STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Family Court
Timothy M. Cain, Family Court Judge

Case No. 03-DR-37-472

REBECCA PRICE,

Respondent,

vs.

MICHAEL R. TURNER,

Appellant.

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, SOUTH CAROLINA NATIONAL OFFICE, THE BRENNAN CENTER FOR JUSTICE, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, AND THE SOUTH CAROLINA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT MICHAEL R. TURNER

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STATEMENT OF ISSUE ON APPEAL

The United State Supreme Court requires under the Sixth Amendment that courts appoint counsel to represent indigent defendants when imprisonment is a possibility. On January 3, 2008, the South Carolina Family Court did not appoint counsel to represent Michael R. Turner, an indigent defendant, and the Court sentenced Turner to serve one year in jail for failure to pay child support. Should this Court vacate the finding of contempt against the Defendant and recognize his Sixth Amendment right to counsel?

STATEMENT OF THE CASE

On January 3, 2008, Michael Turner appeared *pro se* in the Oconee County Family Court before the Honorable Timothy M. Cain on a rule to show cause in a child support case. Judge Cain found Turner in contempt for failure to keep current his child support obligations and sentenced him to 12 months incarceration or payment of the remainder of the account – five thousand seven hundred twenty eight dollars and seventy six cents ($5,728.76). (R. p. 4-5). The judge did not inform Turner that he had a right to counsel.

Turner presented evidence that he was indigent; he stated he had broken his back and was seeking disability. The trial judge made no finding as to Turner's indigent status. (R.p.4)

On January 24, 2008, Turner filed an appeal. The respondent timely filed his initial and final brief on August 19, 2008. On September 28, 2009 the Supreme Court certified this case for review pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

ARGUMENT

I. The Sixth Amendment Requires that Courts Appoint Counsel to Represent Indigent Defendants when Imprisonment is a Possibility

The Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend VI. The United States Supreme Court has recognized since 1963 that the Sixth Amendment requires courts to appoint counsel to represent indigent defendants in state felony trials. Gideon v. Wainwright, 372 U.S. 335 (1963). The Court later expanded Gideon in Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), requiring courts to appoint counsel to represent indigent defendants in any criminal proceeding in which a defendant could be imprisoned.

Whether the proceeding is deemed civil rather than criminal in nature does not diminish the defendant's Sixth Amendment right to appointed counsel, because the defendant's liberty interest is the preeminent factor. See In re Gault, 387 U.S. 1, 41 (1967). The defendant in Gault was committed to a state facility for juvenile delinquents under a state law that considered the proceeding to be civil. Id. at 17, 23-24. Despite the fact that the proceedings were civil and not criminal, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment required the appointment of counsel. See id. at 36.

Indeed, "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." Lassiter v. Dep't of Social Srvs., 452 U.S. 18, 25 (1981) (*citing* Gault). The Supreme Court in Lassiter considered the denial of appointed counsel for a woman whose parental rights were terminated in a North Carolina civil

proceeding. Id. at 18-20. The Court stated, "[t]he pre-eminent generalization that emerges from [the] Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the indigent may lose his physical liberty if he loses the litigation." Id. at 25.

The Lassiter Court then stated, after summarizing its precedents on the right to counsel, that "the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." Id. at 26-27. The Court denied the woman right to appointed counsel in the parental termination proceeding since her liberty was not at sake. See id. Thus, the deprivation of physical liberty triggers the right to appointed counsel under the Sixth Amendment – indeed, even the possibility of a deprivation of liberty triggers that right.

The Supreme Court recently reaffirmed the right to appointed counsel in Alabama v. Shelton, 535 U.S. 654, 662 (2002), holding under the Sixth Amendment that courts must appoint counsel to indigent defendants before activation of a suspended sentence, when the underlying conviction was without counsel. The Shelton Court recognized the benefit of the "guiding hand of counsel so necessary when one's liberty is in jeopardy," and emphasized "actual imprisonment as the line defining the constitutional right to counsel in non-felony cases." 535 U.S. at 661 (*citing* Lassiter, 407 U.S. at 40).

II. Courts Have Found a Right to Counsel for Defendants Facing Imprisonment for Failure to Pay Child Support

The Sixth Amendment applies in equal force to defendants charged with contempt for nonpayment of child support. Every Court of Appeals to consider the Sixth Amendment right to counsel in the context of contempt for nonpayment of support has held that appointment of counsel to represent indigent defendants in these proceedings is constitutionally required when imprisonment is a possibility.[1] See Ridgeway v. Baker, 720 F.2d 1409, 1415 (5th Cir. 1983) (requiring court to appoint counsel in civil contempt action for nonpayment of support); Sevier v. Turner, 742 F.2d 262, 267 (6th Cir. 1984) (same); Henkel v. Bradshaw, 483 F.2d 1386, 1389 (9th Cir. 1973) (same); Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985) (same); see also U.S. v. Hobart Travel Agency, Inc., 699 F.2d 618, 620-21 (2d Cir. 1983) (requiring appointment of counsel for failure to produce records that resulted in incarceration in a civil contempt action); U.S. v. Anderson, 553 F.2d 1154, 1156 (8th Cir. 1977) (same). Such a conclusion is consistent with the tide of Supreme Court precedent following the Gideon decision.

The overwhelming majority of state courts that have addressed this issue have found appointment of counsel to represent indigent defendants mandatory when imprisonment is a possibility in civil contempt actions for nonpayment of child support.[2] See, e.g., Otton v. Zaborac, 525 P.2d 537 (Alaska 1974); Cty. of Santa Clara v. Super. Ct.

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[1] The Fourth Circuit Court of Appeals declined to address this issue in a North Carolina case because the North Carolina Supreme Court had failed to address the issue after Lassiter; however, the Fourth Circuit recognized the long-standing rule that "an indigent has a right to appointed counsel . . . when, if he loses, he may be deprived of his physical liberty." Leonard v. Hammond, 804 F.2d 838, 841 (4th Cir. 1986) (*citing* Lassiter, 407 U.S. at 26-27). Furthermore, the North Carolina Supreme Court thereafter did hold that individuals facing imprisonment for contempt to pay child support, were entitled to counsel. McBride v. McBride, 431 S.E.2d 14 (N.C. 1993)

[2] Compare to Andrews v. Walton, 428 So.2d 663, 666 (Fla. 1983) (holding that fundament fairness prevents indigent parents from being imprisoned for failure to pay child support thus nullifying the right to counsel in these cases).

of Santa Clara, 2 Cal.App.4th 1686 (Cal.Ct.App. 1992); Padilla v. Padilla, 645 P.2d 1327 (Colo.App. 1982); Dube v. Lopes, 481 A.2d 1293 (Conn.Super.Ct. 1984); In re Marriage of Stariha, 509 N.E.2d 1117 (Ind.Ct.App.1987); McNabb v. Osmundson, 315 N.W.2d 9 (Iowa 1982); Johnson v. Johnson, 721 P.2d 290 (Kan.App. 1986); Rutherford v. Rutherford, 464 A.2d 228 (Md.Ct.App. 1983); Mead v. Batchlor, 460 N.W.2d 493 (Mich.1990); Cox v. Slama, 355 N.W.2d 401 (Minn.1984); Hunt v. Moreland, 697 S.W.2d 326 (Mo.App. 1985); Pasqua v. Council, 892 A.2d 663 (N.J. 2006); Gaudette v. Gaudette, 263 A.D.2d 620 (N.Y.App.Div. 1999); McBride v. McBride, 431 S.E.2d 14 (N.C. 1993); Peters-Riemers v. Riemers, 674 N.W.2d 287 (N.D.2004); Schock v. Sheppard, 453 N.E.2d 1292 (Ohio.App.Div. 1982); Ex Parte Martinez, 775 S.W.2d 455 (Tex.Ct.App. 1989); Russell v. Armitage, 697 A.2d 630 (Vt. 1997); Tetro v. Tetro, 544 P.2d 17 (Wash. 1975); Ferris v. Maass, 249 N.W.2d 789 (Wis. 1977).

III. South Carolina Family Courts are Constitutionally Bound to Appoint Counsel to Represent Indigent Defendants When Imprisonment is a Possibility in Child Support Nonpayment Proceedings

South Carolina Family Courts routinely fail to appoint counsel to represent indigent defendants when imprisonment is a possibility for nonpayment of support. In fact, the Family Court did not appoint counsel to represent Michael Turner, an indigent defendant, even though the Court imposed a one-year prison sentence. South Carolina's practice conflicts with longstanding United States Supreme Court precedent that recognizes the right to counsel before a deprivation of liberty. The practice is also contrary to the Fourth Circuit rule of law recognized in Leonard, and the overwhelming federal and state case law recognizing the right to counsel in nonsupport proceedings.

The Supreme Court mandate in Shelton was clear: the Sixth Amendment "does not countenance" the incarceration of a defendant on a conviction that "has never been subjected to 'the crucible of meaningful adversarial testing.'" 535 U.S. 654, 667. The absence of counsel here – and indeed, the State of South Carolina's refusal to provide appointed counsel – destroys any semblance of a "crucible of meaningful adversarial testing." See id.

The South Carolina Family Court nevertheless has imprisoned hundreds, and likely thousands, of indigent defendants for nonpayment of support without appointed counsel. These defendants languish in modern-day debtors' prisons after patently unfair proceedings, many of which lack any factual findings. Often the courts do not even inquire into the defendant's ability to pay their support obligation.

If this Court does not immediately address this obvious constitutional violation, it will be giving the lower courts *carte blanche* to imprison South Carolina citizens without ever providing them the benefit of an attorney to safeguard their rights. Michael Turner is one example, but every day indigent defendants across South Carolina are forced to represent themselves in Family Court on pains of imprisonment. *Amici curiae* submit this Brief urging this Honorable Court to take action to bring South Carolina into compliance with the constitutional mandate as articulated by the United States Supreme Court and as recognized by the Fourth Circuit Court of Appeals, its sister circuits, and the overwhelming majority of state supreme courts, by ordering appointed counsel to represent indigent defendants in nonsupport proceedings when imprisonment is a possibility.

CONCLUSION

For all these reasons, *amici,* the American Civil Liberties Union Foundation South Carolina National Office, the Brennan Center for Justice, the National Association of Criminal Defense Lawyers, the National Legal Aid & Defender Association, and the South Carolina Association of Criminal Defense Lawyers, respectfully urge this Court to vacate the finding of contempt against the Defendant, to vacate the order of commitment and to remand this case to the Family Court for further action, including the appointment of counsel.

Respectfully submitted,

Dated: October _____, 2009

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