press Release, *State Division of Child Support Services Sends Indigent Iraq War Veteran to Debtor's Prison* (Dec. 15, 2010), http://www.schr.org/ action/resou rces/state_division_of_child_support_services_sends_ indigent_iraq_war_veteran_to_debtor_. Sadly, Mr. Miller's incarceration began four days after he had finally found a job. *Id.*

Other minority States offer a different, yet similarly erroneous, rationale right for the denial of

counsel. Florida, for example, like South Carolina, statutorily limits jail sentences for civil and criminal contemnors to a period not to exceed twelve months, Fla. Stat. § 775.02 (2010); but by law, Florida's public defenders are required to represent indigent defendants charged with criminal contempt, Fla. Stat. § 27.51 (2010). No such law protects civil contemnors. Rather, Florida's civil contempt law operates under a legal conceit that because a court requires a finding that the defendant has a "present ability to purge" the contempt, counsel need not be appointed. *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985); *see also Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983) (determining that "fundamental fairness" prevents indigent contemnors from being imprisoned, therefore no counsel is needed). Under this analysis, "there are no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support because if the parent has the ability to pay, there is no indigency, and if the parent is indigent, there is no threat of imprisonment." *Bowen*, 471 So. 2d at 1278 (quoting *Andrews*, 428 So. 2d at 666). The starting point for that analysis is no different than the one adopted by the South Carolina Supreme Court. Both courts presume an accurate determination of the contemnor's ability to pay. But it is the alleged contemnor's burden to show thereafter that he or she does not have the present ability to pay. *Bowen*, 471 So. 2d at 1278-79. Being able to adequately present the court with a defense, including the inability to pay, of course, is the purpose of appointing counsel, which is defeated under the Florida rule.

Like South Carolina, Georgia and Florida are in direct conflict with this Court's decisions requiring counsel to be provided when a defendant's liberty interest is at stake. They ignore the warning abided by the vast majority of States that have decided this issue that no matter how a contempt case is denominated, if the defendant's liberty is at stake, he is owed a right to counsel for one reason:

> If the court errs in its determination that the defendant has the means to comply with the court's order, the confinement may be indefinite. Such an error is more likely to occur if the defendant is denied counsel. Viewed in this light, a civil contempt proceeding may pose an even greater threat to liberty than a proceeding labeled "criminal," with a correspondingly greater need for counsel.

Ridgway v. Baker, 720 F.2d 1409, 1414 (5th Cir. 1983) ("the line between civil and criminal contempt is rarely as clear as the state would have us believe").

Those minority States that provide for counsel to be appointed only on a case-by-case basis in civil contempt proceedings also are violating the due process rights of the defendant. It should not be left to individual courts to decide whether an individual defendant has a right to counsel where incarceration is involved. Even so, certain minority States continue to subscribe to this erroneous point of view. In New Hampshire, for example, a court may at its

discretion provide a defendant the right to counsel only in a "*complicated* nonsupport contempt hearing." *Duval v. Duval*, 322 A.2d 1, 3 (N.H. 1974) (emphasis added). New Hampshire courts recognize that where "issues of sufficient complexity" exist, it would be unfair to deny indigent defendants "the benefit of counsel if they were unable to retain a lawyer because of their financial condition." *Id.* (citation omitted). That standard, however, would not help New Hampshire defendants in situations like Mr. Turner's. Mr. Turner's hearing, the transcript of which encompasses a mere three pages of the record (Pet. App. 16a-18a), undoubtedly would not have met New Hampshire's "complexity" requirement. Yet, that brief and routine hearing sent Mr. Turner to prison for one year. Courts clearly may wrongly assume that complex issues are not present. To the contrary, the burden on a defendant to establish the inability-to-comply defense is a difficult one.

The courts of New Mexico and Nevada apply a similarly erroneous "complexity" requirement. *See, e.g.*, *State ex rel. Department of Human Servs. v. Rael*, 642 P.2d 1099, 1104 (N.M. 1982); *Rodriguez v. Eighth Judicial Dist. Court*, 102 P.3d 41, 51 (Nev. 2004). The New Mexico Supreme Court has incorrectly held that circumstances such as those that resulted in Mr. Turner's lengthy incarceration are precisely the circumstances that do not support the appointment of counsel. *Rael*, 642 P.2d at 1103 ("The defendant is usually capable of marshalling the financial facts, assessing the accuracy of the monetary claim against him and making some sort of presentation to the court."). The *Rael* court opined

that a court's inquiry into a "defendant's ability to pay, reasons for arrearage and mitigating circumstances normally are not complicated and so do not require the assistance of an attorney to clarify them for the court." *Id.* (internal citation omitted). As discussed below, that reasoning fails.

Under New Mexico's rules, the court is the "proper evaluator of the need for counsel on a case-by-case basis, considering factors such as the indigent's ability to understand the proceeding, the complexity of the legal and factual issues, and the defenses that might be presented." *Id.* at 1104. Although the *Rael* court acknowledged this Court's *Lassiter* pronouncement regarding the importance of counsel when a defendant's liberty interest is at stake, it determined that a "defendant's interest in his personal liberty, though an extremely important one, is not as strong as it would be if he were being *criminally* prosecuted or charged with *criminal* contempt," because he "has the keys to his own prison." *Id.* at 1102-03 (emphasis added).

The Nevada Supreme Court has similarly erred in holding that "fundamental fairness does not require the appointment of counsel in every nonsupport contempt hearing when a party faces incarceration." *Rodriguez*, 102 P.3d at 51. It is the Nevada Supreme Court's opinion that a case requiring the aid of counsel is the "exception, not the rule." *Id.* Under Nevada rules, a defendant in a civil contempt case is generally not entitled to counsel because it would be a rare defendant who could not understand the proceedings or marshal the financial facts necessary to put on a defense. *Id.* In Nevada,

too, a defendant's liberty interest is deemed diminished because "the contemnor holds the key to his freedom through willful compliance." *Id.*

Courts in the "case-by-case" jurisdictions rely on a legal theory that counsel is generally not needed because of the State's burden to show willfulness. Absent a showing of willfulness, there can be no contempt. *See, e.g., id.* at 50. As discussed with respect to the Florida rule, however, "willfulness" begins with a presumption of an ability to pay—not a presentation of proving willfulness. It is actually the defendant's burden to show the inability to pay. Mr. Turner's case is a prime example of "willfulness" being shown on the basis of this presumption rather than a showing of willfulness based on his actual income. (Pet. App. 17a; 20a-21a.) Mr. Turner did not hold the "keys to his own prison," as the *Rael* court might have theorized. *Rael*, 642 P.2d at 1102-03. But had he been in a "case-by-case" jurisdiction, he would have fared no better than he fared under South Carolina's rigid rule barring a right to appointed counsel in civil contempt proceedings.

Minority States place a double burden on a civil defendant charged with violating a court order to pay a debt or to pay child support. Not only does the burden shift to the defendant to prove his own inability to pay, a civil defendant must (a) comprehend that he bears that burden, (b) prepare his defense, (c) navigate the court's procedural rules and customs, and (d) put on an evidentiary hearing, usually without any legal education or related experience whatsoever. As the Court acknowledged almost 80 years ago, indigent defendants are

unlikely to have the ready skills available to mount such a defense without the benefit of counsel:

> 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 lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

It would be inherently unfair to an alleged civil contemnor to make the right to counsel subject to the vagaries of judicial discretion when the defendant's liberty interest is at stake and when the defendant bears the burden to establish his defense. Complexity is subjective and even in the two examples provided by the New Mexico and Nevada courts, it is made clear that the opportunity to have counsel appointed would be limited to very few instances. As the record shows, Mr. Turner's hearing might have appeared to be routine, and yet the assistance of counsel would have in all likelihood changed the outcome of the case. (Pet. App. 16a-18a.)

All courts of the United States must universally recognize the constitutional standard that an

indigent defendant is always entitled to counsel in a civil contempt proceeding when his liberty interest is at stake. Due process should not depend upon the State in which a defendant resides. By any measure, that is constitutionally deficient and fundamentally unfair.

C. It Is Illogical For The Minority States To Require Counsel For Defendants Charged With Misdemeanors Per *Argersinger* But To Not Abide By *Lassiter* When Defendants Are Charged With Civil Contempt And Subject To Incarceration

States that follow the minority view, including South Carolina, have acknowledged this Court's instruction in *Argersinger* regarding the Sixth Amendment right to counsel in cases where the defendant is charged with a misdemeanor. *See, e.g.*, *State v. Rau*, 3465 S.E.2d 370 (S.C. Ct. App. 1995) (discussing *Argersinger* and describing "[o]ne of the most valued rights that a defendant can have" as "his Sixth Amendment right to assistance of counsel"); *Florida v. Singletary*, 549 So. 2d 996, 997 (Fla. 1989) ("Any defendant who faces the possibility of incarceration must be provided the services of a lawyer if he cannot afford one. It is axiomatic that these services are deemed essential because of the lawyer's training and expertise."); *Jones v. Wharton*, 316 S.E.2d 749 (Ga. 1984) ("When an accused is placed on trial for any offense, whether felony or misdemeanor, for which he faces imprisonment, the constitutional guarantee of right to counsel attaches."). Yet, they fail to recognize an equivalent concern for defendants in civil contempt cases. *See*

e.g., *Turner*, 691 S.E.2d at 472 n.2 ("We recognize that in holding a civil contemnor is not entitled to appointment of counsel before being incarcerated we are adopting the minority position."); *Adkins v. Adkins*, 248 S.E.2d 646 (Ga. 1978) ("A contempt for failure to pay child support is a civil proceeding. Its primary purpose is to provide a remedy for the collection of child support by coercing compliance with such an order. *Argersinger* relates to criminal prosecutions and is not applicable."). It is illogical that these States decline to provide counsel to indigent defendants in civil contempt proceedings where incarceration is involved.

There is a fine line between whether an act is civil or criminal and "in many circumstances, a civil contempt may have more serious consequences than a criminal contempt." *Pamela R. v. James N.*, 884 N.Y.S.2d 323, 328 (Fam. Ct. 2009). A criminal contemnor, however, is provided a full panoply of protections, including the right to counsel, while a civil contemnor in the minority States stands alone. Furthermore, as discussed more fully above, mounting a defense in civil contempt case can be particularly difficult. Unlike criminal contempt cases where the government bears the burden of proof, the moving party in a civil contempt proceeding need only make a simple *prima facie* case and has no obligation to prove the defendant is actually capable of paying. The defendant must then prove his defense, which can be quite difficult, particularly for someone without legal training.

South Carolina and other minority States have acknowledged the constitutional right of counsel for

criminal defendants even when incarceration may only be for a brief period. At the same time, these same States refuse to protect indigent defendants charged with civil contempt facing indefinite incarceration if they are too poor to pay and are unable to put on an adequate defense without counsel. That is fundamentally unfair.

II. The Minority States Wrongly Assume That Indigent Civil Contemnors "Hold The Key To The Cell Door," Precluding Any Need For Counsel

It has become a common turn of phrase that incarceration for civil contempt is merely coercive—and thus not requiring due process in the minority States—rather than punitive, because civil contemnors "hold the key to the cell door," in that they can purge their contempt at any time. *Turner*, 691 S.E.2d at 472; *see also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911) (he "carries the keys of his prison in his own pocket") (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)); *Pamela R.*, 884 N.Y.S.2d at 328 ("the best rule of thumb for distinguishing between criminal and civil contempts is that if the respondent 'holds the keys to the jail cell in his hands,' then it is a civil contempt"). Nothing could be further from the truth.

A civil contemnor who does not have the present ability to pay "does not have the 'keys to his jail'; what is nominally a civil contempt proceeding is in fact a criminal proceeding—the defendant is not being coerced, but punished." *Mead v. Batchlor*, 460 N.W.2d 493, 496 (Mich. 1990) (citation omitted); *see also Int'l Union, United Mine Workers of Am. v.*

Bagwell, 512 U.S. 821, 831 (1994) (acknowledging that "[t]o the extent that such [civil] contempts take on a punitive character . . . criminal procedural protections may be in order"); *Walker v. McLain*, 768 F.2d 1181, 1184 (10th Cir. 1985) (noting that if a contemnor is truly indigent, "his liberty interest is no more conditional than if he were serving a criminal sentence"); *McBride v. McBride*, 431 S.E.2d 14, 19 (N.C. 1993) ("the facts of the present case illustrate that trial courts do not always make such a determination [of the present ability to pay] prior to ordering the incarceration of a civil contemnor"). Despite indigence being a complete defense to a civil contempt charge, a defendant bears virtually the entire evidentiary burden without the skills or knowledge to master it. *Ridgway*, 720 F.2d at 1414 ("The indigent who appears without a lawyer can be charged neither with knowledge that he has such a burden nor with an understanding of how to satisfy it."). *See also Argersinger*, 407 U.S. 25 at 30 ("'He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be . . . convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.'") (quoting *Powell*, 287 U.S. at 68-69).

Amicus's Right to Counsel Committee spent four years investigating infirmities in the American judicial system regarding the constitutional right to counsel as applied, and supplemented its findings in 2010 due to a growing awareness that the minority States have created "*de facto* 'debtor's prisons' in which individuals too poor to pay their fines or court-ordered obligations are incarcerated based on their inability to pay, without being afforded the

opportunity to be represented by counsel." *See* The Constitution Project, Right to Counsel Committee, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, Recommendation 23 (June 28, 2010), http://www.constitutionproject.org/manage/file/416.pdf. This diverse Committee recognized, as many courts have, that this form of imprisonment is in reality no more conditional than a criminal sentence. *Id.*

"Indigent" and "obdurate" are not synonymous. Even so, Mr. Turner and thousands like him have been incarcerated without any reasonable opportunity to mount a defense. Modern day debtor's prisons are being increasingly used theoretically to "coerce" indigent people who are unable to pay their debts. Because in recent years, courts have been more frequently called upon to assist in cases involving consumer debt, the concept of "debtors' prisons" lately has received much broader attention. *See, e.g.*, Editorial, *The New Debtors' Prisons*, N.Y. Times, Apr. 6, 2009, *available at* http://www.ny times.com/2009/04/06/opinion/06 mon4.html (calling the practice "barbaric and unconstitutional"); *see also* Chris Serres and Glenn Howatt, *In jail for being in debt*, Minneapolis Star Tribune, June 9, 2010, *available at* http://www.star tribune.com/local/ 95692619.html (describing their analysis that in Minnesota, "the use of arrest warrants against debtors has jumped 60 percent over the past four years, with 845 cases in 2009"); Editorial, *People find themselves arrested—and in jail—because they owe money*, Las Vegas Sun, June 14, 2010, *available at* http://www.lasvegassun.com/

news/2010/jun/14/debtors-prisons/ (calling for "an end to this despicable practice").

Florida, one of the minority States that do not recognize a right to counsel in civil contempt proceedings, has also "resurrected the *de facto* debtor's prison" and has jailed hundreds of people for failing to pay their debts. *See* Editorial, *Debtors' prison—again,* St. Petersburg Times, Apr. 14, 2009, *available at* http://www.tampabay.com/opinion/editorials/article991963.ece.

In reality, *de facto* debtors' prisons existed for civil contemnors who were unable to pay long before the present economic difficulties in the United States made their concept interesting editorial copy. And they will continue to exist for as long as "poverty is punished among us as a crime." Samuel Johnson, Idler Essay No. 22, Sept. 16, 1758 (opining that poverty should be treated with the same lenity as other crimes; rather than leaving the debtor languishing in a debtor's prison, the onus must be on the creditor to prove the debtor's assets).

As Mr. Turner's case exemplifies, indigent defendants in the minority States have no right to appointed counsel, have no means of understanding how to put on a defense, and are vulnerable to making admissions against their own interests in court. Moreover, the proceedings are so streamlined that no true evidentiary hearing takes place to determine indigence. Indigent defendants are, in effect, punished for their poverty. Despite this, the South Carolina Supreme Court authorizes no "constitutional safeguards" for accused civil

contemnors, explaining the difference between "civil" and "criminal" contempt as follows:

> A contemnor imprisoned for civil contempt is said to hold the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do. This distinction between civil and criminal contempt is crucial because *criminal contempt triggers additional constitutional safeguards*.

Turner, 691 S.E.2d at 472 (citing *Poston*, 502 S.E.2d at 88 (emphasis added; internal citations omitted).

Mr. Turner deserved the right to counsel before spending a year in the South Oconee Detention Center. Civil contemnors only hold the keys to their cell doors when they have the present ability to purge their contempt. In many cases, indigent contemnors have neither resources to purge their contempt nor knowledge of the judicial system to prove their indigence. Their only choice is to languish in jail—a 21st century form of debtors' prison—until the passage of time allows for their release. This is punitive, not coercive, and the Court should take this opportunity to clarify that a defendant is entitled to counsel in any proceeding resulting in a loss of liberty without regard to whether the proceeding is denominated "civil" or "criminal."

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of South Carolina should be reversed.

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