No. 10-10

In the Supreme Court of the United States

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA L. ROGERS, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amicus curiae the American Bar Association ("ABA") respectfully submits this brief in support of Petitioner Michael D. Turner and asks the Court to hold that the potential deprivation of a defendant's liberty interest requires the appointment of counsel for an indigent defendant who faces potential incarceration at a civil contempt hearing.

With nearly 400,000 members, the ABA is the leading national voluntary bar organization. Its members come from each of the fifty states, the District of Columbia, and the U.S. territories. Its membership is diverse, with attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors and law students.[2]

Since its inception over 100 years ago, the ABA has worked to improve the administration of justice

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no party or counsel for a party authored this brief in whole or in part, and that no person or entity, other than this *amicus*, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties consented to the filing of this brief, except for the South Carolina Department of Social Services, which maintains that it is not a party and does not have authority to give such consent.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

and the judicial process. Its history reflects an unwavering commitment to the principle that society must provide equal access to justice, including meaningful access to legal representation for low-income individuals, in adversarial proceedings.

The ABA's Standing Committee on Legal Aid and Indigent Defendants, the ABA's first standing committee, was created in 1920 with Charles Evans Hughes, later Chief Justice of the U.S. Supreme Court, as its first chair.[3] This Standing Committee is tasked with the study of the administration of justice as it affects low-income individuals and remedial measures intended to help them protect their legal rights. ABA Const. Art. 31.7. In 1965, the ABA's House of Delegates adopted a policy that endorsed federal funding of legal services for low-income individuals after concluding that charitable funding would never meet the need.[4] As stated by then-ABA President, Lewis Powell, "It is fundamental that

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[3] ABA Standing Committees are entities charged with studying "continuing or recurring matters related to the purposes or business" of the ABA. ABA Const. Art. 31.3.

[4] The ABA's House of Delegates, with more than 500 delegates, is the ABA's policymaking body. Delegates represent states and territories, state local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. Recommendations that are adopted by the House of Delegates become ABA policy. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html.

justice should be the same, in substance and availability, without regard to economic status."[5]

The ABA also has worked to strengthen the legal system and the judicial process through the development of standards that represent the work of prosecutors, defense counsel, judges, court personnel, academics, and recognized experts in related fields, such as social work, psychology, health care, education, corrections, and law enforcement. Adopted by the ABA's House of Delegates, these standards provide guidance for the juvenile justice system, the criminal justice system, and judicial administration.[6]

Of particular relevance to this case are the ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSES SERVICES (3d ed. 1992), and specifically, the revisions made to Standards 5-5.1[7] and 5-5.2[8] and

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[5] ABA Report with Recommendation #112A, at 2 (adopted Aug. 2006), *available at* http://new.abanet.org/sdl/Documents/2006_AM_112A.pdf.

[6] ABA standards relating to juvenile justice are available at http://new.abanet.org/sections/criminaljustice/Pages/JuvenileJusticeStandards.aspx. ABA standards relating to criminal justice are available at http://new.abanet.org/ sections/ criminaljustice/Pages/Standards.aspx. ABA standards relating to judicial administration are available at http://new.abanet.org/divisions/Judicial/Pages/Publications_Standards.aspx.

[7] "Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to incarceration."

[8] "Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition,

their Commentaries. As discussed further in the Argument section of this brief, revisions were made because "the line between criminal and civil proceedings which give rise to a constitutional right to counsel has become increasingly blurred." Commentary to Standard 5-5.2, at 65. Thus, "protected liberty interests" justify the provision of counsel to indigent defendants in "quasi-criminal" matters—including contempt proceedings for failure to make child support payments—regardless of their characterization as "civil" and regardless of whether the defendant is actually imprisoned. *Id.*; Commentary to Standard 5-5.1, at 62 n.7.

The ABA's work in the area of legal services to low-income persons also has led it to conclude that counsel should be provided as a matter of right to low-income persons in adversarial proceedings where basic human needs are at stake, such as those involving sustenance, safety, health, or child custody determinations. *See, e.g.*, *ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings* 1 (adopted Aug. 9, 2010).[9] The rationale underlying these *Basic Principles* also supports a right to counsel in civil contempt cases where an indigent defendant faces potential incarceration.

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mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature."

[9] The *ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings* are available at www.abanet.org/legalservices/sclaid/downloads/105_Revised_FINAL_Aug_2010.pdf.

With its long history of work to protect the rights of low-income individuals, the ABA respectfully suggests that its views may assist the Court in this matter.

SUMMARY OF ARGUMENT

Where an indigent defendant faces incarceration for contempt of court, the potential deprivation of the defendant's liberty interest warrants the appointment of counsel—regardless of whether the proceeding is labeled "civil" or "criminal"—to ensure the fair and efficient administration of justice. The line between civil and criminal contempt proceedings has become increasingly blurred, and thus cannot provide a useful basis for determining the right to counsel where personal liberty is at stake.

The appointment of counsel promotes the fair and efficient administration of justice. Concerns over increased administrative and financial burdens associated with providing counsel must be balanced against the costs of improper incarceration, as well as any gains from negotiation of an order with which a defendant can comply. Appointment of counsel promotes the public's interest in obtaining correct outcomes and in efficient use of judicial time and resources.

As the Court has noted, court proceedings must not only be fair, but also must appear to be fair. Representation enhances public confidence and results in increased satisfaction in legal outcomes and respect for the justice system.

Counsel should be provided in these circumstances, accordingly, because of the potential

deprivation of the defendants' liberty interests, and because representation will result in fairer outcomes with greater judicial efficiency and will increase public confidence in our judicial system.

ARGUMENT

The ABA submits that, where an indigent defendant faces incarceration for contempt of court, the potential deprivation of the defendant's liberty interest warrants the appointment of counsel—regardless of whether the proceeding is labeled "civil" or "criminal"—to ensure the fair and efficient administration of justice.

I. A Defendant Facing Incarceration for Contempt Should Be Provided Counsel Regardless of Whether the Proceeding Is Labeled "Civil" or "Criminal."

In the ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3d ed. 1992), the ABA noted that "the line between criminal and civil proceedings which give rise to a constitutional right to counsel has become increasingly blurred. Thus, protected liberty interests have extended due process concepts to justify the provision of counsel for indigent litigants in such 'quasi-criminal' matters as contempt for failure to make child support payments . . . ." Commentary to Standard 5-5.2, at 65.

The ABA called for counsel in all proceedings for offenses punishable by incarceration, "regardless of their denomination as felonies, misdemeanors, or otherwise." Standard 5-5.1. In support, the ABA noted a civil contempt case involving noncompliance with a child support order. Commentary to Standard

5-5.1, at 62 n.7 (citing *Ridgway v. Baker*, 720 F.2d 1409 (5th Cir. 1983)). Like the ABA, the *Ridgway* court recognized that "the line between civil and criminal contempt is rarely as clear as the state would have us believe." *Ridgway*, 720 F.2d at 1414. Rejecting the state's argument that a defendant at a civil contempt proceeding holds "the keys of his prison in his own pocket," the court stated that this old saying ignores two salient facts: "that the keys are available only to one who has enough money to pay the delinquent child support and that, meanwhile, the defendant, whatever the label on his cell, is confined." *Id.* at 1413-14.

The *Ridgway* court also observed that an error in a contempt finding is more likely to occur if the defendant is denied counsel. *Id.* at 1414; *see also* 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, 122 (2008); Robert Monk, *The Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support,* 50 U. Chi. L. Rev. 326, 339 (1983) ("determination of an indigent's ability to comply is especially delicate and susceptible to error"). While coercive contempt is premised on a finding that the defendant can, but is refusing, to comply with the court's order, few lay persons have the training or experience needed to carry the burden of showing that they are not able to comply, even when not under the pressure of potential incarceration.

Further, a contempt proceeding can be converted from civil to criminal through a sentence that is not coercive but is, instead, punitive: "Even a

dispassionate court may mistakenly believe that it is authorized to impose a jail sentence on a defendant without the means to pay, in order to motivate him to greater diligence in the future. Such a sentence is not coercion[. While] the court hopes to deter future noncompliance . . .[,] deterrence is one of the classic aims of punishment." Monk, *supra*, at 340.

As the *Ridgway* court stated in 1983: "The right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or civil.'" 720 F.2d at 1413. Because there can be no dispute that, when a defendant faces a potential for incarceration at a civil contempt proceeding, his or her liberty interest is at stake, the ABA urges that an indigent defendant should have a right to counsel in these circumstances.

II. Where an Indigent Defendant Faces Incarceration for Contempt, the Appointment of Counsel Promotes the Fair and Efficient Administration of Justice.

The need "to assure fair proceedings" was a key consideration when the ABA formulated the right to counsel principles embodied in Standards 5-5.1 and 5-5.2. *See, e.g.*, Commentary to Standard 5-5.1, at 62. While recognizing the concerns that right to counsel issues raise over increased administrative and financial burdens, the ABA concluded that, where a person's liberty interest is at stake, the provision of counsel is essential to both the fair and the efficient administration of justice. In other words, providing counsel to indigent defendants facing incarceration at civil contempt proceedings for

the nonpayment of child support is not only the right, but also the practical, thing to do.

While appointing counsel in these circumstances would necessarily add costs, those costs must be balanced with savings and, potentially, increased support payments that can result. First, providing counsel for indigent defendants does not necessarily result in reduction of support payments: "If [the defendant] cannot pay, then he will not pay, whether confined or not, and whether represented by counsel or not." Monk, *supra*, at 345.

Further, appointed counsel can guard against the improper use—and the costs—of incarceration. *See* Monk, *supra*, at 345. And, in the event of a finding of contempt, counsel can assist the court in fashioning—where a lesser sanction than incarceration would yield compliance—an order that is most likely to be complied with based on the defendant's available resources; counsel can also appeal to the court's considerable discretion in imposing a lesser sanction. *See* Patterson, *supra*, at 122; *see also* Monk, *supra*, at 339.

Moreover, appointment of counsel in these circumstances promotes the public's interest in obtaining the correct outcome. As one federal district court judge has stated, "As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel." Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 505 (1998). Knowledge of and the ability to present substantive claims and defenses substantially increase a litigant's chances of

achieving outcomes that reflect the underlying merits of his or her case. Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 Yale L. & Pol'y Rev. 385, 413-14, Tbl.18 (1995).[10] In short, "Lawyers matter in two main ways: 'by increasing the accuracy of legal decision-making and by conferring advantage on represented parties.'" Brief of Retired Alaska Judges as Amici Curiae in Support of Appellee Jonsson at 14, *Office of Pub. Advocacy v. Alaska Court Sys.* (Alaska 2008) (No. S-12999), 2008 WL 5585566 ("*Jonsson* Amicus Brief") (citation omitted). Unrepresented defendants, for example, "routinely bring in letters with out-of-court statements and are perplexed when these testimonials are excluded, sometimes ending the case." *Id.* at 11-12. "'It is simply unrealistic to expect lay litigants to understand and abide by the formal rules of evidence.'" *Id.* at 11 (quoting Jona Goldschmidt, *The*

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[10] Several recent studies confirm that, in various types of civil matters, access to legal counsel positively impacts litigation results for individuals. These include the Legal Services Corporation's 2009 update to its 2005 Report, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans, available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf. *See also* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 Fordham Urb. L.J. 37 (2010) (discussing empirical data in numerous civil contexts, including eviction proceedings, family law proceedings, consumer actions, administrative actions, unemployment compensation appeals, and immigration cases).

Pro Se Litigant's Struggle for Access to Justice, 40 Fam. Ct. Rev. 36, 52 (2002)).[11]

Appointment of counsel in these circumstances also promotes the efficient administration of justice. As an amicus brief filed by a group of judges noted, when cases are presented pro se, judges have to spend "an inordinate amount of time deciphering pleadings[,] and hearings, when properly scheduled, are slow and onerous."[12] In the *Jonsson* Amicus Brief, that group of judges noted that, "With court time at a premium, any inordinate attention that must be paid to pro se cases has a ripple effect. . . . [T]he community as a whole is impacted by the backlog created by the spillover from pro se cases."[13]

Finally, as this Court has noted, court proceedings must not only be fair, but also must "'appear fair.'" *Indiana v. Edwards*, 554 U.S. 164, 177 (2008) (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)). While those imprisoned for civil

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[11] Indeed, it has long been the ABA's position that "[s]killed counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. . . . [*P*]*ro se* litigants cannot adequately perform any of these tasks." Brief of ABA Amicus Curiae at 9, *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340036.

[12] Brief *Amicus Curiae* of Eleven County Judges in Support of Petition Requesting Supreme Court Take Jurisdiction of Original Action, *Kelly v. Warpinski*, No. 04-2999-OA, at 6 (Wis. 2004), *available at* http://www.povertylaw.org/poverty-law-library/case/55800/55816/55816C1.pdf.

[13] *Jonsson* Amicus Brief, at 20-21 (internal quotation marks and citation omitted).

contempt do not carry all of the trappings of one convicted of a crime (s*ee* Opp. at 27-28), most lay persons aware of the incarceration undoubtedly would fail to comprehend the subtle difference between being jailed for civil contempt versus for a criminal conviction.

On the other hand, public confidence is enhanced through representation by counsel. As found by a Washington state task force, representation not only increased satisfaction with the legal outcomes, but also greatly increased respect for the justice system overall. *Jonsson* Amicus Brief at 15 (citing Task Force on Civil Equal Justice Funding, Washington State Supreme Court, *The Washington State Civil Legal Needs Study* 56 (2003)). This task force concluded that, among low-income people who sought and received an attorney's help, 27% were "very positive" and 27% were "somewhat positive" in their attitudes toward the justice system, while only 3% and 18% had such views, respectively, if they had tried but failed to get an attorney's help. *Id.*

In 2010, the ABA adopted the MODEL ACCESS ACT, having concluded that "[p]roviding legal representation to low-income persons at public expense will result in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants, will produce fairer outcomes, and will promote public confidence in the systems of justice." *See* ABA MODEL ACCESS ACT § 1.F (adopted August 2010).[14]

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[14] *See also* ABA MODEL ACCESS ACT, 2010 Report with Recommendation #104 (blackletter and commentary of Model Act adopted Aug. 2010), Report at 9 (urging adoption of Model

Based on its years of research, study, and experience, the ABA accordingly urges that providing counsel to indigent defendants facing incarceration at civil contempt proceedings—regardless of whether the proceedings are labeled "civil" or "criminal"—is not only necessary because of the potential deprivation of the defendants' liberty interests, but also to ensure the fair and efficient administration of justice.

CONCLUSION

For the foregoing reasons, *amicus curiae* the American Bar Association requests that the judgment of the Supreme Court of South Carolina be reversed.

Act as model for implementing jurisdictions in addressing civil right to counsel where basic human needs at stake), *available at* http://new.abanet.org/sdl/Documents/2010_AM_104.pdf.

Respectfully submitted,

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