No. 10-10

IN THE

Supreme Court of the United States

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA PRICE AND
SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In holding that indigent defendants have no constitutional right to appointment of counsel before being incarcerated for civil contempt, the Supreme Court of South Carolina acknowledged that its decision was contrary to the weight of authority. Pet. App. 3a-4a n.2. Indeed, the decision conflicts with twenty-two decisions of other federal and state courts. Pet. 12-19. This Court's review is warranted to resolve that conflict and reaffirm that the Constitution requires appointment of counsel in any proceeding, civil or criminal, that results in incarceration.

Respondents offer no valid reason why this Court should deny certiorari. Their efforts to minimize the

conflict among the courts are demonstrably unavailing. None of the alleged vehicle problems respondents cite poses any obstacle to this Court's review: the state supreme court squarely passed upon the federal right-to-counsel question, and Turner's case epitomizes the mootness exception for issues that are capable of repetition, yet evade review. Respondents' defense on the merits similarly falls short.

Moreover, though respondents cast unwarranted aspersions on Mr. Turner, they do not deny the importance of the issues at stake. As amici have shown, indigent non-custodial parents are routinely incarcerated in modern-day debtors' prisons in South Carolina and a handful of other States because they cannot pay court-ordered child support and lack the assistance of appointed counsel to present that defense. The Court should grant certiorari to bring those States in line with the Constitution's requirements.

I. CONFLICT AMONG THE COURTS WARRANTS REVIEW

Twenty-two federal and state courts have ruled—contrary to the decision below—that the right to counsel applies in civil contempt proceedings leading to incarceration. Pet. 12-19; Pet. App. 3a-4a n.2; *see also, e.g.*, *Rodriguez* v. *District Court*, 102 P.3d 41, 48 (Nev. 2004) (recognizing split). Respondents' efforts to minimize this entrenched conflict are unpersuasive.

1. Respondents contend (Opp. 13) that most of those cases are distinguishable because they "involved proceedings prosecuted by the State." That is doubly wrong.

First, none of those courts rested its conclusion on the presence or degree of state involvement. The decisions turned on whether a proceeding could result in

incarceration. As the Fifth Circuit explained, the right to counsel "extends to every case in which the litigant may be deprived of his personal liberty if he loses." *Ridgway* v. *Baker*, 720 F.2d 1409, 1413 (5th Cir. 1983); *see also* Pet. 12-14, 16-18.

Second, this case *does* involve the State. Rebecca Price assigned her right to collect child support to the State, and the State continues to enforce the child-support order through automated procedures administered by the family court. Pet. 6-9 & n.2; S.C. Fam. Ct. R. 24. When a child-support obligor has fallen more than five days in arrears, the clerk of the family court must *sua sponte* issue a rule to show cause why the obligor should not be held in contempt. Pet. 5. As occurred here, the court may issue a bench warrant for the obligor's arrest. At the contempt hearing, the clerk's affidavit establishes the defendant's arrearage. *Id.* Thus, it was the State's action that set in motion Turner's contempt proceeding and incarceration. *Id.* at 8-9.

2. Respondents seek (Opp. 16) to distinguish many of the cases recognizing a right to counsel because they purportedly "involved proceedings that the court viewed as criminal or quasi-criminal." In fact, there is broad consensus among those courts that a proceeding resulting in imprisonment implicates the right to counsel whether criminal *or* civil. *See, e.g.*, *Sevier* v. *Turner*, 742 F.2d 262, 266-267 (6th Cir. 1984); *United States* v. *Anderson*, 553 F.2d 1154, 1155-1156 (8th Cir. 1977); *McNabb* v. *Osmundson*, 315 N.W.2d 9, 11-14 (Iowa 1982); *Tetro* v. *Tetro*, 544 P.2d 17, 19-20 (Wash. 1975) (en banc).

3. Respondents attempt (Opp. 17) to distinguish the cases cited in the petition for the further reason

that many involved contempt charges raising "'legal issues of some complexity,'" rather than "child-support proceedings, which are relatively simple." But those decisions rested on the prospect of incarceration, not the complexity of the proceeding. *See, e.g.*, *Walker* v. *McLain*, 768 F.2d 1181, 1183 (10th Cir. 1985); *People* v. *Lucero*, 584 P.2d 1208, 1214 (Colo. 1978).

Moreover, establishing one's inability to pay child support is far from simple for an unrepresented defendant. It is certainly no less complex than cases involving failure to pay a debt, produce financial records, or pay a criminal fine. *Cf.* Opp. 17-18. To meet the burden of proof, the defendant must present competent evidence and argue the weight and import of that evidence under the law. Pet. 26-27. As other courts have recognized, doing so may be an "insuperable undertaking[]" for "the uninitiated layperson." *Pasqua* v. *Council*, 892 A.2d 663, 673 (N.J. 2006).

4. Respondents' remaining arguments similarly fail. *Otton* v. *Zaborac*—which acknowledged a right to counsel in civil contempt proceedings—relied on state *and* federal law. *See* 525 P.2d 537, 538, 539 (Alaska 1974); *cf.* Opp. 18-19. Similarly, the Vermont Supreme Court recognized the "rule" of "requiring assignment of counsel for indigent defendants in civil contempt proceedings that result in incarceration" and "held" that the Constitution "requires the appointment of counsel in a civil contempt proceeding in which an indigent defendant faces actual imprisonment." *Russell* v. *Armitage*, 697 A.2d 630, 633-634 (Vt. 1997); *cf.* Opp. 19. Finally, none of the cases cited by respondents justifies their bare speculation (Opp. 16-17 & n.3) that some courts recognized a right to counsel only because "unrepresented defendants were unevenly matched against plaintiffs' lawyers."

II. NO VEHICLE PROBLEMS PRECLUDE REVIEW

A. The Case Is Not Moot

Although Turner has completed the jail term under review, he remains indigent and faces a substantial risk of again being incarcerated without the assistance of appointed counsel. Indeed, he has been re-incarcerated since his release.

Proceedings against Turner for nonpayment of child support fit comfortably within the "capable of repetition, yet evading review" exception to mootness. Pet. 30 n.21. That exception applies where "'(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Both criteria are satisfied here.

Family court rules requiring *automatic* issuance of a rule to show cause whenever a child-support obligor's account falls more than five days in arrears have triggered contempt proceedings against Turner several times—both before and after the contempt order under review. Pet. 6-10, 30 n.21. These procedures create far more than a "reasonable expectation" that Turner will again be jailed without counsel in future contempt proceedings. Indeed, without a lawyer's assistance, that prospect is virtually certain: Turner remains indigent, and his arrearage far exceeds any income he is likely to earn in the near future.

Moreover, these proceedings are prone to escape appellate review because civil contemnors in South Carolina cannot be incarcerated on any single contempt

order for more than twelve months and are often sentenced for shorter periods. It is thus virtually impossible for a contemnor to litigate the validity of a contempt order prior to release. Indeed, here, Turner had completed his sentence and had been re-incarcerated and released on a subsequent contempt order before the Supreme Court of South Carolina ruled on his appeal. Pet. 30 n.21; *see also Walker*, 768 F.2d at 1182-1183; *Leonard* v. *Hammond*, 804 F.2d 838, 842-843 (4th Cir. 1986).

Respondents contend (Opp. 21) that Turner could obtain review of a contempt sanction in a future case by asking the court to stay the contempt sentence pending appeal. Respondents cite no precedent—and there is none—to support the proposition that a claim does not "evade review" for mootness purposes merely because a court *might* exercise its discretion to stay its order if asked to do so in a future case.

B. Turner Did Not Waive His Claim

The Supreme Court of South Carolina squarely addressed Turner's right-to-counsel claim under the Sixth and Fourteenth Amendments. Pet. App. 2a-5a. That is sufficient for this Court's review. *See, e.g., Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided.").

Moreover, a defendant does not forfeit his right to counsel by failing to ask for a lawyer. Rather, where the right applies, "it is the duty of the court, whether requested or not, to assign counsel for [an indigent defendant]." *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932); *see Miranda* v. *Arizona*, 384 U.S. 436, 473 n.43 (1966); *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938).

Nor is Turner's reliance on *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976), waived.[1] Turner argued on appeal in the state court that he was entitled to counsel under both the Sixth Amendment and the Due Process Clause. Pet. App. 11a-15a. The Supreme Court of South Carolina decided both claims. *Id.* at 2a. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Turner's citation of the *Mathews* balancing test is simply "a new argument to support what has been [a] consistent claim"—that depriving an indigent of appointed counsel when he faces incarceration violates due process. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Walker*, 768 F.2d at 1183-1185.

C. There Are No Other Vehicle Problems

Respondents speculate (Opp. 23) that the outcome here might have been the same even if Turner had been provided counsel. Citing Turner's drug use and unfounded speculation that Turner chose to remain unemployed, respondents insinuate that Turner could not have established an inability-to-pay defense even with a lawyer's assistance. *Id.*; *see also id.* at 11.[2] But re-

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[1] In light of this Court's decisions establishing actual incarceration as the touchstone for the right to counsel, the *Mathews* analysis is unnecessary where a defendant faces incarceration. Pet. 25 & n.14. The petition raised *Mathews* balancing as an alternative to this actual-imprisonment rule. *Id.*

[2] Respondents note that payments were occasionally made on Turner's behalf. As the petition explains (Pet. 8 n.4), the family court ordered wage-withholding on the occasions when Turner

spondents do not dispute that Turner is indigent, and they concede (*id.* at 30 n.7) that a defendant who cannot pay court-ordered support may not be sanctioned in a civil contempt proceeding. A lawyer could have assisted Turner in presenting this defense and addressing any argument that the inability-to-pay defense should not apply. How that question would ultimately have been determined does not preclude this Court's review of the right-to-counsel question.

III. THE DECISION BELOW IS ERRONEOUS

A. A Defendant Facing Incarceration Is Entitled To Appointed Counsel

As shown, an indigent individual in jeopardy of losing his physical liberty has a right to appointment of counsel. Pet. 19-29. This principle holds whether the proceeding is civil or criminal, for "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. *Department of Social Servs.*, 452 U.S. 18, 25 (1981); *see Alabama* v. *Shelton*, 535 U.S. 654, 661 (2002); *In re Gault*, 387 U.S. 1, 36-37 (1967).[3]

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was able to obtain employment. DSS also intercepted any state or federal benefits to which Turner was entitled. For example, family court records indicate that the 2006 payment of $1404 that respondents highlight was the result of such an intercept.

[3] Like the court below, respondents advance the formalistic argument that no right to counsel applies in civil contempt proceedings because, unlike in a criminal prosecution, the civil contemnor "'carries the keys of his prison in his own pocket.'" Opp. 28-29. For the reasons set forth in the petition (Pet. 24-29), this argument fails.

Respondents cite only two cases in which this Court held that an individual facing a loss of physical liberty had no categorical right to counsel. Neither decision supports the judgment below.

In *Middendorf* v. *Henry*, 425 U.S. 25 (1976), this Court upheld the military's use of summary courts-martial to try servicemembers for minor offenses without counsel. The Court held that special considerations applicable to the military distinguished summary courts-martial from civilian proceedings in which the right to counsel had been held to apply. *Id.* at 37-48. The Court further emphasized that servicemembers had the right to refuse trial by summary court-martial and be tried instead at a special or general court-martial at which counsel would be provided. *Id.* at 28-29, 46-48.

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973), is similarly distinguishable. There, the Court held that indigent probationers are not categorically entitled to appointed counsel in all revocation proceedings. *Id.* at 786-791. Rather, due process requires appointment of counsel on a case-by-case basis. *Id.* at 788-791. The probationer enjoyed only a "limited due process right" because he had "been convicted of a crime" in a previous proceeding at which the sentence of incarceration was imposed. *Id.* at 789; *see also id.* at 779. Thus, as the Court recently recognized, the "dispositive factor" in *Gagnon* was that the probationer "had a recognized right to counsel when adjudicated guilty of the felony offense" of which he was originally convicted and sentenced. *Shelton*, 535 U.S. at 664; *see also id.* at 665.

B. Respondents' Remaining Arguments Do Not Support The Judgment Below

1. Respondents contend (Opp. 24) that no right to counsel applies unless the defendant faces an "imbalance of prosecutorial power." *See id.* at 27, 33-34. Here, respondents assert (*id.* at 25), Turner had no right to counsel at the contempt hearing because he faced "only a *pro se* mother."

Respondents' assertion is meritless. Each step in the proceedings to enforce Turner's child-support obligations resulted from actions taken by the Department of Social Services (DSS) or the family court. *See supra* p. 3; *see also* Pet. 4-5, 6-9. Pursuant to court rules, the court clerk automatically issued the rule to show cause that led to Turner's contempt in this case. The court issued a bench warrant for Turner's arrest and conducted the hearing as an inquisition into Turner's failure to pay. And Turner was incarcerated in the county jail. None of these proceedings was a private matter between private litigants, and none depended on Rebecca Price's involvement.[4]

2. Respondents next argue that Turner faced no "stigma" resulting from the contempt order. *See, e.g.*, Opp. 27-28. But the existence of stigma is not and never has been the test for applying the right to counsel. The cases cited by respondents—to the extent they address the right to counsel at all—do not support this proposition. *Id.* To the contrary, this Court has "repeatedly emphasized actual imprisonment as the

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[4] Indeed, the State has begun to garnish the wages of Rebecca Price, who is now a non-custodial parent with child-support obligations of her own. IFP Aff. of Rebecca L. Rogers.

touchstone of entitlement to appointed counsel." *Shelton*, 535 U.S. at 675 (Scalia, J., dissenting); *see also Lassiter*, 452 U.S. at 25.

Moreover, the suggestion that civil contempt for failure to pay child support carries no stigma is unsustainable. Respondents' brief repeats several public sources that refer to parents like Turner as "'deadbeat[s]'" who have "'abdicat[ed] [their] moral and legal dut[ies].'" Opp. 4 & n.1. DSS posts photographs online of "delinquent parents" and encourages the public to help "bring [the parents] to justice."[5] There is no doubt that a parent who fails to pay child support faces public opprobrium. Twelve months' incarceration surely does not lessen that stigma.

3. Respondents contend (Opp. 36-37) that the issues in child-support cases are "straightforward" and "rarely complex." But this Court's right-to-counsel decisions do not turn on the perceived complexity of the specific issues or defenses involved. Moreover, as the petition showed (Pet. 15, 26-28), defending against civil contempt charges in child-support cases can be challenging. To establish an inability-to-pay defense, the defendant must prove the circumstances of his failure to pay through competent evidence and argue that, under the law, he could not be incarcerated in light of those facts. For example, respondents speculate that Turner could not establish an inability-to-pay defense in light of his eligibility for work release.[6] Resolving

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[5] *See* http://www.state.sc.us/dss/csed/delinq.htm (last visited Oct. 4, 2010).

[6] There is no precedent to support that proposition. Moreover, the court's notation that Turner was eligible for work release (Pet. App. 8a) is merely a prerequisite to participation in work re-

such issues in a contempt hearing requires the assistance of counsel.[7]

4. Respondents contend (Opp. 35-36) that requiring appointment of counsel would cost too much and strain public defenders. But numerous States already require the appointment of counsel for indigent civil contempt defendants, and respondents cite no evidence that doing so has caused any undue burden or compromised the quality of legal representation. To the contrary, appointed counsel function effectively in civil contempt cases in States where the right to counsel has been recognized and improve proceedings' efficiency and accuracy. NACDL Br. 18-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

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lease and does not bind the detention center, which conducts additional screening consistent with Department of Corrections regulations. S.C. Code Ann. § 24-13-910. And even assuming the detention center permitted Turner to work—and assuming a job was available—any wages Turner received could not reasonably be expected to cover his entire arrearage, particularly when a portion would be garnished to offset the cost of his incarceration, *id.* § 24-13-930.

[7] The standards governing financial eligibility for appointment of counsel place far less burden on defendants than the question whether a civil contemnor may be incarcerated. *See, e.g.*, 18 U.S.C. § 3006A(b) (trial court must advise defendant of right to counsel and inquire whether defendant is financially unable to obtain counsel); *cf.* Opp. 36-37.

Respectfully submitted.

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