NCCRC
National Coalition for a Civil Right to Counsel

Analyzing the Right to Counsel in Civil Fines and Fees Cases Involving Incarceration

Background

The right to counsel in proceedings to incarcerate an individual for failure to pay fines and fees can depend on a combination of the type of proceeding (probation revocation, parole violation, civil/criminal contempt, enforcement of criminal/suspended sentence, etc.) and the applicable federal/state law. Because of the complexity of the subject, there is a compelling need to put out uniform guidance on the issue.[1] The discussion below applies existing law to the question of the right to counsel in fines and fees enforcement proceedings that are civil in nature, and also discusses important policy considerations surrounding the right to counsel in such cases.

Applying Supreme Court Precedent on the Right to Counsel in Civil Cases to Civil Proceedings Involving Incarceration for Failure to Pay Fines or Fees

There are three key U.S. Supreme Court cases on the Fourteenth Amendment right to counsel in civil matters: *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (taking case-by-case approach to appointing counsel in parole revocation proceedings), *Lassiter v. Dep't of Soc. Servs*., 452 U.S. 18 (1981) (taking case-by-case approach to appointing counsel in termination of parental rights cases), and *Turner v. Rogers*, 564 U.S. 431 (2011) (finding no categorical right to counsel in privately initiated civil contempt cases). **Fines and fees incarceration cases meet all of the requirements established by these cases: a threat of incarceration (lacking in *Lassiter*), a represented government plaintiff (in contrast to *Turner*, where an unrepresented custodial parent was the plaintiff), and formal proceedings implicating an unconditional liberty interest (both of which were lacking in *Gagnon*).**

It is also worth noting that prior to *Turner*, courts in more than a dozen states identified a right to counsel in civil contempt cases resulting in incarceration.[2] A few of these explicitly conditioned

[1] In fact, some municipal courts have not provided appointed counsel even in cases where clearly established caselaw either commands or strongly suggests the presence of a right to counsel in the specific proceedings at issue. *See e.g.* ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors Prisons: How Court-Imposed Debts Punish Poor People in Washington* 10 (Jan. 2014), *available at* http://columbialegal.org/sites/default/files/ModernDayDebtorsPrison.pdf (noting clearly established caselaw providing right to appointed counsel in LFO hearing, "Yet, in the hearings observed by ACLU and CLS attorneys, defendants were not told that they had the right to counsel … Most of the people serving time for non-payment did not understand that they had the right to an attorney …"); Commonwealth of Massachusetts Senate Committee on Post Audit and Oversight, *Fine Time Massachusetts: Judges, Poor People, and Debtors' Prison in the 21st Century* 18-19 (Nov. 7, 2016), *available at* https://malegislature.gov/Bills/189/S2504.pdf (despite case law from state high court establishing right to counsel for cases involving incarceration for failure to pay fines, 2016 Sentencing Bench Book used by district and municipal court judges failed to mention offering counsel to defendants in strongly analogous cases involving failure to pay court fees, and high court's reasoning suggests that fines vs fees "is a distinction without a difference").

[2] Marjorie Caner, *Right to Appointment of Counsel in Contempt Proceedings*, 32 A.L.R.5th 31 (2017).

the right to cases involving government plaintiffs, which is the situation where the court acts on the government's behalf by incarcerating an individual for failure to pay fines and fees.[3]

Application of the *Mathews v. Eldridge* Factors to Civil Fees and Fines Proceedings Involving Incarceration

The general test used to determine if a right to counsel exists in civil cases is *Mathews v. Eldridge*, 424 U.S. 319 (1976), which instructs that courts should consider the personal interests at stake, the risk of erroneous deprivation, and the government's interest.[4] First, in terms of the interests at stake, ***Turner* recognized that a threat to an unconditional liberty interest weighs strongly in favor of a right to counsel because "The interest in securing that freedom … lies 'at the core of the liberty protected by the Due Process Clause.'"[5]**

As to the risk of error, **there are numerous ways in which courts can err in making ability-to-pay determinations,** including "(1) wrongly determining that the defendant has not complied with the court order; (2) wrongly deciding that coercive measures are required to obtain compliance; (3) jailing when other means of forcing payment are available; (4) sentencing punitively, either without a purge condition, for too long a term, or with a purge condition that the defendant cannot meet or one that the court is not permitted to impose."[6] The risk of punitive sentencing presents a particular risk where the litigant has previously appeared before the court, as "The court's sense that failure to obey its past order offends the dignity of the court and the

[3] *See e.g.*, *Mead v. Batchlor*, 460 N.W.2d 493, 501-02 (Mich. 1990) ("At least when he is faced with the loss of physical liberty, an indigent needs an attorney to advise him about the meaning and requirements of applicable laws and to raise proofs and defenses in his behalf. In addition, since the state's representative at such a hearing is well versed in the laws relating to child support, fundamental fairness requires that the indigent who faces incarceration should also have qualified representation"); *State v. Pultz*, 556 N.W.2d 708, 715 (Wis. 1996) (indigent individual is entitled to appointed counsel "when an arm of government brings a motion for a remedial contempt hearing against an individual, and that person's liberty is threatened").

[4] *Lassiter* also added a presumption against the right to counsel where physical liberty is not at stake. But as the matters discussed in this memo all involve the threat of physical incarceration, that presumption is not a factor.

[5] *Turner*, at 564 U.S. at 433.

[6] 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, 338 (Winter 1983). See also Elizabeth B. Patterson, *Civil Contempt and the Indigent Child Support Obligor*: *The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95 (2008) ("Proving inability to comply can be factually complex, implicating the economic circumstances of the obligor, his work history and potential, his available assets, and his own subsistence needs. To meet this burden, the alleged contemnor must at the very least present evidence of his or her employment (or lack thereof), wages, expenses, and assets. However, gauging the ability to pay may be much more complicated than this, involving issues of good faith responsibility for other obligations, voluntariness of the obligor's unemployment or under-employment, and the availability of borrowed funds or assets owned by others to satisfy the obligor's debt. There may be legal as well as factual components to these issues … Adding to the obligor's burden is the potential that the court will hold his or her testimony concerning inability to pay to be insufficient evidence or lacking in credibility in the absence of documentary corroboration. Retention of the necessary records among indigents is rare, particularly given the widespread instability in their employment, housing, and other aspects of their lives. Even in the many states in which the civil contemnor has a right to appointed counsel, the lack of documentary evidence makes it difficult for the attorney to prove to the satisfaction of the court his client's inability to pay. The indigent contemnor without counsel will rarely if ever be able to do so …")

orderly administration of justice and the court's outrage over the defendant's dereliction of moral duty may create a strong impetus toward punitive sentencing."[7] This is not theoretical: appellate courts have flagged this issue as an existing problem.[8] Additionally, **when contempt is the vehicle used for enforcement of fines and fees, "[A] civil contemnor enjoys many fewer safeguards against injustice or error" than in criminal cases,** such as the use of a "clear and convincing" standard instead of "beyond a reasonable doubt", the placement of the burden of proof on the contemnor, the lack of a jury trial, the inability in many jurisdictions to seek interlocutory appeal or collateral relief, and the highly deferential appellate review standard for contempt matters.[9]

Research has proven that the presence of counsel has a significant impact in reducing erroneous determinations. Recently, a meta study examining earlier impact-of-counsel studies concluded that litigants with counsel in civil cases generally are anywhere from eight to over 200 times more likely to prevail than those without counsel, and anywhere from twice to nearly five times more likely to prevail than those who receive the assistance of a nonlawyer advocate.[10] As to civil contempt proceedings in particular, a study submitted by the former State Director of the South Carolina Department of Social Services on child support contempt found that "obligors who appeared without counsel were held in contempt more than twice as often as obligors who were represented by counsel. Only 17% of obligors with attorneys (two of twelve) were held in contempt. By contrast, 42% of unrepresented obligors (131 of 314) were held in contempt."[11] There are many reasons why lawyers are so effective, including the fact that a lawyer is more likely to present a defense and alternatives to incarceration that the judge finds credible.[12]

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[7] Monk, 50 U. Chi. L. Rev. at 340.

[8] Patterson, 18 Cornell J.L. & Pub. Pol'y at 95 ("In almost every case the judge will already have ruled once on the merits against the party accused of violating an outstanding order. He may perceive the party's subsequent conduct as evasive of his commands and be unwilling to listen to proffered explanations, or may bring to the contempt proceeding adverse judgments about motivation or credibility formed earlier. Appellate courts in several states have expressed concern with the repeated abuses of judicial authority in contempt adjudications … Faced with a case containing serious procedural irregularities, the Florida Court of Appeals observed, 'We are deeply troubled that circuit courts continue to illegally incarcerate people for civil contempt in the face not only of ample case law, but also a rule which clearly delineates the procedures that should be followed in order to ensure that the due process rights of alleged contemnors are protected.'")

[9] Jessica Kornberg, *Rethinking Civil Contempt Incarceration*, 44 No. 1 Crim. Law Bulletin 4 (Jan-Feb 2008).

[10] Rebecca Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, American Sociological Review, vol. 80, 5: pp. 909-933 (Oct. 2015).

[11] Brief for Elizabeth Patterson and South Carolina Appleseed as amici curiae, p. 10, *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

[12] Monk, 50 U. Chi. L. Rev. at 341 ("In cases where the defendant is able to arrange some form of payment, there is evidence that a lawyer can be far more effective than the defendant at presenting a plan and convincing the court to accept it"); Jacob Fiddelman, *Protecting the Liberty of Indigent Civil Contemnors in the Absence of Appointed Counsel*, 46 Colum. J.L. & Soc. Probs. 431, 455-56 (Summer 2013) ("Trial attorneys are experts at discovering crucial facts and presenting them to the court in a cogent and convincing manner. Indigent defendants are frequently 'uninformed as to their rights, unaware of the limitations on the court's powers, . . . unskilled in effective speaking, and intimidated by the trappings of authority.' Compared to the accused contemnor making pleas to the court on his own behalf, counsel will often carry more inherent credibility with the court when arguing that full compliance is impossible … Even if the court correctly determines that the defendant should be held in civil contempt, coercive measures short of incarceration may be equally or more effective at securing compliance. Without counsel, an

Finally, the governmental interest is not furthered if a person is jailed erroneously, since the government not only will never receive repayment, but will have to pay for the incarceration.

Appointment of Counsel as a Matter of Judicial Discretion

Where judges are left to exercise their discretion as to whether to appoint counsel in a particular fines and fees case, numerous problems may arise. **Elected judges may face pushback from municipal or county authorities as well as voters each time they opt to exercise their discretion to appoint counsel,** creating an inherent conflict of interest in making such a decision.[13] Furthermore, **where the fees or fines are owed to the court, there may be significant pressure on judges to use incarceration as a coercive tool,** even where the evidence is lacking that the debtor has the ability to pay.[14]

Political realities aside, there are other issues with the case-by-case approach, such as: judges coming to different conclusions upon virtually identical sets of facts; the difficulty of appellate review when the trial record is developed without counsel; and the inability of unrepresented litigants to clearly articulate the reasons why they should be appointed counsel.[15] Indeed, the case-by-case approach in criminal cases was beset with such problems, leading 22 states to file an amicus brief in *Gideon v. Wainwright* urging the adoption of a categorical right to counsel.[16]

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unrepresented litigant may be unaware of alternative remedies or unsure of how to convince the court that confinement is inappropriate.")

[13] The problem of cost considerations factoring into judicial appointment of counsel decisions made by elected judges has been recognized in other contexts. *See e.g.* Stephen B. Bright, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759 (1995) (in death penalty cases, "When the community that elects the judge is demanding an execution, the judge has no political incentive to appoint an experienced lawyer who will devote large amounts of time to the case and file applications for expert and investigative assistance, all of which will only increase the cost of the case for the community. As a result, judges frequently assign lawyers who are not willing or able to provide a vigorous defense.")

[14] *See e.g.* United States Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 43 (Mar. 4, 2015) ("[W]hile the municipal court does not generally deem the code violations that come before it as jail-worthy, it routinely views the failure to appear in court to remit payment to the City as jail-worthy, and commonly issues warrants to arrest individuals who have failed to make timely payment … In this way, the penalties that the court imposes are driven not by public safety needs, but by financial interests."

[15] See e.g. John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L.J. 763 (Spring 2013), *available at* http://civilrighttocounsel.org/uploaded_files/4/The_Case_Against_Case-by-Case__Pollock_.pdf.

[16] Brief for the State Government as Amici Curiae Supporting Appellant, *Gideon v. Cochran* [later *Wainwright*], 372 U.S. 335 (1963).