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 ELIZABETH G. PATTERSON AND SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amicus curiae Elizabeth G. Patterson is the former State Director of the South Carolina Department of Social Services, the agency that administers the child support enforcement program in South Carolina. After heading that agency for four years, in 2003 she returned to the faculty of the University of South

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief, except for the South Carolina Department of Social Services, which maintains that it is not a party and does not have authority to give such consent.

Carolina School of Law, where she has been a Professor of Law since 1980. Professor Patterson specializes in child and family law issues, and her scholarship has focused extensively on federal and state child support enforcement programs and their impact on low-income noncustodial parents. She has conducted both empirical and scholarly research on South Carolina's child support enforcement system, some of which is discussed in this brief. Given her real-world experience and scholarship, Professor Patterson has a unique and informed perspective on South Carolina's child support enforcement system that she believes may be of assistance to the Court.

Amicus curiae South Carolina Appleseed Legal Justice Center ("SC Appleseed") has engaged in advocacy and education for over twenty years aimed at ensuring that South Carolina legislation addresses the interests of the underprivileged. SC Appleseed has a long history of working with the courts and the South Carolina Bar to improve access to legal representation and currently has a seat on the South Carolina Supreme Court's Access to Justice Commission. SC Appleseed has published a large number of educational materials for low-income persons, including guidance for parents involved in South Carolina's child support enforcement system. Given its experience with that system and those directly affected by it, SC Appleseed believes its perspective may be helpful to the Court.

SUMMARY OF ARGUMENT

I. This Court has long recognized the "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). That truth is borne out every day in family courts across South Carolina. A 2010 observational study of hundreds of South Carolina child support contempt hearings, for instance, revealed the following:

- Over 98% of parents held in "willful" contempt were not represented by counsel.
- At least 95% of all contemnors were sentenced to jail; the average sentence imposed was three months.
- Over 75% of all contemnors testified that they were presently or previously unemployed or having difficulty finding work.
- Parents who appeared without counsel were held in contempt *more than twice as often as parents who were represented by counsel.*

The observational study also suggested why the assistance of counsel, or lack thereof, made such a difference to these parents. The hearings had an assembly-line pace lasting just over three minutes on average, with few hearings lasting longer than six minutes. On pointed questioning from judges and social services lawyers, parent-debtors often struggled to clearly articulate a key defense that many of them undoubtedly had: an inability to pay the amount due. In several counties, courts imposed identical sentences or purge amounts for almost

every contemnor, suggesting that no meaningful attempt was made to consider the contemnor's particular circumstances. Without the guiding hand of counsel "to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether [the parent-debtor] has a defense," *In re Gault*, 387 U.S. 1, 36 (1967), contempt sanctions for many of these parents were inevitable.

II. Recent data also reveals one of the unintended consequences of South Carolina's system, which denies counsel to those accused of civil contempt: South Carolina's jails are filled with family court contemnors, creating a modern day debtors' prison for poor noncustodial parents who lack the ability to pay support. Surveys of county jail administrators and sheriffs in 2005 and 2009, for example, reported that 13% to 16% of the total jail population was made up of family court contemnors. Publicly available jail expenditure reports indicate that the cost to detain these individuals is staggering. Meanwhile, these incarcerated contemnors are prevented from earning the income they need to pay past-due child support and avoid the State's automatic contempt process from starting anew when they are released from jail.

The assistance of counsel in child support contempt proceedings could not only prevent the improper detention of those who genuinely are unable to pay, but also could help broker alternatives to incarceration, including programs that already have proven more effective at promoting sustainable employment and reimbursing the State and custodial parents for unpaid child support. At the same time, such alternatives help break the recurring cycle of incarceration that diminishes prospects for employment and deprives children of an opportunity to build a

relationship with their incarcerated noncustodial parents.

While more research is needed, the recent observational study and survey data present a compelling case that petitioner Michael Turner's experience with South Carolina's system is hardly atypical. And the data reflects the truism 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." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

ARGUMENT

I. SOUTH CAROLINA'S CHILD SUPPORT CIVIL CONTEMPT SYSTEM CREATES A HIGH RISK THAT INDIGENT PARENTS WILL BE INCARCERATED DESPITE THEIR INABILITY TO PAY THE ORDERED SUPPORT.

A. Observations Of Hundreds Of Civil Contempt Hearings In South Carolina Suggest That Many Indigent Obligors Risk Being Incarcerated For Contempt Despite Their Inability To Pay.

1. In the decision below, the South Carolina Supreme Court justified denying petitioner and other noncustodial parents the right to counsel in civil contempt proceedings—even where those proceedings result in incarceration—based on the theory that these parents "hold the keys to [their] cell" because they could "avoid the sentence by having a zero balance on or before [their] release." Pet. App. 3a-4a. This conclusion rests on the supposition that *all* child support contemnors are correctly found to have willfully skirted their responsibilities. *See* Pet. Br. 40-42.

That premise defies reality. Researchers have estimated that "at least 16.2 percent and possibly as much as 33.2 percent of young noncustodial fathers do not pay child support and are unable to do so without further impoverishing themselves or their families." Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. Pol'y Analysis & Mgmt. 44, 47 (1998); *accord* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95, 107 (2008) (discussing other estimates). Courts and commentators have referred to these indigent parents as "turnips" because—contrary to the assumption that all obligors are "deadbeat dads"—many noncustodial parents could more aptly be described by the phrase, "you can't get blood out of a turnip." Patterson, *supra*, at 125 (quoting an Ohio trial court judge).

Surveys of South Carolina sheriffs and jail administrators conducted in 2005 and 2009 by *amicus* Professor Elizabeth G. Patterson of the University of South Carolina School of Law indicated that 13% to 16% of the total detainee population consisted of family court contemnors. Although there is little hard data on the circumstances of these contemnors, a 2010 observational study of South Carolina family court contempt proceedings by Professor Patterson suggests that a large percentage of noncustodial parents who are held in contempt and ordered incarcerated are too poor to hold the keys to their jail cell.

From June through August 2010, Professor Patterson's researcher observed child support contempt hearings for 326 parent-debtors ("the 2010 Patterson Study" or "the Study"). Hearings were observed in family courts in thirteen counties across South Caro-

lina, representing a cross-section of the State's geographical regions, county demographics, and judicial districts.[2] The Study recorded specified information about the parent-debtors and the hearings. Approximately 67% of the noncustodial parent-debtors observed during these proceedings were black, 30% were white, and the remaining 3% were of another or unspecified race. Almost 12% of the parent-debtors were women.

Of the 326 obligors, less than 4% (twelve obligors) were represented by counsel at their hearings. A large percentage of all obligors were held in contempt, although the contempt rate varied significantly by county.[3] Among the thirteen county family courts observed, the contempt rates ranged from 0% to 86%, with over one-third of those courts holding 60% or more of the obligors in contempt. Across all courts, the overall contempt rate was almost 41% (133 of 326).[4] Of that 41%, at least 95% (127 of 133) of the parent-debtors were sentenced to a period of

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[2] The thirteen counties were Aiken (June 30, 2010), Anderson (Aug. 3, 2010), Charleston (July 21, 2010), Edgefield (July 13, 2010), Fairfield (June 22, 2010), Florence (July 16, 2010), Greenville (July 14, 2010), Hampton (July 15, 2010), Horry (Aug. 2, 2010), Marlboro (July 20, 2010), Orangeburg (July 28, 2010), Richland (June 10, 2010), and Sumter (June 29, 2010).

[3] Although thirty-five obligors appeared for contempt hearings on multiple child support orders, only two of them had "split decisions," in that they were held in contempt on one order but not on the other. For purposes of data analysis, these two obligors were counted among those who were held in contempt.

[4] Not all of the remaining obligors necessarily escaped a contempt sanction. For at least 11% of obligors (36 of 326), the courts continued the proceedings. The remaining 157 obligors, or 48%, were found not to be in contempt.

incarceration. As discussed in more detail below, the average imposed sentence was three months.[5] The average purge amount that these contemnors would have to pay to secure their release was just over $1,100.[6]

2. The 2010 Patterson Study provides persuasive evidence that a large proportion of the parents held in contempt were indigent. Over 75% of all contemnors (101 of 133) testified either that they:

- were unemployed at the time of the hearing;
- could not find steady work; or
- previously had difficulty finding work.[7]

Many of these individuals attributed their financial difficulties to a lack of employment opportunities, disabilities and health issues, or past incarceration.

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[5] Sentencing data was recorded for all but two of the contemnors.

[6] Purge amounts were recorded for 114 of the 133 contemnors.

[7] Many contemnors, particularly the unemployed and underemployed, appeared to have arrearages disproportionate to their earning capacity. For example, the Study recorded that at a July 2010 hearing in Orangeburg County, an obligor with over $26,000 in arrears explained that he had been looking for work since 2008, when he last paid child support. Although he had found work on a roof repair job the week before the hearing, he testified that he earned only enough to pay for the cost of his tools. The court held him in contempt, sentenced him to six months in jail, and set a purge amount of $5,000.

As petitioner explains, high arrearages are not uncommon among low income obligors, due to a variety of flaws in the child support enforcement system, including the practice of imputing income to low-income obligors pursuant to standardized formulas and retroactively applying child support obligations. *See* Pet. Br. 8 n.5, 9.

While the Study examined only a small cross-section of South Carolina parents subject to contempt hearings, its observations are consistent with national data concerning delinquent child support obligors. *See* Office of Child Support Enforcement, Dep't of Health and Human Servs., *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* 4 (July 2004), *available at* http://www.acf.hhs.gov/programs/cse/pol/DCL/2004/dcl-04-28a.pdf (finding that 70% of child support debt is owed by noncustodial parents with earnings less than $10,000 per year or no quarterly income at all); Patterson, *supra*, at 106 (discussing another study that "found that fewer than one in five such [low-income noncustodial fathers] have full-time, year round work . . . [and that these fathers] earned an average of $4,221 annually").

Michael Turner's case exemplifies what the 2010 Patterson Study recorded over the course of hundreds of contempt proceedings. At his January 2008 contempt hearing, Turner testified that his non-payment was due to his physical disability and drug addiction, both of which limited his earning potential. *See* Pet. App. 17a. The court held him in contempt and sentenced him to a term of imprisonment not to exceed twelve months, the statutory maximum. J.A. 60a-62a; *see also* S.C. Code Ann. § 63-3-620. While his appeal of that sentence was pending, he was brought into court again in April 2009 for his child support arrearage. There, Turner explained that despite looking for jobs in the four months since his release from jail, he was unable to find any work. The judge asked Turner two questions about where he lived, and then found him in "willful contempt" and sentenced him to six months incarceration subject to a purge amount of $2,500 plus a 5% court

fee. J.A. 86a, 90a-91a. Given Turner's financial condition, the purge amount may as well have been $1 million.

B. The Observed Hearings Showed That Parent-Debtors Without Counsel Were Held In Contempt More Than Twice As Often As Those Represented By Counsel.

1. The 2010 Patterson Study reinforces the "obvious truth" that the assistance of counsel can be a significant factor in a child support obligor's success in avoiding both a contempt finding and incarceration, and that self-representation "usually increases the likelihood of a trial outcome unfavorable to the defendant . . . ." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). The Study observed a distribution of contempt rulings that suggests the decision-making process in South Carolina family courts is skewed against noncustodial parents who appear without counsel in child support contempt hearings.

Of the 326 obligors observed during the Study, less than 4% (twelve obligors) were represented by counsel. And obligors who appeared without counsel were held in contempt more than twice as often as obligors who were represented by counsel. Only 17% of obligors with attorneys (two of twelve) were held in contempt.[8] By contrast, 42% of unrepresented obligors (131 of 314) were held in contempt.

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[8] In both cases where the obligor had counsel but was held in contempt, the evidence reflected that the obligor had an income stream. At a June 2010 hearing in Richland County, one of the represented obligors was employed and had a longstanding child support debt. The other represented contemnor, whose hearing

The discrepancy in contempt rates between obligors with lawyers and those without lawyers does not appear to be attributable to the obligors' economic circumstances. Rather, the Study suggests that, as a group, parent-debtors with counsel were no better off financially than the unrepresented obligors. At least four of the parents with counsel were unemployed, and at least two of the four parents who had jobs were not earning a significant income.[9] At a July 2010 hearing in Greenville County, for example, a parent who was represented by counsel testified that she made $250 per week as a chain restaurant waitress. The court did not hold her in contempt. Later that month at a Charleston County hearing, another parent who was represented by counsel testified that he was a truck driver making half of what he used to because of a company-wide reduction in schedules. He was not held in contempt. By contrast, the researcher observed case after case where unrepresented individuals with similar circumstances were sentenced to jail.

2. Although many parents who appeared without lawyers were not held in contempt, these outcomes were not necessarily attributable to the obligors' efforts at self-representation. The Study recorded that the thirteen family courts varied widely in their contempt rates, from 0% to 86%. There are any number of reasons for such divergent outcomes. One possibility is that each court differed—perhaps due to

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was in Horry County in August 2010, was unemployed but had a monthly military pension. In his case, an agency lawyer at the hearing informed the court that the child support order originated in another state, which had requested enforcement.

[9] Employment data was not recorded for another four obligors who had counsel.

caseload or experience with the effectiveness (or ineffectiveness) of contempt as a means of securing payment—in how it exercised its broad discretion to determine whether an obligor proved that his or her failure to comply with the child support order was not willful. This is precisely the type of discretionary finding that is vulnerable to the "arbitrary exercise of judicial power," and for which the assistance of counsel is "both necessary and appropriate" to protect against punitive contempt sanctions. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 834 (1994).

Moreover, the Study also strongly suggests that regardless of the hearing outcomes, many of the obligors—whether represented or not—were similarly situated with respect to their inability to pay. Overall, 68% of all obligors (223 of 326) testified either to past or present unemployment or under-employment. Substantial majorities of contemnors (76%, or 101 of 133) and non-contemnors (63%, or 122 of 193) testified to the same effect. Thus, whatever the reasons that some of the parents observed during the 2010 Patterson Study were able to muddle through the system and escape incarceration, the fact remains that parents without lawyers were over twice as likely to be held in contempt as similarly situated parents who had the assistance of counsel.

C. The Observed Hearings Showed That Parent-Debtors Needed Counsel To Navigate The System And Present Their Available Defenses.

1. Profile Of A South Carolina Child Support Civil Contempt Proceeding

South Carolina family courts administer all child support cases that involve the State's Department of Social Services ("DSS"). Most child support contempt proceedings are initiated by the clerk of court, pursuant to South Carolina Family Court Rule 24, entitled "Automatic Enforcement of Child Support and Periodic Alimony."[10] The Rule empowers the clerk both to determine arrearages and to compel an obligor to appear in court. The clerk conducts a monthly review of child support accounts and determines the arrearage based on whether scheduled payments are late by five days or more. S.C. R. Fam. Ct. 24(a). For any overdue payments, the clerk issues a "rule to show cause" and an affidavit identifying the child support order at issue and the amount of arrearages accrued. S.C. R. Fam. Ct. 24(b). The rule to show cause, which has "the same force and effect as a rule to show cause issued by a judge," also sets a hearing date and directs the parent-debtor to attend. *Id.*

At a Rule 24 hearing, the family court judge may find a parent-obligor in contempt if the parent was in "willful disobedience" of the prior child support order, in that he or she "voluntarily and intentionally" and

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[10] For child support or alimony orders not administered by the court, the noncustodial parent must commence his or her own rule to show cause. Stephanie G. Borsanyi, *Rules to Show Cause*, 19-Nov. S.C. Law. 16, 21 (2007).

"with specific intent" failed to pay as ordered. *Spartanburg Cnty. Dep't of Soc. Servs. v. Padgett*, 370 S.E.2d 872, 874 (S.C. 1988) (quoting Black's Law Dictionary 1434 (5th ed. 1979)); *accord* S.C. Code Ann. § 63-3-620. The clerk's records, as reflected in the affidavit, constitute *prima facie* evidence that the parent has not complied with the court's prior child support order. *See S.C. Dep't of Soc. Servs. v. Johnson*, 688 S.E.2d 588, 592-93 (S.C. Ct. App. 2009). Once the clerk's affidavit establishes the parent's disobedience of the child support order, *see id.*, the burden shifts to the parent-debtor to establish that his or her disobedience was not willful. *Pratt v. S.C. Dep't of Soc. Servs.*, 324 S.E.2d 97, 98 (S.C. Ct. App. 1984). A parent's lack of willfulness—such as a financial inability to pay—thus becomes a key factual question at the contempt hearing.

Family courts in South Carolina generally hold civil contempt hearings on specific days that are set aside for that purpose. The 2010 Patterson Study observed hundreds of such hearings in thirteen different counties. Though the procedures varied, the hearings tended to follow a similar process. The hearings had an assembly-line pace, lasting only about three minutes on average, with few hearings lasting more than six minutes. They typically commenced when either the clerk or the judge called a debtor (or group of debtors) by name and then swore-in the debtor (or group). In all observed hearings, an attorney for DSS was present, usually sitting at opposing counsel's table. The DSS attorney often was assisted by a DSS staff member with computer access to information in the agency's database.

Once the parent-debtor was before the court, the proceedings routinely turned to an examination of the parent-debtor's economic circumstances. In most counties, the questioning was performed primarily by the judge, although on the day proceedings were observed in Charleston County, the DSS attorney took a principal role in the questioning. Even when DSS attorneys did not lead the questioning, however, these agency lawyers often participated in the proceedings. Across all counties, in about one-quarter of the obligors' hearings (76 of 326), for instance, a DSS attorney directly questioned the parent-debtor, answered questions posed by the court, confirmed or contradicted the obligor's testimony, or informed the court of the outcome desired by DSS.

As discussed below, the observed proceedings demonstrate that a child support obligor needs a lawyer "to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether he has a defense . . . ." *In re Gault*, 387 U.S. at 36.

2. Counsel's Assistance Is Needed To Identify Administrative And Procedural Errors.

The assistance of counsel provides an essential check on the inevitable administrative errors that arise at the inception of South Carolina's automated child support enforcement process. As noted, the process begins when a parent's name appears on a list of late-payors and the clerk issues a rule to show cause and affidavit that constitute *prima facie* evidence of the arrearage and the parent's non-compliance. Lacking an attorney's ability to navigate the law, procedures, and administration of large

agency programs, a layperson cannot be expected to challenge the presumption of regularity that attaches to these court records.

For example, the 2010 Patterson Study recorded that during a July hearing in Marlboro County, it was revealed that, due to an administrative error, a noncustodial parent never received notification that he should have been paying child support. The court discovered this mistake only because a DSS lawyer identified the error and requested that the court not hold the obligor in contempt and instead continue the hearing due to the lack of notice. Similar errors that a layperson would be hard-pressed to raise include computational errors in the amount purportedly owed, jurisdictional defects in the underlying support order, or defects in the rule to show cause affidavit. *See Brasington v. Shannon*, 341 S.E.2d 130, 131 (S.C. 1986).

3. Counsel's Assistance Is Needed To Present An "Inability To Pay" Defense.

Counsel also would help the parent-debtor prepare a proper defense and satisfy his or her burden of proof on the crucial issue of inability to pay. To satisfy the burden of proof, a parent-debtor might be expected to present evidence of "his or her employment (or lack thereof), wages, expenses and assets." Patterson, *supra*, at 120; *see also Hicks v. Hicks*, 312 S.E.2d 598, 599-600 (S.C. Ct. App. 1984). Although this burden may sound "simple, orderly and necessary to the lawyer," to the untrained layman it "may appear intricate, complex and mysterious." *Johnson*, 304 U.S. at 463. Thus, "[e]ven the simplest 'inability to pay' argument requires articulating the defense, gathering and presenting documentary and other

evidence, and responding to legally significant questions from the bench—tasks which are 'probably awesome and perhaps insuperable undertakings to the uninitiated layperson.'" Patterson, *supra*, at 121 (quoting *Pasqua v. Council*, 892 A.2d 663, 673 (N.J. 2006)). In the proceedings observed in the 2010 Patterson Study, for instance, parent-debtors held in contempt routinely did not bring documents or other evidence that might corroborate their testimony about their circumstances.

The burden is even greater when a fact-finder requires proof not only that the obligor was unemployed, but also that the unemployment was not voluntary. Such proof might consist of evidence concerning the local unemployment rate, the basis for dismissal or departure from a previous job, subsequent efforts to find employment, or the effect on employability of various personal "barriers to employment," such as limited education or work skills, addictions, physical or mental health problems, or a criminal record. Patterson, *supra*, at 105-06 ("Studies have shown that large proportions of poor non-custodial fathers lack a high-school degree or GED, have criminal records, and suffer from health conditions that limit the kind or amount of work they can perform."); *see also id.* at 120-21. A layperson's attempt to meet this burden is no substitute for a trained lawyer's ability to identify and convey the relevant information to the court. For example, in a July 2010 hearing in Hampton County, an unemployed parent-debtor explained that he was laid off two years earlier and that he suffered from schizophrenia. He brought his mother, who corroborated that he was disabled. He was held in contempt and sentenced to thirty days in jail.

Additionally, parent-debtors may have other dependents for whom they are responsible, Patterson, *supra*, at 120 n.171, and whose needs should be considered in determining the obligor's ability to pay. At an August 2010 hearing in Anderson County, one parent-debtor explained that he was laid off from his job soon after paying the purge amount set at a previous contempt hearing. Although he since had found other employment, he testified that there was insufficient work at his new job for him to support the three children in his own household as well as the two others for whom he was paying child support. He was held in contempt and sentenced to thirty days in jail. On that same day, the Anderson County court also held in contempt a parent-debtor who was brought to the court from jail wearing his orange jumpsuit. The court held him in contempt even though he was only two weeks into a separate ninety-day child support contempt sentence with obviously no ability to earn money to pay the past due support. The significance of these types of circumstances may go unnoted without an attorney's explanation, argument, and assistance to identify and present corroborating evidence and witnesses.

4. Counsel's Assistance Is Needed To Shape An Appropriate Contempt Sanction.

Even if an obligor is held in contempt, an attorney's skills and knowledge can still help ensure that the court's determination of the purge amount and jail sentence is realistic in light of the obligor's economic circumstances. South Carolina law gives the family court judge broad discretion in sentencing a parent-debtor for willful failure to pay, including the ability to impose imprisonment of up to one year and up to a

$1,500 fine. *See* S.C. Code Ann. § 63-3-620. Because the court may use incarceration only as a means of coercing compliance with the child support order, the court may impose a jail sentence only if the contemnor can comply with the support order and thus purge the contempt. If the parent-debtor lacks the ability to comply, then he or she cannot be incarcerated in a civil proceeding. Given the three-minute average hearing length recorded by the 2010 Patterson Study, it is unlikely that an obligor could, without a lawyer's help, focus the court's sentencing analysis upon the actual proportion of the arrearage, if any, that the obligor could realistically pay *at that time* as a purge amount.

Apart from observing the lack of inquiry into the parent-debtor's present ability to pay, the 2010 Patterson Study revealed that the purge amounts often were not tailored to the contemnor's circumstances. The Study found that purge amounts varied significantly from county to county, ranging from a few dollars to over $10,000, with the average amount just over $1,100. In many individual counties, however, it appeared that no attempt was made to determine a reasonable purge amount based on the parent's individual circumstances. For example, in Hampton County, every recorded purge amount was set at $500, except for two hearings where the amounts of the underlying arrearage were less than $500. In other counties, the purge amount was set as a proportion of the arrearage; for example, the Richland County court set the purge amount at 10% to 20% of the outstanding arrearage. And in Florence County, the court routinely set the purge amount at the full amount owed by the obligor. In Michael Turner's case, the Oconee County court used this

same approach, setting the purge amount at the full $5,728.76 Turner owed in arrears. J.A. 61a.

Similar approaches were recorded concerning sentencing practices. The 2010 Patterson Study recorded that the length of incarceration varied from county to county, ranging from 0 to 365 days, with an average sentence of three months. In several individual counties, however, courts appeared to use a one-size-fits-all approach to sentencing, suggesting that no meaningful attempt was made to base the sentence on the particulars of the case or the parent's circumstances. For example, all sixteen contemnors in Hampton County were sentenced to thirty days in jail, while each of the twenty-two contemnors in Charleston, Greenville, and Horry Counties received six-month sentences.

Counsel also can play an important role in negotiating settlements that could promote the goal of increasing child support payments while avoiding the counterproductive step of incarcerating the obligor. Such settlements might involve job training or job placement assistance, vocational rehabilitation programs, treatment for addictions or health problems, or other actions designed to improve the obligor's earning capacity. *See* S.C. Code Ann. §§ 63-17-490, 63-17-500; *see also infra* at 29-30 (discussing Alternative to Incarceration program). Petitioner Turner, for example, was incarcerated at least five times when he appeared at contempt proceedings without the aid of counsel. Pet. Br. 9-15. But at petitioner's 2010 contempt proceeding, *pro bono* counsel was able to negotiate a suspended jail

sentence conditioned on completion of a substance abuse program. Pet. Br. 15 n.10.[11]

Finally, given the wide discretion available to the courts in these cases, and the family court's "continuing supervisory role" over an indigent parent's most intimate economic affairs, *Bagwell*, 512 U.S. at 842 (Scalia, J., concurring), the right to counsel is an essential safeguard against the constant threat of erroneous incarceration. *Id.* at 834. The only check on the courts' discretion is the deferential "abuse of discretion" standard of appellate review. *See Durlach v. Durlach*, 596 S.E.2d 908, 912 (S.C. 2004). It goes without saying that an unrepresented parent is ill-equipped to understand or build any record for an appeal. And even if they could find a *pro bono* lawyer to file one, appellate courts do not lightly "disregard the family court's findings" because they conclude "that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." *Johnson*, 688 S.E.2d at 590.

The hundreds of proceedings observed in the Study reflect the obstacles that uncounseled South Carolina obligors faced in presenting defenses and preserving their physical liberty. In a courtroom filled with skeptical representatives of the State's executive and judicial branches, an attorney who is trained to clearly and precisely articulate the relevant facts may be effective in a proceeding that averages only three minutes. But it is inevitable that many layper-

[11] That petitioner was subsequently jailed when he did not complete the substance abuse program does not detract from the fact that the opportunity to benefit from such a program arose only through the efforts of his attorney.

sons will be "overwhelm[ed]" by the "distressing and disorienting situation" of a rushed contempt hearing. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 30 (1981).

II. PROVIDING COUNSEL SHOULD SAVE SOUTH CAROLINA AND ITS COUNTIES MONEY AND BETTER ENSURE THAT CHILDREN RECEIVE NEEDED FINANCIAL SUPPORT.

Recent data also reveals one of the potential consequences of denying counsel to those accused of civil contempt: South Carolina's jails are filled with family court contemnors, creating a modern day debtors' prison for poor noncustodial parents who lack the ability to pay support. South Carolina's current approach to child support enforcement is penny wise and pound foolish; providing counsel to indigent noncustodial parents in South Carolina likely would *save* the State and local governments significant resources. At the same time, it would facilitate, rather than hinder, the provision of needed child support.

A. The Cost Of Detaining Child Support Obligors Is Staggering.

Child support contemnors comprise a significant portion of South Carolina's jail population. In 2005 and 2009, Professor Patterson surveyed county sheriffs and jail administrators across South Carolina to determine what proportion of the State's jail population consisted of child support contemnors confined on civil contempt charges ("the 2005 and 2009 Patterson Surveys"). Each response reported the total number of inmates and the number of those inmates who were "family court detainees" on the particular day the report was completed; according to

survey participants, "family court detainees" consisted exclusively of civil contemnors and primarily of child support contemnors.[12] Complete responses were received from jails serving thirty-one of the State's forty-six counties in 2005, and from thirty-three counties' jails in 2009. Only three small counties failed to respond to either survey.[13]

In 2005, the sheriffs and administrators reported a total jail population of 8,251 for thirty-one counties, of which 16.2% (1,335) were "family court detainees." The figures were similar in 2009: the total jail population was 9,537 for thirty-three counties, of which 13.2% (1,259) were family court detainees.[14] These numbers paint a striking portrait: Nearly one out of every six to eight individuals in county jails were family court civil contemnors. Some individual county jails had even higher proportions of these contemnors. In 2009, jails serving eleven counties reported that family court detainees made up almost one-fifth or more of the jail population.[15]

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[12] A small number of "family court detainees" reportedly were persons in arrears on alimony payments, who are also subject to South Carolina Family Court Rule 24.

[13] Those counties were Bamberg, Fairfield, and Union. In 2009, the total estimated population of these three counties was almost 66,000, out of a statewide estimated population of approximately 4.6 million. *See* U.S. Census Bureau State Population by County, *available at* http://quickfacts.census.gov/qfd/states/45000.html.

[14] A jail serving two additional counties responded to the 2009 Survey by providing the number of family court detainees, but not the total number of all detainees. That jail's response has been excluded from this analysis.

[15] These jails served the counties of Aiken, Barnwell, Berkeley, Clarendon, Dorchester, Greenwood, Lee, Jasper, Pickens, Sumter, and York.

The cost to confine these parents is significant. For example, Charleston County—a large jurisdiction—expended over $29 million to operate its jails in 2009.[16] On the day that its jail officials responded to the 2009 Survey, Charleston's jail housed 1,644 prisoners, almost 16% of whom were family court detainees. The data is similar for rural counties such as Anderson County, which spent over $5 million on its detention center;[17] its 2009 Survey response indicated that 12% of its jail was filled with family court detainees. And Oconee County, where petitioner Turner was incarcerated, appropriated $2,472,964 to fund its detention center in 2009.[18] Although the Oconee County jail did not respond to the 2009 Survey, it reported in 2005 that almost 17% of its inmates were family court detainees.

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[16] *See* Charleston County Approved Budget Detail FY 2011 at 63-65 ("Charleston Budget"), *at* http://www.charlestoncounty.org.

[17] *See* Anderson County Annual Operating and Capital Budget FY 2009 at 180-81, *at* http://www.andersoncountysc.org.

[18] *See* Oconee County General Fund Budget Summary FY 2010 at 25-27, *at* http://www.oconeesc.com.

Amici were able to locate fiscal year 2009 jail expenditures for twenty-one of the counties that responded to the 2009 Survey.[19] The table below displays these counties' jail costs, the number of total detainees that they reported, and the corresponding numbers and percentages of family court detainees.

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[19] *See* Charleston Budget, *supra* note 16; Anderson Budget, *supra* note 17; *see also* Aiken County Budget Ordinance FY 2009 at vii, *at* http://archive.aikencountysc.gov; Beaufort County Comprehensive Annual Financial Report at 77, *at* http://www.bcgov.net; Berkeley County Interim Financial Statement 2010 at 8, *at* http://www.berkeleycountysc.gov; Clarendon County Budget Summary FY 2011 at 19, *at* http://www.clarendoncounty.sc.gov; Dorchester County Budget FY 2011 at 276, *at* http://www.dorchestercounty.net; Florence County Comprehensive Annual Financial Report FY 2009 at 175, *at* http://files.florenceco.org; Georgetown County Audited Financial Statement FY 2009 at 63, *at* http://www.georgetowncountysc.org; Greenwood County Comprehensive Annual Financial Report FY 2009 at 59, *at* http://www.greenwoodsc.gov; Horry County Comprehensive Annual Financial Report FY 2009 at 87, *at* http://www.horrycounty.org; Jasper County Comprehensive Annual Financial Report FY 2009 at 45, *at* http://www.jaspercountysc.org; Kershaw County Comprehensive Annual Financial Report FY 2009 at 57, *at* http://www.kershaw.sc.gov; Laurens County Report on Financial Statements FY 2009 at 38, *at* http://www.sccounties.org; Lexington County Comprehensive Annual Financial Report FY 2009 at 115, *at* http://www.lex-co.com; Newberry County Audit Report FY 2009 at 28, *at* http://www.newberrycounty.net; Pickens County Comprehensive Annual Financial Report FY 2009 at 55, *at* http://www.co.pickens.sc.us; Richland County Annual Budget FY 2011 at 77, *at* http://www.richlandonline.com; Spartanburg County Adopted Operating Budget FY 2009 at 28, *at* http://www.spartanburgcounty.org; Williamsburg County Budget Highlights FY 2009, *at* http://www.williamsburgcounty.sc.gov; York County Comprehensive Annual Financial Report FY 2009 at 67, *at* http://www.yorkcountygov.com.

County	*FY 2009 Jail Costs*	*2009 Detainees*	*2009 Family Court Detainees & Percentage of Total*
Charleston	$29,063,891	1644	255 (15.5%)
Richland	$19,929,824	957	61 (6.4%)
Horry	$14,928,960	631	36 (5.7%)
Spartanburg	$13,461,869	647	71 (11%)
Lexington	$11,385,599	882	70 (7.9%)
Beaufort	$6,597,248	318	32 (10.1%)
York	$6,439,058	145	49 (33.8%)
Florence	$6,133,251	479	36 (7.5%)
Anderson	$5,351,375	365	43 (11.8%)
Aiken	$4,615,082	406	85 (20.9%)
Dorchester	$4,239,010	244	53 (21.7%)
Jasper	$3,536,155	102	20 (19.6%)
Georgetown	$3,140,762	197	10 (5.1%)
Berkeley	$2,617,589	399	105 (26.3%)
Laurens	$2,123,716	188	32 (17%)
Greenwood	$2,039,927	178	40 (22.5%)
Clarendon	$1,915,788	71	16 (22.5%)
Kershaw	$1,657,994	86	16 (18.6%)
Newberry	$1,609,836	93	17 (18.3%)
Williamsburg	$1,452,725	98	8 (8.2%)
Pickens	$1,225,627	88	21 (23.9%)
TOTAL	**$143,465,286**	**8,218**	**1,076 (13.1%)**[20]

[20] The 13.1% family court detainee population for the twenty-one counties listed above is consistent with the 2009 Survey's

As shown, these twenty-one counties' jail costs totaled over $143 million. On average, they spent over $17,000 per reported detainee. This corresponds with the South Carolina Department of Corrections' reported combined State and federal expenditures of over $16,000 per post-conviction prisoner. *See* S.C. Dep't of Corrections, Costs Per Inmate Fiscal Years 1988-2009, *available at* http://www.doc.sc.gov/research/BudgetAndExpenditures/PerInmateCost1988-2009.pdf; *see also* Pet. Br. 49 (citing State portion of expenditures). Considering that these twenty-one counties alone reported over 1,000 family court detainees, with most being child support contemnors, it is clear that South Carolina spends considerable amounts of money jailing parents who lacked the assistance of counsel when they were determined to have been in "willful" contempt.

B. Incarceration Creates A Counterproductive Cycle Of Nonpayment And Contempt And Precludes Implementation Of More Efficient, Constructive Alternatives.

In addition to imposing substantial unnecessary costs on the State and local governments, incarceration impedes an obligor's ability to provide for his or her child, in many cases creating a cycle of contempt and incarceration. Few parent-debtors are able to generate income while incarcerated. Indeed, nationwide, prisoners who owed $10,000 in child support obligations before imprisonment frequently owed $20,000 or more once released. *See* Center for Law and Social Policy, *Staying in Jobs and Out of the*

13.2% proportion of family court detainees from all thirty-three participating counties.

Underground: Child Support Policies That Encourage Legitimate Work 1 (2007), *available at* http://www.clasp.org/admin/site/publications/files/0349.pdf; *see also* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 NO. 1 Judges' J. 5, 7 (2004).

In addition to facing mounting arrearages upon release, many indigent obligors, like petitioner, face barriers to employment, which can be "made more difficult by virtue of th[eir] prison record." Rebecca May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, *available at* http://www.cffpp.org/publications/effect_child.html. And in South Carolina, the clock is ticking: within a month, the clerk will again review the child support accounts and determine whether scheduled payments are late by five days or more. S.C. R. Fam. Ct. 24(a). Thus, parent-debtors soon find themselves subject to a costly cycle of incarceration:

> [F]athers exit the detention cent[er] owing more than they did when they left [home], with no more employment skills than when they entered. Many fathers lose their housing, transportation and other assets they were able to acquire . . . . [W]ithin a short period of time they find themselves again ruled into court for non-payment of child support and incarcerated.

Irene Luckey & Lisa Potts, *Alternative to Incarceration for Low-Income Non-Custodial Parents*, 16 Child & Fam. Social Work 22, 23 (2011). Indeed, that is exactly what happened to petitioner Turner. Turner was jailed on at least five occasions for contempt. Pet. Br. 9-15. During at least three prison terms, Turner's unpaid child support debt continued to grow. *Id.* And each time Turner was released from

jail, the clerk soon issued another rule to show cause and the cycle began again. *Id.*

Work release programs, often promoted as employment options for incarcerated child support obligors, have proven ineffectual at stemming this cycle. Work release programs are designed to allow eligible prisoners to work at offsite businesses at designated times. Luckey & Potts, *supra*, at 23. But inmates must meet certain criteria, *see* Pet. Br. 12 n.8, and the program depends upon voluntary participation by employers who are seldom willing to accommodate the program's transportation and scheduling restraints, especially for low-skill, low-wage prisoners. Luckey & Potts, *supra*, at 23.

These impediments are aggravated in the current economic recession. One study shows that, even for a once-productive work release program in York County, South Carolina, only eight of the forty prisoners were participating in the program in 2009, five of whom were continuing employment obtained before they were incarcerated. South Carolina Center for Fathers and Families, *Impact on Detention Center Population of "Jobs Not Jail" Alternative Sentencing Program* 3, *available at* http://www.scfathersandfamilies.com/public/files/docs/Impact%20of%20Jobs%20Not%20Jail.pdf. Even in a more robust economy, the State continues to bear the costs of confinement during a work release program. Luckey & Potts, *supra*, at 23.

Alternatives to imprisonment, which, as noted, may require the assistance of counsel to pursue, have been developed in some South Carolina counties. Employment-based fatherhood programs, such as the Alternative to Incarceration ("ATI") program, have proven effective at securing long-term employment

for poor noncustodial fathers. From 2006 to 2009, ATI helped 1,171 putative contemnors keep or obtain employment, earn approximately $6.9 million in wages, and pay roughly $1.5 million in child support. *Id*. at 28-29. Even during the 2008-2009 recession year, where unemployment in the nine participating counties ranged from 8% to 17%, the program helped 390 putative contemnors earn nearly $1.8 million in wages and pay more than $460,000 in child support. *Id*.

Such programs not only increase child support satisfaction, but are also cost effective for the State. ATI program costs, for example, were at least $2 million less per year than the average incarceration costs for all program participants. *Id*.

These savings and benefits are lost to the State and the family each time an indigent putative contemnor is sentenced to prison. The intervention of counsel can help break the cycle of incarceration and forge constructive, sustainable, and efficient alternatives.

C. Incarceration Negatively Affects Noncustodial Family Relationships.

Even among separated families, incarceration deprives children of the prospect of cultivating a relationship with their noncustodial parent. *See* Patterson, *supra*, at 126. Studies have shown a correlation between paternal involvement and offspring behavioral development. *See, e.g.,* Jeffrey Rosenberg & W. Bradford Wilcox, U.S. Dep't of Health and Human Servs., *The Importance of Fathers in the Healthy Development of Children* 11-13 (2006), *available at*: http://www.childwelfare.gov/pubs/usermanuals/fatherhood/fatherhood.pdf; *see generally* Paul R. Amato & Fernando Rivera, *Paternal Involvement and*

Children's Behavior Problems, 61 J. of Marriage & Family 375 (1999). Once behind bars, however, noncustodial fathers largely are precluded from providing any developmental support.

In the case of indigent noncustodial parents like petitioner, recurring civil contempt proceedings may further strain relationships and destabilize the child's developmental environment:

> Being forced into repeated court appearances with mother as plaintiff (although the state initiated the case) and father as defendant undermines relationships in these fragile families . . . . The mother's name on the case may make it look like she instigated the case, though she actually has no control in the decision to begin a contempt action and is often not informed about the action until she, too, receives a summons.

Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 Notre Dame L. Rev. 325, 373 (2005).

Incarceration is not only financially costly and counterproductive, but it may exacerbate the breakdown of the family unit. By contrast, the guarantee of counsel is a fiscally prudent measure and serves to fashion productive solutions to child support delinquencies.

CONCLUSION

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

Respectfully submitted,

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