No. 10-10

In The
Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA L. ROGERS AND LARRY E. PRICE, SR.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR LAW PROFESSORS BENJAMIN BARTON AND DARRYL BROWN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*

Amici are scholars who have researched solutions for providing effective assistance to indigent litigants. *Amici* have studied methods for improving the institutions and institutional actors involved in the judicial system to enhance the efficacy of such proceedings for *pro se* litigants. Their findings are relevant to the questions facing this Court.[1]

SUMMARY OF ARGUMENT

1. Courts must ensure that indigent defendants receive fair and accurate hearings that comport with due process and fundamental fairness. But creating a categorical right to an appointed attorney for contemnor fathers in civil child support enforcement hearings is not necessary to ensure that these hearings satisfy the requirements of due process. Child support enforcement proceedings are generally straightforward hearings on the factual question of the contemnor parent's ability to pay. Implementing basic procedural reforms to make these proceedings accessible to *pro se* litigants can ensure that these

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

hearings satisfy the requirements of due process, and all at a lesser cost than requiring appointed counsel.

2. Extending *Gideon* to civil contempt proceedings like these will further burden already strained public defense systems. Public defenders struggle to provide vigorous representation for those criminal defendants who require it the most. Given the limited resources available for public defense, extending *Gideon* to civil contempt will only draw scarce resources away from those criminal defendants who gain the greatest benefit from the assistance of appointed counsel.

ARGUMENT

I. Appointing Counsel for Contemnor Fathers Facing Unrepresented Mothers in Child Support Enforcement Proceedings Does Not Enhance the Fair and Efficient Administration of Justice

This Court has long recognized that for a defendant to receive a fair and accurate trial, he must stand "equal before the law" with his accusers. *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). In an adversarial criminal proceeding, an indigent defendant without access to counsel cannot adequately mount a sufficient defense. *Id.* Appointment of counsel in such cases ensures a proceeding where the defendant has the ability to be heard, thereby reducing the likelihood of an erroneous result. *Id.* In such

circumstances, the State must appoint counsel in order to ensure the fairness of the proceedings and the accuracy of the final result. See *Gideon*, 372 U.S. 335; *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

But where evenly matched parties confront one another in simple and straightforward proceedings, the same concerns underlying the *Gideon* line of cases weigh against disrupting the balance of resources. In child support enforcement proceedings, appointing counsel for the contemnor father while leaving the unrepresented and often indigent mother to advocate on her own behalf would tip the scales in favor of the contemnor. It would now be the unpaid and often indigent mother who "plainly is outstripped" by the resources amassed against her as she seeks to secure the financial support necessary to raise her child. See *Lassiter* v. *Dep't of Soc. Servs.,* 452 U.S. 18, 37 (1981) (Blackmun, J., dissenting) (explaining that it is the imbalance of power between the parties that results in a proceeding that violates due process).

In *pro se* proceedings to enforce child support such as the one at issue in this case, two unrepresented parents appear before the court to determine the straightforward factual question of the contemnor parent's ability to pay. The contemnor parent is not facing a formal adversarial proceeding against the full prosecutorial and investigative resources of the State. In fact, the State is generally not present or says nothing in these proceedings. In such a setting, the appointment of counsel is not necessary to protect the contemnor father. *Id.*; see also *Gagnon* v.

Scarpelli, 411 U.S. 778, 789 (1973) (where the State is not represented by a prosecutor, formal procedures and formal rules of evidence are not employed, members of the hearing body are familiar with the problems and the practice at issue, and counsel is not necessary).

Moreover, far from being a complex legal proceeding, these hearings involve only the straightforward factual question of the contemnor's ability to pay. This is the same inquiry courts routinely make to determine if appointed counsel is required in criminal cases. It is a determination that courts are adept and experienced at making, and it requires the contemnor to provide only basic information about his personal finances. More intricate questions of proof and evidence are generally not at issue. Because child support enforcement proceedings are generally brief and the issues and evidence presented are relatively simple, the aid of counsel is not required. See *id*. at 787, 790 (where the evidence is simple and straightforward, investigation or exposition by counsel is unnecessary).

The empirical data supports the conclusion that adding appointed counsel to child enforcement proceedings may provide only marginal benefit to the father, while doing little to enhance the accuracy or efficacy of these hearings.

A recent empirical study by Professor Erica J. Hashimoto suggests that the appointment of counsel in federal misdemeanor cases does not provide a

significant benefit to the represented defendant. Specifically, Prof. Hashimoto found that federal *pro se* misdemeanor defendants achieve better results than represented defendants in all categories of cases other than DUI. And *pro se* federal misdemeanor defendants fared better than their represented counterparts in the sentencing process. Prof. Hashimoto concludes that "the empirical evidence suggests that *counsel in misdemeanor cases do not typically provide significant benefits to many of their clients*." Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 Wm. & Mary L. Rev. 461, 461 (2007) (emphasis added). "Indeed, pro se misdemeanor defendants in federal court appear both to have lower conviction rates and to receive more favorable sentencing outcomes than represented misdemeanor defendants." *Id*. at 489. Prof. Hashimoto therefore determines that the value added by counsel in simple misdemeanor cases is far less than the value added by counsel in more complex and serious cases. *Id*. at 466.

In a similar study, Prof. Hashimoto found that *pro se* felony defendants in state courts are convicted at rates equivalent to or lower than the conviction rates of represented felony defendants. They also garner a higher percentage of dismissals and deferred adjudications than their represented counterparts, and the overall acquittal rate of *pro se* defendants is higher than the overall acquittal rate of represented defendants. See Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423,

449-51 (2007). While Prof. Hashimoto acknowledges the limitations of her data, she nonetheless concludes that this data "certainly undermine[s] the assumption that decisions to engage in self-representation necessarily lead to bad outcomes." *Id*. at 450; see also *Indiana* v. *Edwards*, 554 U.S. 164, 178-79 (2008) (citing Prof. Hashimoto's research to refute concerns that the right to self-representation has led to trials that are unfair to the *pro se* defendant).

In the civil context, Professors D. James Greiner and Cassandra Wolos Pattanayak recently conducted a randomized trial to determine how much difference legal representation makes with respect to low-income clients in civil cases. Their data demonstrated that the offer of representation in administrative hearings to determine eligibility for unemployment benefits had no effect on the probability of success in the proceeding, but did cause a delay in resolution. These results led them to conclude that the defendants would likely have been better off had they appeared *pro se*. D. James Greiner & Cassandra Wolos Pattanayak, *What Difference Representation?* at 1 (January 13, 2010), *available at* http://ssrn.com/abstract=1708664. The authors opined that one possible explanation for this result is that in the types of proceedings studied, the issues presented and the procedures used are sufficiently simple and straightforward enough that the system is accessible to *pro se* litigants. Therefore, counsel provided little additional value. *Id*. at 46-47.

Although Prof. Greiner and Prof. Pattanayak concluded that it would be a mistake to overgeneralize

from the results of their study, they determined that this "startling" result merited additional investigation and undertook a comprehensive review of the literature studying the effect of representation in civil proceedings. After analyzing the body of scholarship on this issue, the authors determined that "we currently have astonishingly little credible, objective information about the effect of representation." *Id*. at 70. Specifically, Profs. Greiner and Pattanayak found that most studies attempting to measure the impact of representation were observational case studies that suffered from severe methodological flaws, rendering their findings unreliable. There were virtually no randomized empirical studies that could produce statistically significant results, and the two studies that were methodologically sound produced conflicting findings. *Id*. at 51-52, 70.

The observational case study of Elizabeth Patterson suffers from many of the methodological flaws discussed by Profs. Greiner and Pattanayak. See Brief of Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as *Amici Curiae* in Support of Petitioner. Patterson's study purports to show that having counsel in child support contempt cases has a positive effect on outcomes for the contemnor parent. But the Patterson study does not control for selection effects or the relative strength of the obligors' defenses. For example, Patterson finds that child support obligors who appeared without counsel were held in contempt more than twice as often as obligors who were represented. Patterson

does not address the fact that many of the represented obligors had counsel as part of their pending workers' compensation or disability cases, which independently gave rise to valid defenses for non-payment.[2] The inability to control for such variables greatly undermines the reliability of this observational study.[3]

In contrast, the more rigorous empirical studies discussed above cast significant doubt on the assertions of *amici* that the appointment of counsel in these cases will greatly reduce the risk of error.[4] As Prof. Hashimoto asserts, "it appears that states could reduce the number of cases in which counsel is

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[2] See Brief of Respondents, at p. 55-56 n. 17.

[3] Prof. Greiner and Prof. Pattanayak explain that observational studies generally suffer from at least one of three types of methodological problems: "the failure to define an intervention being studied, the failure to account for selection effects . . . and the failure to follow basic statistical principles to account for uncertainty." See Greiner & Pattanayak, *What Difference Representation?* at 53. Due to these significant methodological flaws, they conclude that "*the results in these studies are unworthy of credence*." *Id.* at 54 (emphasis added). More importantly, they worry that the "failure to address these methodological concerns may cause, and probably has caused in many instances, the following, easy-to-understand consequence: the wrong answer." *Id.* at 51.

[4] See, *e.g.*, Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers, The Brennan Center for Justice, the National Legal Aid & Defender Association, The Southern Center for Human Rights, and the American Civil Liberties Union in Support of Petitioner, at 26-30; Brief of Center for Family Policy and Practice as *Amicus Curiae* in Support of Petitioner, at 16-19.

appointed without significantly undermining the accuracy of the results in those proceedings." Hashimoto, 49 Wm. & Mary L. Rev. at 466.

These studies further suggest that even if forcing civil litigants to proceed *pro se* in civil contempt proceedings violated fundamental fairness and due process, it is not clear that the most effective remedy would be to provide a court-appointed lawyer. Given the dearth of empirical data affirming the efficacy of appointed counsel, this Court should consider other alternatives for improving the fairness and accuracy of judicial proceedings for *pro se* parties.

For example, better enabling both parties to represent themselves as *pro se* litigants may be a more efficacious approach. See Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 Fla. L. Rev. 1227 (2010). Prof. Barton concludes that while *Gideon* is "absolutely the right decision[,]" extending *Gideon* to civil cases would likely only lead to "overwhelmed lawyers, frustrated clients, and no justice." *Id*. at 1263. Prof. Barton explains that "[e]xperience teaches that the most the poor can hope for is more lawyers or more process, with little of substance to show for it." *Id*. at 1269.

Prof. Barton instead suggests a systematic effort to simplify the law and procedures in courts with a large *pro se* docket would improve outcomes and do more for the poor than a guarantee of counsel. And all at less cost. As he explains, "[t]oo often, access to justice only means access to lawyers. Rather than

seeing the plight of the poor as an opportunity to fund more lawyers, we should see it as an opportunity to make American law simpler, fairer, and more affordable." *Id*. at 1233-34.

For whatever reason, courts seem very comfortable requiring appointment of counsel in response to a perceived violation of due process. But there is no constitutional reason why that should be the case. In *Mathews* and *Lassiter* this Court reaffirmed that a case-by-case review is necessary to determine whether fundamental fairness has been violated in a given proceeding. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); *Lassiter*, 452 U.S. at 35. Reviewing courts are required to assess the entire process at issue, not just the availability of an appointed lawyer. Where the court process is simple and straightforward, and the court makes a clear effort to assist *pro se* litigants, the case for a categorical right to appointed counsel is much weaker.

Prof. Barton suggests that simple reforms, such as revamping court forms and processes so that they are more clear and transparent for *pro se* litigants, can improve the ability of these litigants to represent themselves in a traditional courtroom. Barton, *Against Civil Gideon* at 1273. Prof. Barton points out that a number of courts are already undertaking such changes. For example, the Eastern District of New York has created a federal magistrate position assigned to hear *pro se* cases, and San Antonio and other cities have also established specialized *pro se*

courts that have adopted specific procedures for better accommodating *pro se* litigants. *Id*. at 1271-72.

A number of other scholars have begun to advocate for *pro se* court reform as a more effective means of providing equal justice to indigent parties than supplying appointed counsel. Recognizing that the scarce financial resources available for appointed counsel will never suffice to eradicate the inequality facing indigent litigants, these scholars have undertaken extensive studies to explore how to adapt our current court system to better respond to the needs of *pro se* parties. See Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 Fordham L. Rev. 969 (2004); Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 Wash. U. J.L. & Pol'y 47 (2003).[5] While there is significant debate regarding the details of such reforms, it is notable that scholars have moved away from the notion that only appointed counsel can

[5] Barton highlights a number of studies in this area, including Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 367 (2008); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 Fam. Ct. Rev. 36 (2002); Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 Cardozo Pub. L. Pol'y & Ethics J. 659 (2006).

remedy the representation needs of the poor. See Barton, 62 Fla. L. Rev. at 1272.

In fact, appointing a lawyer is a backward-looking solution in these types of cases. Courts that retrain court personnel to assist *pro se* litigants and utilize technology can improve fairness and participation, all at a lesser cost than appointing a lawyer in every contempt case. The area of child support is particularly well suited to this approach, since the ability-to-pay calculation is a straightforward math problem. Many jurisdictions already use software to calculate payments: the non-custodial parent reports his or her income and the computer program calculates a payment number. In contempt cases, there may be extenuating circumstances to explain non-payment, but again, these are factual issues easily raised by the non-custodial parent. They are not complicated legal issues. If there is any issue that litigants are capable of arguing on their own, and that judges are capable of determining without lawyers, it is whether a litigant can or cannot afford a required payment.

In child support enforcement proceedings, such simple and straightforward reforms are likely to be the most effective way of ensuring that the court accurately determines whether the contemnor parent has the ability to pay the required child support. As the United States explains, "simple, minimally burdensome procedures" such as providing the non-paying parent with an understandable form seeking financial information will often be effective to satisfy

due process. "In the typical case, providing basic information about one's personal finances is not the kind of undertaking that requires assistance of counsel." See Brief for the United States as *Amicus Curiae* Supporting Reversal, at 12, 27 (explaining that even in criminal cases, defendants do not have a right to appointed counsel for assistance with filling out the forms that establish their financial eligibility for government-appointed counsel).

Given the straightforward nature of child support enforcement proceedings, and the relative balance of resources between the parties, adding lawyers may do little more than increase the contentiousness and prolong the duration of the proceeding. Instead of injecting an adversarial edge into these hearings by appointing counsel, better enabling both parties to represent themselves as *pro se* litigants before the court in a non-adversarial, fact-finding proceeding may be a more efficacious and just approach.

II. Extending *Gideon* to Civil Contempt Proceedings Such As This One Will Frustrate the Principles and Purpose of *Gideon* Itself by Drawing Resources Away from Those Criminal Defendants Who Benefit the Most from the Appointment of Counsel

Gideon promised to provide an equal voice to indigent defendants before the law. Yet it has long been a concern that expanding this right to appointed counsel would overwhelm the justice system. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 62 (Powell, J.,

concurring) (worrying that providing counsel for misdemeanor offenses would result in "problems of availability of counsel, of costs, and especially of intolerable delay in an already overburdened system"). Today, it is widely agreed that "[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel." Barton, 62 Fla. L. Rev. at 1251 (internal quotations omitted). See also The Constitution Project National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009).

Insufficient funding and the growing number of cases requiring appointed counsel have led to excessive caseloads that cripple the ability of attorneys to provide vigorous representation for the criminal defendants who need them most. As one study reported, "The evidence is unambiguous and telling. Lawyers representing indigent defendants often have unmanageable caseloads that frequently run into the hundreds, far exceeding professional guidelines." Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev. 2062, 2064 (2000).

Prof. Hashimoto reviewed the stark statistics in public defenders offices across the country and found that "caseloads of indigent defense counsel still remain shockingly high." Hashimoto, 49 Wm. & Mary L. Rev. at 471-72. Often public defenders representing defendants charged with serious felonies represent up to 500 clients per year, despite professional guidelines

which provide that counsel handling felony cases should only take 150 cases per year. *Id.*

> In 2003, public defenders statewide in Minnesota handled more than 900 cases per attorney per year. In 2001, a trial staff of fifty-two lawyers at the public defender office in Hamilton County, Ohio, which encompasses much of the Cincinnati metropolitan area, handled 34,644 cases, an average of 666 cases per attorney. In Maryland in 2002, the public defender office, which had not increased in size in five years, reported that it would have to hire 300 attorneys just to meet national caseload standards. In 1996, staff attorneys at the Office of the Public Defender in Orange County, California maintained caseloads of 610 cases. In 2004 in Kentucky, public defenders handled an average 489 cases per lawyer.

Id. (footnotes omitted).

Prof. Barton provides the "jaw-dropping" anecdotes behind these statistics:

> In a case of mistaken identity, Henry Earl Clark of Dallas was charged with a drug offense in Tyler, Texas. After his arrest, it took six weeks in jail before he was assigned a lawyer, as he was too poor to afford one on his own. It took seven more weeks after the appointment of the lawyer, until the case was dismissed, for it to become obvious that the police had arrested the wrong man. . . . During this time, he lost his job and his car,

which was auctioned. After Clark was released, he spent several months in a homeless shelter.

. . . Sixteen-year-old Denise Lockett was retarded and pregnant. Her baby died when she delivered it in a toilet in her home in a South Georgia housing project. Although an autopsy found no indication that the baby's death had been caused by any intentional act, the prosecutor charged Lockett with first-degree murder. Her appointed lawyer had a contract to handle all the county's criminal cases, about 300 cases in a year, for a flat fee. He performed this work on top of that required by his private practice with paying clients. The lawyer conducted no investigation of the facts, introduced no evidence of his client's mental retardation or of the autopsy findings, and told her to plead guilty to manslaughter. She was sentenced to twenty years in prison. . . .

. . .

A defendant in Missoula, Montana, was jailed for nearly six months leading up to his trial. During the months before his trial, the defendant met with his court-appointed attorney just two times. That attorney did nothing to investigate the defendant's allegations that police obtained evidence against

> him during an illegal search. A second court-appointed lawyer subsequently had the case dismissed.[6]

As Prof. Barton explains, this grim reality has led even dedicated former criminal defense lawyers to suggest loosening the Sixth Amendment to recognize the necessity of indigent defense triage.[7]

The American Bar Association Standing Committee on Legal Aid and Indigent Defendants summarizes the criminal-defense situation as follows: "Forty years after *Gideon* v. *Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction. Funding for indigent defense services is shamefully inadequate. Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation."[8] Despite these findings the ABA, as *amici*, nonetheless advocate for further burdening the system by requiring appointed counsel in civil

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[6] Barton, 62 Fla. L. Rev. at 1254 (citing Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L.J. 1031 (2006).

[7] Citing John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 Val. U. L. Rev. 925 (2005).

[8] American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, at v (2004).

contempt cases. See Brief of *Amicus Curiae* American Bar Association in Support of Petitioner.

Expanding the right to appointed counsel to include child support enforcement proceedings will only exacerbate the problems facing this overburdened system. Additional funding will not appear, especially given the harsh fiscal realities currently facing many state governments. Instead, requiring counsel in these cases will simply stretch overburdened resources even thinner.

The experience of states that currently provide appointed counsel in child support enforcement proceedings is telling. In New Jersey, the state supreme court has held that the constitution provides a right to appointed counsel for civil contemnors. See *Pasqua* v. *Council*, 186 N.J. 127 (2006). Unable to provide additional funding for state appointed counsel or to secure adequate pro bono services, the state in response *gave up trying to use civil contempt to enforce child support orders against low-income parents.* Now, these non-paying parents are simply released. See Brief for Senators Demint, Graham, and Rubio as *Amici Curiae* In Support Of Respondents, Appendix A at 8a.

Similarly, in Pennsylvania, the state supreme court has established that an indigent parent in a child support enforcement proceeding has a right to counsel if faced with imprisonment for nonpayment.

Yet Pennsylvania remains unable to provide counsel in these cases, despite the constitutional mandate.[9]

Moreover, it is not clear that appointed counsel in these cases would be particularly useful. As discussed *supra* at 4-8, the relative value of such counsel comes into question in light of the available scholarship.

And even those who disagree recognize that without additional funding – which has not been forthcoming from state or local governments – appointed counsel may be of limited effectiveness. Elizabeth Patterson as *amicus* for the petitioner says that the assistance of counsel in child support proceedings is crucial for preventing the improper detention of those who are unable to pay. See Brief of Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as *Amici Curiae* in Support of Petitioner. But Patterson has herself acknowledged that the "availability of appointed counsel standing alone does not ensure full and fair consideration of the obligor's ability to pay. Appointed counsels are often overburdened and unable to provide the needed level of representation. Researchers who observed child support contempt proceedings in several states reported, 'In many of the courtrooms we watched, these attorneys would call out their client's name as

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[9] See Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers, The Brennan Center for Justice, the National Legal Aid & Defender Association, The Southern Center for Human Rights, and the American Civil Liberties Union in Support of Petitioner at 28-29 n. 9.

the courtroom filled with cases, meeting the client for the first time just prior to the hearing.'"[10]

Despite acknowledging the financial limitations facing appointed counsel, Patterson nonetheless continues to advocate for expanding the right to appointed counsel, while also asserting that "adequate state resources [must] be devoted to assuring that representation is meaningful." *Id.*

This solution is unlikely at best. State governments have been unable to provide adequate funding to keep pace with the growth in the number of cases requiring appointed counsel. Examining indigent defense budgets at the state and local level, Prof. Hashimoto found that while the total number of cases has risen between 100 and 200 percent since 1982, budgets for indigent defense have increased only 50 to 75 percent. See Hashimoto, 49 Wm. & Mary L. Rev. 461, 486-87 (2007).

Deborah Rhode similarly points out that over the last two decades, "national spending on legal assistance has been cut by a third." Rhode, 12 Wash. U. J.L. & Pol'y 47, 48 (2003). Today, for civil legal aid, the federal government currently spends about $300 million. But "[r]ecent estimates suggest that well over ten times that amount – on the order of three to four

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[10] See 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, 139 (2008).

billion dollars – would be required to meet the civil legal needs of low-income Americans." *Id.* at 50.

As one scholar bluntly noted, "public defense is a zero-sum game. Whatever resources are added to one public defense client's defense will not be available to another. And significant additional public funds are simply not forthcoming to increase the public defense pie." John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 Val. U. L. Rev. 925, 926 (2005) (footnotes omitted).

Recognizing this reality, there is a compelling argument that the best way to preserve the promise of *Gideon* is to limit the right of court-appointed counsel to cases where it will have the greatest impact. Prof. Hashimoto explains that the empirical evidence suggests that the appointment of counsel in misdemeanor cases may not provide a significant benefit. As discussed above, Prof. Hashimoto has shown that *pro se* misdemeanor defendants in federal courts actually achieve more favorable outcomes than their represented counterparts. See *supra* at 4-6.

Yet despite the scarcity of attorney resources, and the relative ineffectiveness of appointed counsel in misdemeanor cases, "indigent defense systems force counsel to direct significant attention to low-level misdemeanor cases." Hashimoto, 49 Wm. & Mary L. Rev. at 464. But Prof. Hashimoto explains that "[b]ecause the empirical evidence indicates that counsel play a significantly less critical role in minor misdemeanor cases than they do in felony cases,

limiting appointment of counsel to felony and more serious misdemeanor cases could relieve pressure on indigent defense systems while violating neither the Sixth Amendment nor the spirit of *Gideon*." *Id.* at 489.

Therefore, "states should redirect resources now spent on such [low-level cases] to reduce indigent defender caseloads so that those who represent defendants charged with more serious crimes will have more time to spend on those cases." *Id.* at 464.

Overextending the limited resources available for indigent defendants by requiring appointed counsel in child support enforcement proceedings would only further undermine *Gideon*'s promise to provide effective representation for those who need it the most. As discussed above, given the nature of child support enforcement proceedings, there is little reason to think that the addition of appointed counsel for the contemnor father will improve the accuracy of these proceedings. The proceedings deal only with the straightforward factual issue of the contemnor father's ability to pay, and courts are well experienced with making these indigency determinations.

As respondents pointed out, in child support proceedings, "the evidence confirms that there is little need for lawyers because courts are carefully evaluating the merits." In a majority of cases (54 percent) judges decline to find the nonsupporting father in contempt. 80 percent held in contempt alleged no disability or injury limiting their ability to pay. "Judges

appear to be carefully sifting fathers who cannot pay from fathers who choose not to pay, instead of rubber-stamping findings of contempt." Respondent's Brief In Opposition To Certiorari at 37, n. 10 (citing certiorari-stage Brief *Amici Curiae* of Center for Family Policy & Practice et al. 17-20).

If appointed counsel do not definitively improve results in federal felony cases, or many state misdemeanor cases, it is unclear that appointing counsel for a contemnor father facing an unrepresented mother would add much value in a child enforcement proceeding, or increase the likelihood of a fair and accurate outcome. Rather, it would simply draw the scarce resources available for indigent defense away from those who need them the most. As Prof. Hashimoto argues, "[i]n a world of limited indigent defense resources, states must make a choice: They can provide minimal representation to all indigent defendants, or they can . . . focus those resources on the representation of defendants facing charges of greatest severity. . . ." Hashimoto, 49 Wm. & Mary L. Rev. at 513. "[S]tates should focus their indigent defense resources on those who need them most-defendants who have a constitutional right to counsel, who gain the greatest benefit from counsel's assistance, and who face the gravest consequences in the absence of forceful, focused, and skilled representation." *Id*.

Given the fiscal constraints facing states across the country, additional funding to support an expansion of the right to appointed counsel will not suddenly materialize if this Court extends *Gideon* to civil

contempt proceedings. And such an extension is not an effective way to allocate scarce state resources when it is of questionable (if any) benefit to the contemnor.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the South Carolina Supreme Court.

February 15, 2011

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