

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 *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**

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INTERESTS OF *AMICI CURIAE*¹

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit professional bar association that works on behalf of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL’s mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 11,000 members nationwide – joined by ninety state, local, and international affiliate organizations with another 30,000 members. Its membership, which includes private criminal defense lawyers, public defenders, and law professors, is committed to preserving fairness within America’s criminal justice system.

The Brennan Center for Justice at New York University School of Law (“Brennan Center”) is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center’s work are its efforts to close the “justice gap” by

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties were notified prior to the filing of this brief of our intention to file, and consent to file was obtained from all parties 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.

strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Brennan Center's Access to Justice Project works to ensure that low-income individuals, families, and communities in this country are able to obtain effective legal representation.

The National Legal Aid and Defender Association ("NLADA") is a nonprofit corporation that seeks to secure equal justice by supporting excellence in the delivery of public defense and civil legal aid services to those who cannot afford counsel. NLADA has approximately 700 program members, including nonprofit organizations, government agencies, and law firms, representing 12,000 lawyers. Created in 1911, NLADA is a recognized expert in public defense services and a leader in the development of national public defense standards.

The Southern Center for Human Rights ("SCHR") is a non-profit, public interest law office that is dedicated to enforcing the civil and human rights of people in prisons, jails, and other criminal justice institutions in Georgia and Alabama. SCHR aims to ensure that the quality of justice received by individuals is not dependent on one's income, and that defendants with financial means and those without are treated equally in the courts. In recent years, SCHR has represented numerous indigent parents who were jailed for long periods, without counsel, for being too poor to satisfy their child support obligations.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization

with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that mission, the ACLU has been involved in numerous cases before this Court involving the right to counsel when individual liberty is at stake, beginning with *Powell v. Alabama*, 287 U.S. 45 (1932). In addition, the ACLU recently published a report documenting the increasing incarceration of indigent individuals unable to pay judicially ordered legal debts. American Civil Liberties Union, *In For a Penny: The Rise of America's New Debtors' Prisons* (2010).

Although NACDL, the Brennan Center, NLADA, SCHR, and ACLU (collectively the "*amici curiae*") all have different missions, all have a significant interest in guaranteeing – and urge this Court to ensure – that all indigent individuals have a right to counsel in civil contempt hearings when they face imprisonment.

SUMMARY OF ARGUMENT

Civil contemnors are entitled to counsel when facing the threat of incarceration. Indigent parents who face imprisonment for nonpayment of child support often lack the basic skills necessary to defend themselves against contempt charges. Such individuals often face unique obstacles that make it difficult for them to represent themselves in court, such as under-education and lack of literacy skills.

Accordingly, for indigent parents facing civil contempt charges, representation by counsel is especially necessary for the contempt hearing to be fair and effective. In the child support context, the

burden is placed on the parent to show that he or she is unable to meet the child support obligation; however, the inability-to-pay defense is a complex one to present. The assistance of counsel is essential to establish that an indigent parent's nonpayment was in fact not willful. Without ensuring that an alleged contemnor actually has the ability to pay, the courts risk wrongful imprisonment and the creation of debtors' prisons.

Significant evidence suggests that parents facing contempt charges frequently have meritorious inability-to-pay defenses. In the absence of counsel, this defense often goes ignored. The imprisonment of these indigent parents does not result in deterrence of future nonpayment, but does pose serious and harmful consequences to the parent, the family, and the state.

The contrasting experiences of indigent parents who have counsel and those who do not demonstrate the necessity of counsel. For instance, in North Carolina, where counsel is provided to indigent parents facing incarceration, counsel is helpful to both the court and the parent, and ensures that only those who willfully have not paid support are incarcerated for coercive purposes. By contrast, in Georgia, where indigent parents face civil contempt charges without the assistance of counsel, long jail sentences are meted out even in cases where it should have been clear that willfulness was lacking.

This Court should confirm the established constitutional rule that the appointment of counsel is required whenever a defendant's liberty is at

stake, regardless of whether the hearing is technically categorized as “civil.” While the majority of states provide counsel and thus would not be affected by such a decision, a clear ruling from this Court would bring uniformity to the enforcement of the right to counsel across the country and ensure that all individuals facing incarceration for contempt receive a fair hearing.

Amici curiae urge this Court to reinforce the constitutional rule that no indigent person should face the threat of imprisonment without being provided the assistance of counsel.

ARGUMENT

I. PROVIDING COUNSEL TO AN INDIGENT INDIVIDUAL IN A CIVIL CONTEMPT HEARING IS ESSENTIAL TO PREVENT WRONGFUL INCARCERATION.

No indigent person should be unrepresented when his or her freedom is at stake. In the criminal context, this Court has recognized that indigent defendants facing the potential loss of liberty need lawyers because of “the obvious truth that the average defendant does not have the professional legal skills to protect himself.” *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). Thus, “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The contempt context is no different. In this case, this Court should reassert what its precedents already acknowledge: our legal system’s commitment to fairness and equal justice requires that indigent individuals have a right to

appointed counsel at any hearing at which they face loss of their liberty.

A. Indigent Parents Facing Contempt Proceedings Encounter Significant Obstacles That Especially Necessitate the Assistance of Counsel.

Most individuals do not have the skills to represent themselves successfully in a court of law. As this Court recognized long ago, “[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. Even the intelligent and educated layman has small and sometimes no skill in the science of law.” *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also Johnson*, 304 U.S. at 462-63 (noting “a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself That which is simple, orderly and necessary to the lawyer – to the untrained layman – may appear intricate, complex, and mysterious.”). Indigent parents, who are often under-educated, are at an even greater disadvantage when it comes to understanding the legal system and defending themselves.

1. Alleged contemnors are frequently indigent.

Indigent non-custodial parents face significant challenges to meeting payment obligations. According to the federal Office of Child Support Enforcement, 70% of child support debt is owed by non-custodial parents with no quarterly income or with annual earnings of less than \$10,000. *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). See also Rebecca May & Marguerite Roulet, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, Center for Family Policy & Practice 9 (Jan. 2005) (“May & Roulet”) (analyzing data on child support debtors). Only 4% of child support arrears are owed by non-custodial parents with annual incomes of more than \$40,000. *Id.*

Indigent non-custodial parents, unfortunately, tend to remain indigent and therefore unable to meet their child support obligations. A primary reason for the continuing state of indigence is lack of employment opportunities. According to one study, low-income non-custodial fathers earned an average of only \$4,221 annually. 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, 106 (2008) (“Patterson”).

Another study found that in 1999, 92% of non-indigent fathers were working, compared to only about half of indigent fathers who had work at the time of the survey. Elaine Sorensen & Helen Oliver, *Policy Reforms are Needed to Increase Child Support from Poor Fathers*, The Urban Institute 6 (Apr. 2002) available at <http://www.urban.org/UploadedPDF/410477.pdf> (“Sorensen & Oliver”). This study also found that in addition to low levels of education, incarceration, lack of recent work experience, and poor health conditions were also significant obstacles to employment. *Id.* at 6-7.

Over half of indigent non-resident fathers lacked health insurance. *Id.* at 9. Among the indigent non-custodial fathers who were not employed, half indicated that poor health was the reason for not working. *Id.* at 6-7.

Finding and maintaining employment in the current economy is especially challenging, and the last hired are often the first fired. Without meaningful employment, indigent non-custodial parents frequently lack the basic means to meet their support obligations.

2. Indigent parents facing contempt charges often lack the basic skills necessary to defend themselves in court.

Indigent parents accused of contempt are often under-educated and lack the necessary skills to represent themselves in court. Extensive research confirms that indigent defendants in general tend to be among the least educated and least literate members of society. *See generally*, U.S. Dep't of Educ., *Literacy Behind Bars* 45 (2007), available at <http://nces.ed.gov/pubs2007/2007473.pdf> (“Literacy Report”).² For example, 63% of the state prison inmates whose personal income in the month before

² The Literacy Report summarizes results from the 2003 National Assessment of Adult Literacy Survey. Literacy Report, *supra*, at iii. The survey examined three types of literacy: prose literacy, document literacy, and quantitative literacy. *Id.* at iv. For each literacy type, the survey grouped respondents into four literacy levels, including below basic, basic, intermediate, and proficient. *Id.*

arrest was less than \$1000 had failed to graduate from high school. *See* Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Justice, *Education and Correctional Populations* 10 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf>.³

Indigent parents with child support obligations are, much like indigent criminal defendants, disadvantaged relative to the general population. A 2002 study of fathers with child support obligations found that 41% of indigent fathers did not have a high school diploma – double the rate for those whose income was not below the poverty threshold. Furthermore, non-indigent fathers were three times more likely than indigent fathers to have attended school beyond twelfth grade. Sorensen & Oliver, *supra*, at 7; *see also* Patterson, *supra*, at 106.

Burdened with under-education and illiteracy, indigent parents suffer from a lack of practical skills and abilities. For such an individual, understanding what a judge is asking and articulating his or her case persuasively is a difficult task.

Those *amici* and their members who have provided representation in contempt proceedings have found that even questions that might seem straightforward to educated persons, or attorneys, may create complexities for indigent individuals. For instance, an indigent parent asked if he or she “has a home” may well be unsure about whether the

³ By contrast, only 18% of the general population has failed to complete high school. Sorensen & Oliver, *supra*, at 1.

question seeks information about owning a home, or only about whether he or she maintains a residence of any sort. The individual may be concerned, as well, about answering fully, if, for example, he or she is not listed on a lease or the landlord does not know that he or she shares the space with others. Similarly, indigent defendants living in subsidized housing, homeless shelters, or halfway houses may be concerned about the impact a reported arrest could have on their living situation. While wanting to cooperate in a hearing, concern over such matters can lead an indigent parent to hesitate or appear confused. A disinclination to speak may also arise from an inability to comprehend the nature of the questions. This hesitation or failure to respond is then often interpreted as a failure to cooperate, which, particularly in the context of a contempt proceeding, can be determinative.

In this way, requiring indigent parents to proceed alone poses a serious threat to their right to be heard. Without legal counsel, indigent parents facing the threat of imprisonment too often lack the ability to effectively represent themselves.

B. Representation by Counsel is Necessary to Ensure that a Contempt Proceeding Does Not Result in Wrongful Incarceration.

A parent who is haled into court for failure to meet child support obligations and faces incarceration as a result is precisely the type of person for whom court-appointed counsel is necessary.

A normal contempt proceeding for failure to pay consists of many intricate steps, all of which

present challenges for the layman. Parents facing the charge of contempt must anticipate and present their own defense. They must spot and prioritize issues, develop facts and arguments, conform to the rules of evidence, obtain documents and testimony, and challenge the evidence presented by their opponents. Often, the parent bears a significant evidentiary burden. Such circumstances are difficult even for trained attorneys to handle, and especially difficult for individuals with significant educational barriers.

1. The defense of a contempt charge for nonpayment of child support is complex.

To find a non-custodial parent in contempt of the court order setting forth child support obligations, the court must determine that the failure to pay is willful. *See, e.g.*, S.C. Code Ann. § 63-3-620 (2009) (“An adult who willfully violates, neglects, or refuses to obey or perform a lawful order of the court ... may be proceeded against for contempt of court.”); *see also* Patterson, *supra*, at 104-105. For a contempt finding to be appropriately applied, the alleged contemnor must have known about the court order and willfully disobeyed it. These safeguards are in place to prevent the incarceration of those who are incapable of complying with the court order.

Willfulness, or intentionality, is a critical criterion for a finding of contempt. Without the component of willfulness, contempt charges would fall on all those who failed to meet their child support obligations, whether or not they were in fact

able to make those payments. *See, e.g., In re Warner*, 905 A.2d 233, 243 (D.C. 2006) (Schwelb, J., concurring) (warning that unrestrained use of the contempt power in child support cases “present[s] a significant risk that a non-custodial parent will face imprisonment on account of poverty”). Only by ensuring that the failure to pay leading to contempt and imprisonment is something the parent could have prevented can we avoid the effective return to debtors’ prisons.

The burden is on the parent to prove that his or her noncompliance was not willful. The basic rule, as set forth in state contempt statutes and elucidated by this Court in *United States v. Rylander* is that, after the state demonstrates noncompliance with a payment order, the contemnor may assert an inability to comply with the order in question as a defense, but the contemnor bears the burden of production. 460 U.S. 752, 757 (1983). Providing sufficient evidence to meet this burden can be very difficult for an indigent alleged contemnor trying to represent himself or herself.

Key to this analysis in some jurisdictions is the question of whether the defendant’s inability to pay is caused by some voluntary action on the part of the defendant. *See, e.g., Smith v. Smith*, 427 A.2d 928, 931-32 (D.C. 1981) (in determining whether the defendant was able to pay the child support debt owed, the trial court must consider all the circumstances of the case, “including whether the defendant’s asserted inability to pay is due to involuntary financial straits or a voluntary decision to reduce his or her income.”). Present lack of resources is often not sufficient in itself to establish

the inability-to-pay defense. *See, e.g., Wilson v. Wilson*, 114 P.2d 737, 739 (N.M. 1941) (stating that “[t]he duty rests upon appellant to exhaust his every reasonable resource It is not enough that he offer mere possible excuses for his failure to meet this obligation; he must offer good and reasonable ones.”).

Factors considered in the willfulness analysis may include the availability of other sources of income beyond employment. *See id.* Courts may also delve into how the parent has spent his money and/or his choices about employment. *See Niemyjski v. Niemyjski*, 646 P.2d 1240, 1241 (N.M. 1982) (finding sufficient evidence of financial ability to comply with support order where a father had used his funds for business and personal living expenses); *Shippen v. Shippen*, 693 S.E.2d 240, 243-4 (N.C. Ct. App. 2010) (basic finding of present ability to pay is minimally sufficient to defeat inability-to-pay defense); *Faught v. Faught*, 312 S.E.2d 504, 509 (N.C. Ct. App. 1984) (“[A] failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests himself or herself of assets or income after entry of the support order.”).

Non-custodial parents accused of contempt face a heavy burden to excuse themselves from their child support obligations. In the face of this heavy burden, a *pro se* parent’s chance of prevailing on an inability-to-pay defense is vanishingly small.

2. Significant evidence suggests that alleged contemnors frequently have meritorious inability-to-pay defenses.

The indigence and employment levels of non-custodial parents discussed above strongly suggest that many of those facing contempt simply are not able to meet their child support obligations. There is also evidence that support payments are frequently set beyond the ability of the non-custodial parent to pay. For example, a Department of Health and Human Services report issued in February 2002 stated that non-custodial parents with earnings below the poverty line were ordered on average to pay 69% of their reported earnings. *See* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 No. 1 Judges' J. 5, 5 (2004) ("Pearson"). *See also* Dep't of Health and Human Servs., *Child Support for Children on TANF ii* (2002), available at <http://www.oig.hhs.gov/oei/reports/oei-05-99-00392.pdf>. Federal law permits payments of only 50% to 65% of income. *See* Pearson, *supra*, at 5.

The legitimate inability of a parent to meet his or her obligation would seem the obvious defense to be raised in the context of a contempt proceeding for nonpayment of child support. In the absence of counsel, however, it appears that the opportunity to raise the defense is often missed, and large numbers of indigent parents are wrongfully imprisoned for failure to meet child support obligations every year.

There are no compiled statistics on the total number of Americans imprisoned for nonpayment of child support, yet "the limited existing data suggest

that the number is substantial.” Patterson, *supra* at 117. For example, in 2003, experts estimated that in New Jersey, 300 persons were imprisoned without being provided counsel.⁴ See May & Roulet, *supra*, at 29. A study of one county in New Mexico revealed that over a two-year period, 131 civil contemnors went to jail for nonpayment. See Michelle Hermann & Shannon Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M. L. Rev. 275, 277 (1984). That was in just one of 33 counties in New Mexico. These levels of incarceration, combined with the unemployment and indigence data noted above, strongly suggest that a significant number of these non-custodial parents are incarcerated not for willful failure to pay but simply because they lack the ability to pay their support obligations.⁵

⁴ In 2006, New Jersey conformed its practice to the holdings of this Court and now requires counsel to be appointed for indigent civil contemnors facing possible imprisonment. See *Pasqua v. Council*, 892 A.2d 663, 666 (N.J. 2006) (holding that indigent contemnors were entitled to appointed counsel). No more recent statistics are currently available to assess the impact of this change.

⁵ While indigent alleged contemnors would be required to establish their indigence before being appointed an attorney, this analysis would not itself be duplicative of the contempt hearing. The standard for determining eligibility for appointment of counsel varies by jurisdiction and, at times, even within a jurisdiction. See Brennan Ctr. for Justice at NYU School of Law, *Eligible for Justice* (http://brennan.3cdn.net/c8599960b77429dd22_y6m6ivx7r.pdf) (2008). Generally, the standard for eligibility and the level of evidentiary support required under this standard are much lower than those required to meet the burden to establish an inability-to-pay

3. The experience of indigent parents in Georgia demonstrates the harm caused by the failure to provide court-appointed counsel.

Evidence from the state of Georgia demonstrates that indigent individuals charged with contempt are denied counsel and that this denial results in wrongful incarcerations.

In 2010, the Southern Center for Human Rights surveyed county sheriffs in Georgia to determine the number of child support contemnors confined to the state's jails solely on civil contempt charges. Responses were received from 135 of the state's 159 counties. The sheriffs who responded reported that 526 child support contemnors were confined to Georgia jails as of July 2010 on civil contempt charges. An analysis of surveys sent to 75

(Cont'd)

defense to avoid being jailed for contempt of court. By upholding the constitutional right to court-appointed counsel whenever incarceration is at stake, the Court would not be merely moving an existing legal analysis to an earlier stage in the process.

As noted here, the defense of a contempt charge can be exceedingly complex. By contrast, in most jurisdictions, establishing lack of resources sufficient to merit a court-appointed attorney in the first place is a relatively *pro forma* exercise. In South Carolina, for instance, an indigent defendant must simply execute an affidavit stating that he or she is financially unable to employ counsel and setting forth all his or her assets. S.C. Code Ann. § 17-3-45 (2009). A forty dollar application fee applies, but can be waived or reduced upon application to the clerk of court. *Id.* The only factor to be considered in determining whether counsel should be provided is the indigent applicant's total assets.

of these individuals found that all of them were indigent and all were jailed without counsel.

Evidence from one south Georgia jail is illustrative of the scope of the problem. As of February 2009, the county jail in Adel, Georgia held 140 people. Of those 140, just under one-third, or 45 people, were held for child support contempt. *See* Charles Shriver, *Hatley Set Free From Cook County Jail; Atlanta Group Refers to 'Debtors' Prison*, Adel News Tribune, July 22, 2009. Of these 45 parents, 32 were men and 13 were women. *See id.* One man in the group was Frank Hatley, a 51-year-old who was jailed for 19 months for his inability to pay child support arrears. There was DNA evidence showing that Mr. Hatley was not the father of the child in question. Without legal representation at his contempt hearing, Mr. Hatley was unable to show the court that his failure to pay was not willful, and thus he was incarcerated. Also in this group were Quinton Jackson and Marquita Johnson, parents of 6-year-old K.J. Both parents were incarcerated for their inability to reimburse the state for welfare payments made to support their son. As a result of their incarceration, their child had to live with relatives.

A number of those incarcerated for contempt without having been provided counsel in Georgia are veterans returning from overseas deployments. One such individual, Lance Hendrix, age 23, was incarcerated in Cook County, Georgia after he fell behind in his child support payments for his 4-year-old daughter. *See* Contempt Order, *Dep't of Human Servs. v. Lance Hendrix*, Civ. Action No. 00-CVU-75 (Ga. Super. Ct., Cook County., May 26, 2010). Mr.

Hendrix was stationed overseas in the military until September 2009. While in the military, Mr. Hendrix had an excellent payment history. But when he returned from military service to his small, economically depressed town, he had trouble finding consistent work. His payments of \$480 per month were not lowered to account for the fact that he no longer had steady employment. Mr. Hendrix worked whatever jobs he could find to pay child support – picking up pecans and scrap metal, and doing home restoration and yard work. Despite his efforts to pay, Mr. Hendrix was charged with contempt and jailed after a perfunctory hearing at which he was unrepresented by counsel. He spent four months in jail and was released in November 2010. He faces jail again if he does not pay \$1,822 by February 2, 2011.

Another example, from north Georgia, similarly illustrates the inability of the indigent parents to effectively defend against contempt charges absent the appointment of counsel. Randy Miller, a 39-year-old African-American father of three and a veteran of the Iraq War, has been incarcerated in Rome, Georgia since November 15, 2010, for contempt for failure to pay child support. *See* Petition for Release from Incarceration at 1, *Dep't of Human Servs. v. Randy Miller*, Civ. Action No. 99-CV-15437C1-JFL003 (Ga. Super. Ct., Floyd County, Dec. 14, 2010). Mr. Miller served in the military reserves for fourteen years, was gainfully employed while not on active duty, and had an excellent child support payment history for well over a decade. *See id.* at 3. But he lost his job in July 2009 and has not been able to find full-time work

since. *See id.* at 4. After he lost his job, Mr. Miller continued to try to provide support for his children, making about \$3,000 in payments (using money from income tax refunds and odd jobs) between July 2009 and November 2010. *See id.* at 5. In 2010, Mr. Miller's financial situation became steadily worse. *See id.* at 4. He had difficulty making his mortgage payments. Eventually, he could not even afford to keep utilities on in his home. By October 2010, Mr. Miller lost his home to foreclosure and had exhausted his savings. *See id.* His bank account contained just 39 cents. *See id.* at 5; Ex. D to Petition.

On November 11, 2010, Mr. Miller finally found a new job assembling furniture and equipment. *See id.* at 6. But just four days later, on November 15, the State ordered Mr. Miller to pay \$3,000 or go to jail. *See id.* Mr. Miller appeared at the hearing *pro se*. No defense counsel was appointed. Because Mr. Miller could not pay, he was jailed. *See id.* at 6; Ex. C. There was no significant inquiry into his ability to pay at his hearing. He remains in jail today.

As these examples demonstrate, serious harm occurs when indigent parents are not appointed counsel capable of explaining the circumstances of their inability to pay child support. In the absence of the appointment of counsel, legitimate defenses are not raised effectively, and the result is that parents are wrongfully incarcerated.

4. Wrongfully incarcerating non-custodial parents who simply cannot pay does not serve the goals of contempt and visits serious, harmful consequences on the contemnor, his or her family, and the state.

The imprisonment of indigent parents without evidence of willful nonpayment is counterproductive to the goals of child support enforcement – it has no coercive effect and adversely affects the parent’s children and family.

Sentencing indigent parents to imprisonment when they are simply unable to pay does not serve any coherent policy. Indeed, it is almost certain to worsen the payment situation, as the incarcerated parent is typically unable to generate income while in prison. *See, e.g., Peterson v. Roden*, 949 So. 2d 948, 950 (Ala. Civ. App. 2006) (noting that although work release programs are available, contemnors’ participation may be ended for rule violations).

The New Jersey Supreme Court recently noted this point during an examination of the cases of three indigent parents who were sentenced to jail time. *Pasqua v. Council*, 892 A.2d 663, 666 (N.J. 2006) (holding that indigent contemnors were entitled to appointed counsel). The court observed at the outset that the three indigent parents in the case had not been helped at all by spending time in jail. *Id.* Anne Pasqua spent fifteen days in jail, was released without making any payment, and as of January 2003 still owed nearly \$13,000. *Id.* Ray Tolbert spent seventy-one days in jail, was released without making a payment, and as of January 2003

still owed nearly \$135,000 in child support. *Id.* Michael Anthony spent twenty-four days in jail and was released after paying merely \$125 towards his obligation of nearly \$50,000. *Id.* at 667. As of January 2003, he remained unable to make his weekly \$145 payments. *Id.* As these examples make clear, indigent parents are rarely able to improve their payment history when incarcerated. Moreover, the incarcerated parent often loses his or her job as a result of the imprisonment, jeopardizing future compliance with support obligations. *See, e.g., Sevier v. Turner*, 742 F.2d 262, 265-66 (6th Cir. 1984); *Wilson v. Holliday*, 774 A.2d 1123, 1127 (Md. 2001).

The improper imprisonment of an indigent parent can also have serious effects on the family relationships. *See generally* Patterson, *supra*, at 126. Many jails, like the one in Adel, Georgia, discussed above, *see supra* I.B.3, do not permit children to visit, so that indigent parents do not see their children for the duration of their confinement for contempt. Imprisonment may sever the parent-child relationship and result in the lack of emotional and psychological benefits that children gain from their parental relationships. *See, e.g.,* Jeffrey Rosenberg & W. Bradford Wilcox, U.S. Dep't of Health & 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>.

This sad state of affairs also imposes a substantial burden on the states. For example, imprisoning three thousand individuals cost the state of Indiana approximately \$186,000 *per day* a

decade ago. *See* State Prison Expenditures, Bureau of Justice Statistics, Dep't of Justice, 1 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf>. If the costs of imprisonment increase at the same rate as between 1986 and 2001, then in 2016 it will cost Indiana almost \$280,000 per day to incarcerate these individuals.

In sum, the consequences of the wrongful imprisonment of indigent parents may extend beyond the prison term of the parent. The family, the children, and society all pay a heavy price.

5. Evidence demonstrates that the presence of counsel helps to ensure that only those persons who willfully refuse to pay child support will be incarcerated.

The experience in one jurisdiction that provides counsel to alleged parents facing incarceration demonstrates that counsel is helpful to both the court and the parent, and ensures that only those who willfully have not paid support are sentenced to jail time. In North Carolina,⁶ indigent parents facing contempt are represented through the Office of Indigent Defense Services, which has a Department of Parental Representation.⁷ The office coordinates the provision of representation across

⁶ In North Carolina, courts have recognized a constitutional right to counsel for contemnors facing incarceration. *See McBride v. McBride*, 431 S.E.2d 14 (1993).

⁷ The Department's web address is <http://www.ncids.org/ChildSupport/ChildSupportHome.htm>.

the state, although the mechanisms through which counsel are provided and the contempt processes in each county differ. Telephone Interview with Wendy Sotolongo, Parent Representation Coordinator, North Carolina Office of Indigent Defense Services, July 15, 2010 (“Sotolongo Interview”). Training is offered to lawyers on how to handle cases of alleged contempt, and the training addresses the law regarding willfulness and how to gather evidence of appropriate efforts to obtain or retain employment. *Id.* See also John Saxon, *The Law of Contempt*, May 2009 (on file with counsel). The attorneys who represent alleged contemnors also have an active email list where they can ask each other questions and share helpful precedent. Telephone Interview with Sarah Rackley, Assistant Public Defender, Durham County, North Carolina, July 23, 2010 (“Rackley Interview”).

In Durham County, North Carolina, a contempt case for failure to pay begins with the issuance of an order to show cause why the individual should not be held in contempt, which must be supported by an affidavit setting forth a factual basis for the assertion that the failure to pay is willful. *Id.* Counsel is assigned to indigent defendants at the first appearance after the issuance of an order to show cause. *Id.* A pretrial conference is then scheduled for two to four weeks thereafter, giving counsel time to meet with the parent and evaluate the case. *Id.*

According to one Durham County public defender who represents alleged contemnors, the attorneys meet with their clients before the pretrial hearing to review work history, disability status,

previous incarcerations, history of child support orders, pay history and ability to pay. *Id.* She noted that the primary service an attorney provides in these cases is to help the client gather the relevant documentation and appropriate evidence, which generally concerns whether the failure to pay is willful. *Id.* For example, she asks clients to document their job search by going back to places where they have applied, obtaining copies of their applications, and following up on their prospects. *Id.* At the pretrial hearing, the attorneys often raise the issue of willfulness. *Id.* They also raise procedural issues, including the existence of multiple or conflicting orders for support and any problems with the affidavit in support of the order to show cause. *Id.*

Most cases are resolved at the pretrial hearing stage. *Id.* If a case does proceed to an adversarial hearing on the order to show cause, the hearing generally takes 10-20 minutes. *Id.* Typically, the alleged contemnor will testify about his or her living situation, work history, job search, if applicable, and the explanations for unpaid support. *Id.* Occasionally, where relevant, a case manager, probation officer or community support officer are called upon to testify. *Id.* The opposing party does not generally offer evidence beyond the history of non-payment. *Id.*

The public defender reported that, in this system, a very small percentage of alleged contemnors are incarcerated. *Id.* A larger percentage of alleged contemnors are held in contempt, but the system is fairly effective at collecting arrearages from those who can pay. *Id.*

Defense attorneys also find the system relatively effective at determining when the alleged contemnor's failure to pay was not willful and making appropriate adjustments to avoid unwarranted incarcerations. *Id.*

In other counties, the process works differently, but the outcome appears to be similar. For example, a number of more rural North Carolina counties with fewer alleged contempt cases use a lawyer-for-the-day system. Sotolongo Interview. A number of orders to show cause are set for the same day. *Id.* At the start of the proceeding, a general announcement is made about the alleged contemnors' right to counsel if they cannot afford to hire an attorney. *Id.* The alleged contemnors are then given the option of requesting counsel or waiving their right to counsel. *Id.* Those that exercise their right to counsel are assigned to a lawyer who is present and a recess is granted to permit the lawyer to speak to the client and ascertain, initially, the issues in the particular case. *Id.* Where necessary, a hearing can be rescheduled to allow the attorney to gather more evidence. *Id.*

Regardless of the type of system, there was general agreement that the presence of counsel increases the efficiency of the system, by ensuring that only those issues relevant to failure to pay are raised during the contempt proceedings. A number of attorneys who represent alleged contemnors noted that their clients frequently want to focus on some other issue in the underlying case, such as the custody arrangement or what the other spouse did wrong. *See, e.g.,* Rackley Interview. Without attorney assistance such clients would appear before

the court with the intention of trying to change the issue in the contempt hearing. They likely would be unprepared to even address the issue of the willfulness of the failure to pay. By explaining the narrowness of the proceedings to their clients and focusing solely on the issues and evidence related to failure to pay and willfulness, the presence of defense attorneys streamlines the process and reduces the burden on the court, in addition to improving the accuracy of its outcomes.

The North Carolina example demonstrates that the presence of attorneys in contempt proceedings can increase efficiency and accuracy.

II. A CLEAR RULING THAT COUNSEL IS REQUIRED FOR ALL INDIGENT ALLEGED CONTEMNORS FACING INCARCERATION IS NECESSARY TO PREVENT WRONGFUL INCARCERATIONS AND ENSURE DUE PROCESS.

The evidence cited above demonstrates that indigent parents facing contempt are frequently denied counsel. However, the failure to provide counsel to indigent alleged contemnors is not limited to the child support context. In a number of states, indigent defendants are incarcerated for debt-related civil contempt in other contexts as well. These cases raise the same concerns about individuals being wrongfully incarcerated for significant periods of time because they simply lack the ability to pay.

Many states authorize the use of incarceration to collect court-imposed fees, fines and restitution arising out of criminal cases. *See generally* Alicia Bannon *et al.*, Brennan Ctr. For Justice, *Criminal*

Justice Debt: A Barrier to Reentry 22 & n.131 (2010), available at <http://www.brennancenter.org/page/Fees%20and%20Fines%20FINAL.pdf> (11 out of 15 states studied in report authorize incarceration for willful failures to pay criminal justice debt) and American Civil Liberties Union, *In For a Penny: The Rise of America's New Debtors' Prisons* (2010), available at <http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons> (“ACLU Debtors’ Prisons”). Sometimes, the mechanism for such incarceration is civil contempt. *See id.* Florida, for example, authorizes civil contempt proceedings to collect criminal justice debt in which there is no right to counsel. *See Fla. Stat. § 938.30(9)* (Any person failing “to comply with a payment schedule established by the clerk of court, may be held in civil contempt.”); *see also* Rebekah Diller, Brennan Ctr. for Justice, *The Hidden Costs of Florida's Criminal Justice Fees* 15-19 (2009), available at http://www.brennancenter.org/content/resource/FL_Fees_report/ (describing operation of Florida’s “collections courts”). In Louisiana, recently created restitution recovery divisions within prosecutors’ offices are authorized to seek contempt when individuals have failed to pay probation fees, restitution, and other court costs. La. Code. Crim. Proc. Ann. Art. 895.5(C).

Ohio similarly authorizes incarceration for failure to pay a fine. *See Ohio Rev. Code § 2947.14*. While counsel is provided at the time of sentencing, counsel is generally not provided at subsequent contempt hearings. *See ACLU Debtors’ Prisons, supra*, at 44-45. In 2006, one individual, Howard Webb, was incarcerated no fewer than four times

over a six year period for contempt resulting from failure to pay fines and court costs in criminal and traffic cases. Mr. Webb did not have counsel at any of his contempt proceedings. *Id.*

Even in states where a right to counsel for indigents facing incarceration for civil contempt has been recognized, often the right is unenforced. In Pennsylvania, for example, the state supreme court has ruled that there is a presumption that an indigent defendant is entitled to counsel in any proceeding where “he may be deprived of his physical liberty.” *Commonwealth v. \$9,847.00 U.S. Currency*, 704 A.2d 612, 615 (Pa. 1997) (quoting *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 26 (1981)). Likewise, the Pennsylvania Superior Court has explicitly recognized that an indigent parent facing imprisonment for nonpayment is entitled to the assistance of counsel. *See Commonwealth ex rel. Brown v. Hendrick*, 283 A.2d 722, 723-24 (Pa. Super. Ct. 1971).

Despite this clear precedent, indigent parents facing contempt charges in Pennsylvania are not being provided with counsel. For example, in Berks County, eighteen individuals were denied access to counsel and were forced to petition the Pennsylvania Supreme Court for relief.⁸ *See* Application for

⁸ The Pennsylvania Supreme Court denied the petition after the county agreed to provide counsel to all “present and future indigent litigants facing incarceration for nonpayment.” *Cepeda v. Court of Common Pleas for the County of Berks*, No. 128 MM 2009 (Pa. 2010) (order denying relief). But lawyers for the petitioners pointed out that other counties in Pennsylvania

Extraordinary Relief Under Pa. R.A.P. § 3309 and King’s Bench Powers, *Cepeda v. Court of Common Pleas for the County of Berks*, No. 128 MM 2009 (Pa. 2010). Thus, even in those states that appear to provide counsel for indigent parents, the enforcement has been piecemeal.⁹

Given the risk of wrongful incarceration presented by the variety of contexts in which individuals face incarceration for “civil” contempt, it is vital that this Court reaffirm the constitutional rule that all indigent alleged contemnors facing imprisonment be provided counsel. Only through the reaffirmation of a concrete rule requiring counsel

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fail to appoint counsel for such litigants and expressed concern that such practices may indeed be widespread. *See id.* at 2.

⁹ Over the years, despite the existence of clear precedent, this issue has come up in a number of Pennsylvania counties. While efforts to address it at the county level are sometimes successful, the litigation has not successfully addressed the recurrence of the issue in other locales. *See ACLU Applauds Pennsylvania Court Decision to Appoint Lawyers for Poor People Facing Prison*, June 9, 2004, available at http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/aclu-applauds-Pennsylvania-court-d (describing the ACLU’s success in getting one Pennsylvania county to change policy and provide lawyers in child support hearings, but noting that other counties still do not provide lawyers); Larry Lewis, *Montco Revises Policy at Prison*, Philadelphia Inquirer, Dec. 12, 2003 (same). Pennsylvania is not alone in this respect. There are narrative accounts of similar practices in other states where the precedent states the appointment of counsel is required. It is for this reason that a pronouncement by the United States Supreme Court on the constitutionally required process is necessary.

be appointed in all cases where an indigent individual faces incarceration can this Court ensure civil contempt hearings across all jurisdictions are fair and effective at preventing wrongful incarceration.

By contrast, a ruling that would require appointment of counsel only on a case-by-case basis would not serve the goal of promoting fairness in civil contempt hearings. Such a case-by-case approach would leave the door open to the unfortunate possibility that jurisdictions with a history of imprisoning indigent parents without legal justification or ignoring the right to counsel even when established under state precedent might simply decline to appoint counsel in every case. A clear ruling from this Court that all indigent contemnors are entitled to counsel, whether the contempt is characterized as civil or criminal, is essential to preventing wrongful incarcerations.

III. PROVIDING COUNSEL TO INDIGENT ALLEGED CONTEMNORS FACING INCARCERATION WILL NOT IMPOSE A SIGNIFICANT BURDEN ON THE STATES.

A ruling from this Court adopting a constitutional requirement that indigent individuals facing incarceration for contempt receive appointed counsel would not impose a heavy burden on the states. As demonstrated by the Petitioner, many states already have statutory or court-made rules that provide counsel to indigent parents facing imprisonment, which represent the bulk of such contempt cases. Pet. 16-18. These states will be

unaffected by a constitutional ruling from this Court. Such a ruling would result in changes only in the small minority of states that have rejected the right to counsel in this context or that have failed to enforce the right.

Even those states with the minority view would not be unduly burdened by a new constitutional rule, as they would have several options as to how to approach such a ruling from this Court. Most obviously, they could simply provide counsel as they do to criminal defendants, as the North Carolina example demonstrates. An additional option would be to take imprisonment off the table. Different states can experiment differently, yet no individual will be sent to prison without the assistance of counsel.

While most states provide counsel and would not be affected, a clear ruling from this Court would help make uniform the enforcement of the right to counsel across the country. Wherever personal liberty is at stake, indigent parents deserve court-appointed counsel, regardless of whether the hearing is technically categorized as “civil” or “criminal.”

This Court has an obligation to ensure that the process by which these alleged contemnors are jailed complies with constitutional norms. *Amici curiae* respectfully request that the Court address the grave problem of wrongful incarceration by implementing a constitutional rule to ensure that all indigent parents, in all states, are afforded the right to counsel in the face of potential incarceration. Such a solution would protect the rights of many of

the most vulnerable without imposing an undue burden on the states.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to rule that indigents have a right to appointment of counsel in civil contempt hearings whenever they face imprisonment.

Respectfully submitted,

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