EXHIBIT A

IN THE SUPREME COURT OF

THE STATE OF NEVADA

MICHAEL FOLEY	)	
	)	
Appellant,	)	Supreme Court No.: 69997
	)	
vs.	)	
	)	District Court No.:
PATRICIA FOLEY,	)	R-11-162425-R
	)	
	)	
Respondent.	)	

***AMICUS* BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NEVADA IN SUPPORT OF APPELLANT**

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF THE AMICUS CURIAE

Amicus Curiae, American Civil Liberties Union of Nevada is a non-profit, non-partisan organization, working to defend and advance the civil liberties and civil rights of all Nevadans. It is the only organization in Nevada dedicated solely to protecting the Constitutional rights and liberties of every individual in the state. Grounded in the principles of liberty, justice, democracy and equality, the ACLU of Nevada works in three areas: public education, advocacy, and litigation, including the submission of amicus briefs relevant to our work.

The ACLUNV is an affiliate of the American Civil Liberties Union, a nationwide organization that advocates for civil liberties and civil rights of all people across the United States. Since 2009, the ACLU and ACLU affiliates across the country have been exposing and challenging practices that lead to modern-day debtors' prisons, such as the failure of courts to meaningful assess an individual's ability to pay prior to ordering incarceration for an outstanding fine, fee, court cost, or other debt. The ACLU and ACLU affiliates have uncovered how debtors' prisons across the country threaten civil rights and civil liberties. The ACLU and ACLU affiliates are also working in state legislatures and courts, and with judicial officials to end these practices. The ACLU of Nevada recently testified to the

Nevada Advisory Committee to the U.S. Commission on Civil Rights[1] on the civil rights implications of debtors' prison practices in Nevada, highlighting in their public testimony the need to conduct ability to pay hearings and the constitutional right to counsel when an individual faces incarceration for an inability to pay a fine, fee, court cost or other debt.

The ACLUNV has submitted a motion seeking leave of the court to file this brief per NRAP 29 (a).

[1] Press Release, *ACLU of Nevada Legal Director To Testify At United States Commission On Civil Rights Panel* (March, 14, 2017), *available at* https://www.aclunv.org/en/news/aclu-nevada-legal-director-testify-united-states-commission-civil-rights-panel.

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae has no parent corporations and no publicly held company owns 10% or more of its stock.

The following law firms have appeared and/or are expected to appear in this court:

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I. STATEMENT OF FACTS AND PROCEDURE

Although Mr. Foley has laid out the facts of this case in great detail in his opening brief, Amicus recounts here several relevant details relating to Mr. Foley's appeal. These facts highlight Mr. Foley's repeated pleas of indigency, and the lower courts' summary disregard of Mr. Foley's inability to pay.

Mr. Foley was arrested on November 12, 2015 on an outstanding bench warrant based on contempt for failure to pay. (1 App. 221, 1 App. 218). This bench warrant was set at $2,000. (1 App. 218). Mr. Foley appeared for an in-custody hearing on November 16, 2015. (1 App. 219-229). Mr. Foley's testimony at this hearing demonstrated that he did not have the means to pay the current court-ordered level of child-support, and that it was impossible for him to pay the outstanding $2,000 bench warrant to secure his release from incarceration.

Mr. Foley informed the court at this hearing that he made $275 per week, that he had no other sources of income, and that his current visitation schedule (weekdays from 12:00 -7:00 pm) made it difficult to secure regular employment. (1 App. 222, 224). Mr. Foley also testified that his efforts to secure employment were further frustrated by his inclusion in the child abuser database.[2] (1 App. 224). Mr. Foley affirmed that he had previously attempted to modify the child support orders

[2] Mr. Foley was engaged in a federal court action at the time in an attempt to remove his name from this database. (1 App. 224-225).

to reflect his indigency, but was unsuccessful (1 App. 225). The day of the hearing, Mr. Foley had $119 to his name. (1 App. 226).

Mrs. Foley was not present at this November 16th hearing. (1 App 220). The Chief Deputy D.A. Edward W. Ewert, however, engaged in significant questioning of Mr. Foley. (1 App 219-29).

The following two exchanges at this November 16th hearing between the District Attorney and Mr. Foley, underscore that Mr. Foley's failure to comply with the previous court orders to pay large sums of money was based on indigency, and not on willfulness:

> **District Attorney Ewert**: Well you're under an order to pay through the D.A's office, why aren't you obeying that?
>
> **Mr. Foley**: I cannot afford. My budget, my income does not allow for it
>
> (1 App. 223)
>
> **…**
>
> **District Attorney Ewert**: You're not obeying this order because you think the mother's going to squander the money on gambling?
>
> **Mr. Foley**: No, that's not what I said. **It's strictly inability to pay**
>
> (1 App. 225) (emphasis added)

Despite this testimony, the court made no further inquiry into Mr. Foley's ability to comply with the court order, and failed to make a finding on the record of

either his ability or inability to pay. (1 App. 219-229). The Court then ordered Mr. Foley to serve 10 days in jail (with time served) unless he could produce the outstanding bench warrant amount of $2,000. (1 App. 228). The court set another hearing for January 15, 2017, and informed Mr. Foley that if he did not pay $833 in December (the current court-ordered child support amount) he would be held in contempt again. (1 App. 228). Mr. Foley had no attorney at this hearing to represent or advocate for his interests.

Mr. Foley filed objections to this order of incarceration. (1 App. 230-233, 234-235). He once again tried to explain his indigency to the court, objected to the unconstitutional confinement as punishment, and argued that he had a constitutional right to appointment of counsel. (1 App. 230-233, 234-235). Mrs. Foley did not respond to these objections. The District Attorney filed a written opposition to Mr. Foley's objections. (1 ROA 162-170).

The court denied Mr. Foley's objections at a hearing on January 20, 2016. (1 App. 240-247). Mrs. Foley was not present for this hearing. (1 App. 241). The State, however, was present. (1 App. 241). In its January 26, 2016 order on Mr. Foley's objections, the court only found that "there is an ***indication*** of ***possible*** willful underemployment." (1 ROA 185-186)(emphasis added). The court's order gave no reasoning for either it's finding that Mr. Foley had the ability to pay, or for its uncertain assertion that Mr. Foley might possibly be underemployed. *Id.*

II. SUMMARY OF ARGUMENT

First, this Court should overturn Mr. Foley's contempt conviction because it was imposed in an unconstitutional fashion.

The Constitution prohibits courts from using their civil contempt power to jail indigent defendants for failure to pay. To do otherwise deprives defendants of their rights to equal protection and due process under the Fourteenth Amendment.

Civil contempt is a tool available to courts to coerce compliance with an order. Incarceration may be appropriate as a coercive tool in civil contempt cases because where the contemnor possesses the present ability to pay, the contemnor "carr[ies] the keys of their prison in their own pockets." *Penfield Co. of Cal. v. Securities*, 330 U.S. 585, 590, 67 S. Ct. 918, 921 (1947). Yet, when an individual is incarcerated for contempt for failure to pay, and does not in fact have the present ability to meet the outstanding amount owed, their only recourse is to remain in jail for the remainder of their sentence. The jail sentence then has no coercive effect and is simply a punishment, which is a hallmark of criminal contempt; a punitive incarceration is unconstitutional in the civil contempt context.

To avoid jailing indigent debtors and violating their constitutional rights, the U.S. Supreme Court has explained that a careful assessment of an individual's ability to pay must be made prior to incarceration, and the Court outlined a number of procedural safeguards to be followed. *Turner v. Rogers*, 564 U.S. 431, 454, 131

S. Ct. 2507, 2523 (2011). Recently enacted federal regulations recognized this constitutional necessity and adopted similar procedural safeguards. 45 C.F.R.§ 303.6 (2016). These procedural protections are critically important because the majority of individuals in arrearages on child support are indigent and thus precautionary measures must be taken. The court instituted none of these safeguards for Mr. Foley.

Incarceration for an inability to pay is also bad public policy. It creates an endless cycle of imprisonment and nonpayment, and has significant negative consequences for familiar relationships.

Second, this Court should join the weight of authority from other states and recognize a right to counsel for indigent defendants in contempt cases where the state seeks to incarcerate a child support obligor. The United States Supreme Court suggested in *Turner* that when the state is prosecuting the contempt charge (as it is here), the equities weigh in favor of appointing counsel. *Turner*, 564 U.S. at 449. This is exactly what happened in this case: a representative from the district attorney's office, not Mrs. Foley, consistently argued for contempt and incarceration of Mr. Foley. Even if the procedural safeguards outlined in *Turner* are implemented, they are unlikely to provide the intended protections without counsel. Unsophisticated debtors often lack the skills to present compelling

evidence of their inability to pay and may have difficulty distinguishing between civil and criminal contempt to effectively represent their interests to the Court.

III. ARGUMENT

A. THE USE OF CIVIL CONTEMPT TO INCARCERATE INDIGENT NON-CUSTODIAL PARENTS IS BOTH UNCONSTITUTIONAL AND BAD PUBLIC POLICY

1. Use Of The Civil Contempt Power To Jail Non-Custodial Parents Without Assessing Ability To Pay Violates The Fourteenth Amendment's Equal Protection And Due Process Clauses.

a) Contempt as a tool to coerce compliance versus contempt as a tool to punish

A court's contempt power is used to address "disobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers." Nev. Rev. Stat. § 22.010. When the contempt is based on "the omission to perform an act *which is yet in the power of the person to perform*, the person may be imprisoned until the person performs it." Nev. Rev. Stat. § 22.110 (emphasis added). Imprisonment can be an effective remedy to compel compliance in these circumstances, as the contemnor has the power to secure their own release from imprisonment by performing the court ordered act, which they have been previously unwilling to perform. When a contemnor can comply with the order,

but simply refuses to do so, they "carry the keys of their prison in their own pockets." *Penfield Co. of Cal. v. Securities*, 330 U.S. 585, 590, 67 S. Ct. 918, 921 (1947) (citing *In re Nevitt*, 117 F. 448, 461 (8th Cir. Mo. Aug. 28, 1902)).

However, when a civil contempt order seeks to compel performance of an act that the alleged contemnor cannot perform, incarceration will not further – and may, in fact, frustrate – the court's goal of compelling compliance. *See United States v. Rylander*, 460 U.S. 752, 757, 103 S. Ct. 1548, 1552 (1983) ("Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action."). If a court is unconcerned with whether the contemnor has the means to comply, this is a hallmark of criminal contempt as it indicates the contempt is for the purposes of punishment, not coercion. "Criminal contempt is a crime in the ordinary sense; therefore, criminal contemners are entitled to the protections that the Constitution requires of such criminal proceedings, including the right to counsel." *Turner v. Rogers*, 564 U.S. 431, 454, 131 S. Ct. 2507, 2523 (2011) (internal citations omitted) A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Id. at* 442 (citing *Hicks v. Feiock,* 485 U.S. 624, 638, n. 9, 108 S.Ct. 1423 (1988)).

b) A court acts in contravention of the Constitution if it does not make a finding that the contemnor is able to pay prior to incarceration.

The Supreme Court has explained that a careful ability-to-pay hearing is the key to ensuring that civil contempt is not unconstitutionally transformed into criminal contempt:

> The fact that ability to comply marks a dividing line between civil and criminal contempt, reinforces the need for accuracy. That is because an incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding.

Turner, 564 U.S. at 445 (internal citations omitted).

A court thus violates the non-custodial parent's right to due process under the Fourteenth Amendment to the US Constitution when it imposes a civil contempt sentence of incarceration if the alleged contemnor has no present ability to pay. *See Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 811, 102 P.3d 41, 50 (2004) ("In the setting of a contempt hearing for the nonpayment of child support, a party loses his personal freedom *only after the court determines that he has the ability to comply* with the child support order but failed to make an effort to do so.") (emphasis added)*; Rodriguez v. Robbins*, 804 F.3d 1060, 1075–76 (9th Cir. 2015) ("If compliance is impossible—for instance, if the individual lacks the financial resources to pay court-ordered child support—then contempt sanctions do not serve their purpose of coercing compliance and therefore violate the Due

Process Clause."); *Shillitani v. United States*, 384 U.S. 364, 371, 86 S. Ct. 1531, 1536 (1966)(". . . the justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order."); *Elzey v. Elzey*, 435 A.2d 445, 448 (Md. 1981) "[W]ith regard to civil contempt proceedings based upon the defendant's failure to comply with a decree ordering support payments ..., the issue is not the ability to pay at the time the payments were originally ordered; instead, the issue is his *present* ability to pay.").[3]

Turner outlined several procedural safeguards that it hoped would help ensure that the ability-to-pay determination is made correctly. These included:

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[3] Helpful comparisons can be drawn from jurisprudence regarding legal financial obligations as failure to pay these types of court imposed debts, like contempt based on failure to pay child support, carries the possibility of unconstitutional confinement. The U.S. Supreme Court established in *Bearden v. Georgia* that it is a violation of the Fourteenth Amendment's Equal Protection and Due Process clauses to jail a person for nonpayment if the court does not first provide a hearing on that person's ability to pay. *Bearden v. Georgia* 461 U.S. 660, 672, 103 S. Ct. 2064, 2073 (1983) (". . . a sentencing court must inquire into the reasons for the failure to pay."). This Court applied the *Bearden* holding to its decision in *Gilbert v. State*, where it determined that ability to pay hearings are required before imprisonment for nonpayment of a fine. "Before a defendant may be imprisoned for nonpayment of a fine, a hearing must be held to determine the present financial ability of the convict." *Gilbert v. State*, 99 Nev. 702, 708, 669 P.2d 699, 703 (1983). Incarceration for failure to pay child-support carries the same fundamental fairness concerns as depriving an individual of liberty due to inability to pay court imposed costs, fines, and fees. *See Bearden, 461 U.S. at 672*. This Court should recognize the same here.

"(1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay." 564 U.S. at 447-48.

Recently enacted federal regulations further recognize the constitutional obligation to properly assess a child support debtor's ability to pay prior to imposing incarceration. 45 C.F.R. § 303.6. This new rule, adopted in December 2016, establishes procedural standards surrounding the use of civil contempt in the enforcement of child support obligations. Specifically, the rule requires child support agencies to:

> (i) screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order;
>
> (ii) provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions; and
>
> (iii) provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action.

45 C.F.R. § 303.6

These regulatory requirements, the Department of Health and Human Services explained, "are designed to reduce the risk of erroneous deprivation of the noncustodial parent's liberty [], without imposing significant fiscal or administrative burden on the State." Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93532 (Dec. 20, 2016)

In fact, this Court has recognized that "consistent with due process, a party cannot be found guilty of failing to pay child support and sentenced to jail conditional upon his payment of arrearages unless the trial court first determines that the individual (1) has the ability to make the payment and (2) willfully refuses to pay. *Rodriguez,* 120 Nev. at 809. In discussing the indigency determination in *Rodriguez,* this Court made note of the importance of ensuring a correct determination because the decision to incarcerate an individual "involves the protection of basic constitutional rights." *Id at* 807.

These procedural protections are essential because the majority of individuals in arrearages on child support are indigent. "70% of child support arrears nationwide are owed by parents with either no reported income or income of $10,000 per year or less." *Turner v. Rogers,* 64 U.S. 431, 445–46, 131 S. Ct. 2507, 2518, 180 L. Ed. 2d 452 (2011)(*citing* E. Sorensen, L. Sousa, & S. Schaner, Assessing Child Support Arrears in Nine Large States and the Nation 22 (2007)

(prepared by The Urban Institute), http://aspe. hhs.gov/hsp/07/assessing-CS-debt/report.pdf.

The trial court instituted none of these safeguards for Mr. Foley. Mr. Foley was not given notice that his "ability to pay" would be a critical issue in the contempt proceeding and the hearing master did not make an express finding of Mr. Foley's ability to pay before imposing incarceration, In fact, the hearing master completely ignored testimony from Mr. Foley that he did not in fact have the means to cure the contempt order. In confirming this unconstitutional order, the District Court Judge made just a cursory finding that Mr. Foley had the ability to pay, and made a noncommittal assessment that Mr. Foley was potentially willfully underemployed. Even if such underemployment were proven, at most it would indicate that he had the ability to comply at the time the payments were ordered, not that he had the *present* ability to pay, and incarceration of Mr. Foley completely eliminated the possibility of any present income, fully employed or otherwise.

2. Incarceration For An Inability To Pay Child Support Creates A Cycle Of Imprisonment And Nonpayment, Harming Families And Running Counter To The Policy Goals Of The Child Support Program.

The Child Support Enforcement Program is a "family-first program intended to ensure families['] self-sufficiency by making child support a more reliable

source of income." Nev. Dep't of Health and Human Services, *Child Support*, https://dwss.nv.gov/Support/1_0_0-Support/. The Federal Office of Child Support Enforcement describes its goal as one of assisting state agencies to "ensure that child support orders are fair – that noncustodial parents are not burdened by a debt they cannot pay – and that children receive regular support payments." U.S. Dep't of Health and Human Services, Admin. for Children and Families, *Child Support Handbook*, 1 (Feb. 28, 2013). Incarcerating non-custodial parents who are too poor to pay child support, frustrates achievement of these goals.

While incarcerated, the parent has no real ability to earn a wage, and worse, incarceration will likely lead to loss of employment for the non-custodial parent, further reducing their ability to pay child support. Studies have shown that incarceration has a negative impact on wages overall. A 2010 study by Pew Charitable Trusts regarding collateral consequences of incarceration found that incarceration reduces hourly wages for men by approximately 11 percent, annual employment by 9 weeks and annual earnings by 40 percent. The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* (2010)(http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf).

The Department of Health and Human Services, in adopting its final rule in 2016 recognized the significant policy concerns with incarcerating indigent

parents, explaining:

> While the State has a strong interest in enforcing child support orders, it secures no benefit from jailing a noncustodial parent who cannot discharge his obligation. The period of incarceration makes it less, rather than more, likely that such parent will be able to pay child support. Meanwhile, the State incurs the substantial expense of confinement. While child-support recovery efforts once ''followed a business model predicated on enforcement'' that ''intervened only after debt, at times substantial, accumulated and often too late for collection to be successful, let alone of real value to the child,'' experience has shown that alternative methods—such as order modifications, increased contact with noncustodial parents, and use of ''automation to detect noncompliance as early as possible''—are more effective than routine enforcement through civil contempt.
>
> Flexibility, Efficiency, And Modernization In Child Support Enforcement Programs 81 Fed. Reg. 93492, 93532 (Dec. 20, 2016)

Even this Court noted in *Rodriguez v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, that "putting a father in jail for an extended stay is counterproductive to the ultimate goal of coercing his payment of child support." 120 Nev. 798, 805, 102 P.3d 41, 46 (2004).

Imprisonment also negatively impacts the relationship between an indigent parent and their family. An incarcerated parent may not be allowed visitation with children, which is traumatic for both the parent and the child. *See* Lindsey Cramer, Margaret Goff, Bryce Peterson, & Heather Sandtrom, *Parent-Child Visiting Practices in Prisons and Jails: A Synthesis of Research and Practice*, (2017)

(prepared by The Urban Institute)(*available at* at http://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails.pdf) "[T]he disruption of the parent-child relationship and attachment is considered an adverse childhood experience. Adverse childhood experiences are associated with an increased risk of trauma and the potential for lasting effects such as risky health behaviors, chronic health conditions, and early death." *Id*. at 2. Children with incarcerated parents are also "more likely to have insecure attachments to their incarcerated parents and primary caregivers." *Id*. at 6.

Taking into consideration the ultimate goals of the child support enforcement program, as well as the trial court's failure to conduct a proper inquiry into Mr. Foley's inability to pay, this Court should overturn his contempt conviction.

B. THE COURT SHOULD RECOGNIZE A RIGHT TO COUNSEL IN CIVIL CONTEMPT CASES WHERE THE STATE SEEKS TO INCARCERATE A CHILD SUPPORT OBLIGOR.

1. The Supreme Court Has Suggested that Child Support Contempts Prosecuted by the State Require Counsel, and Other States Have Agreed.

While *Turner* declined to recognize a categorical right to counsel in child support contempt actions purely between two private parties, it strongly implied it would come to a different conclusion were the State to prosecute the action:

> We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. *See* supra, at 443, 180 L. Ed. 2d, at 463. Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. *Cf. Johnson v. Zerbst*, 304 U.S. 458, 462-463, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) ("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel" (emphasis added)). And this kind of proceeding is not before us.
>
> *Turner*, 564 U.S. at 449.

Indeed, such a proceeding not only lacks the "asymmetry of representation" concern raised by the Court when two private parties litigate contempt, *Id*. at 447, but in fact creates a completely different asymmetry of representation, namely pitting an unrepresented and indigent obligor against the vast resources and expertise of the State. Moreover, such a scenario was not contemplated in *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 102 P.3d 41 (2004), as that case involved two private parties, and therefore *Rodriguez* is not dispositive of whether a right to counsel should attach in State-prosecuted contempt actions.

This Court would not be alone in creating a limited right to counsel in this fashion: prior to *Turner*, state supreme courts in Delaware, and Michigan, and Wisconsin recognized a Fourteenth Amendment right to counsel that was limited

to contempt prosecuted by the state. Because *Turner* explicitly declined to address this situation, these decisions continue to be good law. *Black v. Div. of Child Support Enforcement*, 686 A.2d 164, 169 (Del. 1996) ("[A]n indigent obligor who faces the possibility of incarceration in a State initiated civil contempt proceeding does have a due process right to court appointed counsel"); *Mead v. Batchlor*, 460 N.W.2d 493, 503 (Mich. 1990) (reversing *Sword v. Sword*, 249 N.W.2d 88 (Mich. 1976)(holding that counsel in contempt cases should be appointed on case-by-case basis, to establish categorical right in state-initiated contempt, in part "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.");[4] *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.").[5]

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[4] In *Sturgis v. Sturgis*, No. 326163, 2016 Mich. App. LEXIS 1977, *9 (Mich. App. 2016), the Court of Appeals stated that *Mead* was "abrogated by *Turner.*" But given that *Mead* specifically confined its holding to a situation that *Turner* explicitly did not address, this statement in *Sturgis* is without merit.

[5] See also *Finding of Contempt in v. Sheppard*, Appeal No. 2016AP350, 2017 Wisc. App. LEXIS 541, *17-18 (Wisc. App. 2017) (noting that *Pultz* established a 'bright-line rule' that a defendant has a right to appointed counsel when his or her liberty 'is threatened by a remedial contempt action brought by the government' ... The decision reaffirmed the rule in *Ferris v. State*, 75 Wis. 2d 542, 546, 249 N.W.2d 789 (1977), which provided that 'where the state in the exercise of its (continued…)

In Mr. Foley's case, a representative from the DA's office was not only present at every hearing, but was also the one to seek contempt sanctions against Mr. Foley and oppose Mr. Foley's request for appointment of counsel. Mrs. Foley, on the other hand, was not even present at many of the hearings, and when present acted more like a witness. At one particular hearing on a Motion to Review and Adjust Child Support, the Court informed Mrs. Foley that she did not even need to appear for these proceedings if she did not want to appear. (1 App. 197–201).[6]

Such a situation clearly fits into the scenario referred to by the Supreme Court, where the government acts as a debt collector and has "counsel or some other competent representative." *Turner*, 564 U.S. at 449.

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police power brings its power to bear on an individual through the use of civil contempt ... and liberty is threatened ... such a person is entitled to counsel.' Thus, a key part of the rationale for the blanket rule was 'to protect litigants against unpredictable and unchecked adverse governmental action.'").

[6] Of the eleven relevant hearings after Mr. Foley was ordered to pay child support, a Chief Deputy D.A. from the Family Support Divisions was present at every one. Mrs. Foley was present at only five of these hearings and never made substantive arguments to the Court. (*See* 1 App 1–11; 1 App 63–71; 1 App 72–79; 1 App 104–108; 1 App 172–183; 1 App. 190–196; 1 App 197–201; 1 App 202–215; 1 App 216–218; 1 App 219–229; 2 App. 315–317).

2. The Majority of States Examining a Right to Counsel in Contempt Cases Have Recognized Such a Right and Have Continued to Do So Since *Turner v. Rogers*.

In addition to the states mentioned above that have created a right to counsel limited to government-prosecuted civil contempt cases, at least six states (Alaska, Indiana, Maryland, New Jersey, Washington State, and West Virginia) have recognized an independent state constitutional due process right to counsel in child support contempt cases, and nearly all have explicitly reaffirmed this right since *Turner*.[7]

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[7] *Otton v. Zaborac*, 525 P.2d 537, 538 (Alaska 1974) (relying on Alaska Const, Art. I, § 7 as well as the Fourteenth Amendment); *Dennis O. v. Stephanie O*., 393 P.3d 401, 406, (Alaska 2017) (stating, "We have held that due process requires appointment of counsel to an indigent parent if the proceeding could lead to ... the deprivation of liberty", and citing to *Otton*); *Branum v. State*, 822 N.E.2d 1102, 1104 (Ind. App. 2005) (recognizing that *In re Marriage of Stariha,* 509 N.E.2d 1117 (Ind. Ct. App. 1987), established right to counsel for any proceedings where person will be incarcerated, and observing that "Indiana has long recognized a person's right to have counsel appointed under such circumstances", citing to 1854 case in which the Indiana Supreme Court recognized a right to counsel in criminal cases "more than a century before *Gideon v. Wainwright*"); *Moore v. Moore*, 11 N.E.3d 980 (Ind. Ct. App. 2014) (quoting *Stariha* for proposition that "where the possibility exists that an indigent defendant may be incarcerated for contempt for failure to pay child support he or she has a right to appointed counsel and to be informed of that right prior to commencement of the contempt hearing"); *Rutherford v. Rutherford*. 296 Md. 347, 464 A.2d 228, 237 (1983) (recognizing right to counsel in child support contempt cases under Md. Declaration of Rights Art. 24 in addition to Fourteenth Amendment); *Grandison v. State*, 38 A.3d 352, 364 (Md. 2012) ("'We recognized in *Rutherford* ... that, under certain circumstances, the requirements of due process include a right to counsel, with appointed counsel for indigents, in civil cases or other proceedings not constituting stages of criminal trials'"); *Pasqua v. Council*, 892 A.2d 663, 673 (N.J. 2006) (continued…)

Additionally, more than a dozen courts recognized a federal constitutional right to counsel prior to *Turner* and have not yet revisited those opinions. *See County of Santa Clara v. Superior Court*, 5 Cal. Rptr. 2d 7, 10-12 (Cal. App. 1992); *People v. Lucero*, 584 P.2d 1208, 1214 (Colo. 1978); *Emerick v. Emerick*, 613 A.2d 1351, 1353-1354 (Conn. App. Ct. 1992); *Sanders v. Shephard*, 645 N.E.2d 900, 906 (Ill. 1994) (approving *Sanders v. Shephard*, 541 N.E.2d 1150, 1156-1157 (Ill. Ct. App. 1989)); *McNabb v. Osmundson*, 315 N.W.2d 9, 11-14

(relying on N.J. Const. art. I, P1 in addition to Fourteenth Amendment); *In re Child by J.E.V.*, 141 A.3d 254, 264 (N.J. 2016) (citing approvingly to *Pasqua*'s state constitutional holding); *Tetro v. Tetro*, 544 P.2d 17, 19 (Wash. 1975) (recognizing right to counsel in civil contempt cases); *In re Detention of Turay,* 986 P.2d 790 (Wash. 1999) (citing *Tetro* for the proposition that "The sixth and fourteenth amendments of the United States Constitution guarantee the right to counsel in state proceedings where liberty is at stake," but not specifically mentioning state constitution); *State v. Stone,* 268 P.3d 226, 223 n.9 (Wash. App. 2012) (stating *Tetro* was decided under "both the federal and the state constitution", finding right to counsel in incarceration for failure to pay legal financial obligations, and pointing out that *Turner* was distinguishable because "LFO defendants faced a state prosecutor, not an unrepresented private party"); *Moore v. Hall*, 341 S.E.2d 703, 705 (W. Va. 1986) (citing to *State ex rel. Graves v. Daugherty*, 266 S.E.2d 142 (W.Va. 1980), for proposition that "Our state constitutional due process right to counsel requires court-appointed attorneys in criminal and civil actions which may constrain one's liberty or important personal rights," and explicitly extending right to child support contempt). *See also State v. Churchill*, 454 S.W.3d 328 (Mo. 2015) (citing to *State ex rel. Family Support Div. - Child Support Enforcement v. Lane*, 313 S.W.3d 182, 186 (Mo. App. 2010), for proposition that "for purposes of triggering a defendant's right to counsel under the due process clause, the distinction between a 'criminal' and a 'civil' proceeding is irrelevant if the outcome of the civil proceeding is imprisonment", but not finding right to counsel in the case before it since the protective custody proceeding at issue did not involve risk of imprisonment).

(Iowa 1982);[8] *Johnson v. Johnson*, 721 P.2d 290, 294 (Kan. Ct. App. 1986) (dicta); *Allen v. Sheriff of Lancaster County*, 511 N.W.2d 125, 127 (Neb. 1994), *overruled on other grounds by Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 684 (Apr. 16, 2010); *McBride v. McBride*, 431 S.E.2d 14, 19 (N.C. 1993);[9] *Ullah v. Entezari-Ullah*, 836 N.Y.S.2d 18, 22 (App. Div. 2007); *Peters-Riemers v. Riemer*s,

[8] In *Spitz v. Iowa Dist. Court for Mitchell County*, 881 N.W.2d 456, 466 (Iowa 2016), the court held that a parent had no right to counsel in a contempt proceeding regarding child visitation, finding that the trial court had provided all of the "procedural safeguards" outlined in *Turner*, namely notice of the central issue in the case, an opportunity to present evidence, and specific findings on the record. However, like *Turner*, the plaintiff in *Spitz* was the other parent, not the government, and like *McNab*, the *Spitz* court limited its ruling to the requirements of the Fourteenth Amendment; it did not evaluate the state constitution's due process conclusion.

[9] Subsequent to *Turner,* the North Carolina Court of Appeals has taken an ambiguous path. In *Young v. Young*, 736 S.E.2d 538 (N.C. App. 2012), the Court of Appeals cited both *Turner* and *McBride* but gave little indication of what it would do on civil contempt cases generally because it found that the defendant had failed to meet his burden of proving that he was indigent. The *Young* court did say, though, that "[c]ontrary to Plaintiff's assertion, *Turner* does not stand for the proposition that counsel is not required only when the opposing party is also unrepresented; rather it finds both that in such a scenario, counsel is not required if there are appropriate safeguards in place, and that counsel is not '*automatically* require[d]' in all civil contempt hearings for child support from indigent litigants.'" *Id* at 544. Then, in *D'Alessandro v. D'Alessandro*, 762 S.E.2d 329 (N.C. App. 2014), the court quoted from *McBride* regarding a right to counsel in civil contempt proceedings, failed to mention *Turner*, and added, "Where a defendant faces the potential of incarceration if held in contempt, the trial court must inquire into the defendant's desire for and ability to pay for counsel to represent him as to the contempt issues"). But then, in *Tyll v. Berry*, 758 S.E.2d 411 (N.C. App. 2014), the court relied on *Turner* for the case-by-case approach to appointing counsel under the Fourteenth amendment and did not mention *McBride* except for purposes unrelated to constitutional right to counsel.

663 N.W.2d 657, 664-665 (N.D. 2003); *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc*., 661 N.W.2d 719, 724-725 & n.3 (S.D. 2003), *abrogated in part on other grounds, Sazama v. State ex rel. Muilenberg*, 729 N.W.2d 335 (S.D. 2007); *Bradford v. Bradford*, No. 86-262-II, 1986 WL 2874, at *4-5 (Tenn. Ct. App. Mar. 7, 1986); *Ex parte Walker*, 748 S.W.2d 21, 22 (Tex. App. 1988); *Choiniere v. Brook*s, 660 A.2d 289, 289 (Vt. 1995). At this stage, it is unknown whether the courts will modify their opinions because of *Turner* (for instance by limiting their reach to government-initiated contempts), but the number of opinions demonstrates the general consensus existing that counsel should be required for civil contempt proceedings. This Court should follow the weight of authority and find a right to counsel for civil contempt proceedings, at least where the government prosecutes the contempt action.

3. The Procedural Safeguards Outlined in *Turner v. Rogers* Are Unlikely to Protect Indigent Contemnors Without Counsel.

In its 2016 final rule on child support, the Department of Health and Human Services explained that child support contempt proceedings are often based on wrongly-sized child support orders imposed on parents who lacked counsel.

> Many States work diligently to develop a factual basis for orders. However, in some jurisdictions, a two-tiered system exists with better-off noncustodial parents receiving support orders based upon evidence and a determination of their individual income. Poor, low-skilled noncustodial parents, usually unrepresented by counsel, receive standard-issue support orders. Such orders

> lack a factual basis and are instead based upon fictional income, assumptions not grounded in reality, and beliefs that a full-time job is available to anyone who seeks it.
>
> Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93519, 93524 (Dec. 20, 2016).

Although appointed counsel in contempt proceedings cannot collaterally attack the child support order itself, counsel can use evidence that the order is wrongly sized to demonstrate that the contemnor lacks the present ability to pay. Such an approach is beyond most unrepresented parents in contempt proceedings, and the minimal procedural safeguards outlined in *Turner v. Rogers* (such as mere notice that ability to pay is a key issue) do not address this problem.

The Supreme Court of New Jersey, in recognizing a right to counsel in civil contempt cases, further explained the reasons why alternative safeguards are insufficient:

> We reject the Appellate Division's contentions that "a judge can adequately protect an [indigent parent] by conducting a thorough and searching ability-to-pay hearing" or that the "solution to plaintiffs' perceived problem can be found readily through judicial education and training, and need not implicate the right to appointed counsel." However well intentioned and scrupulously fair a judge may be, when a litigant is threatened with the loss of his liberty, process is what matters. A person of impoverished means caught within the tangle of our criminal or civil justice system and subject to a jail sentence is best protected by an adversarial hearing with the assistance of a trained and experienced lawyer. Although requiring counsel may

> complicate the procedures pertaining to enforcement of court orders, it protects important constitutional values, including the fairness of our civil justice system.
>
> *Pasqua v. Council*, 892 A.2d 663, 673-74 (N.J. 2006)

Another problem with the procedural safeguards is that an unrepresented child support obligor is not likely to know when a trial court judge has conflated civil and criminal contempt, potentially imposing penalties within the context of a civil contempt proceeding that are constitutionally impermissible. This is not a theoretical problem: courts across the country have struggled with the thin line between criminal and civil contempt, and appellate courts have often reversed trial courts that impermissibly mixed the two.[10]

[10] See e.g. *Hale v. Peddle*, 648 A.2d 830, 831 (Vt. 1993) (trial court's finding of ability to pay "was based primarily on his admission that he had given away over $20,000 to his children within the last year. While this may be evidence of willful dissipation of assets, it is not evidence of present ability to pay. In fact, it suggests the contrary"); *Marriage of Connelly*, 752 P.2d 1258, 1261 (Or. App. 1988) (court notes "difficulty of determining whether the court punished father to enforce compliance with the dissolution judgment, as for a civil contempt, or whether the punishment was for a criminal contempt for failure to pay child support. The judgment and incorporated findings have some of the earmarks of both kinds of contempt …"); *Key v. Key*, 767 S.E.2d 705 (N.C. App. 2014) ("The district court's imposition of a criminal punishment and its exclusion of any finding that Defendant was delinquent at the time of the order's entry and of a purge provision lead us to conclude that the court mistakenly labeled the contempt 'civil' rather than 'criminal'").

Finally, the procedural safeguards outlined in *Turner* have not achieved their desired effect in Nevada. In *Turner*, the Court made clear that there is no right to counsel only where

> the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel *and* the State provides alternative procedural safeguards equivalent to those we have mentioned ...

Turner, 564 U.S. 431, 448 (emphasis added). It stands to reason, then, that where a state has failed to provide such procedural safeguards, the right to counsel must attach. In the instant case, it has been six years since the U.S. Supreme Court decided *Turner*, and as detailed in the Appellant's Brief and this *Amicus* Brief, the Nevada trial courts continue to incarcerate child support obligors without even basic safeguards such as a clear determination of the ability to pay. In fact, Nevada's trial courts were put on notice even earlier, when the *Rodriguez* court pointed out that the trial court in that case had not taken even the minimal steps necessary to determine ability to pay:

> Although the district court made summary findings that Rodriguez was underemployed, the court did not make specific findings regarding indigency and his potential ability to pay. The court referenced the business awarded to Rodriguez in the divorce, but made no specific findings concerning the type and value of the business or what Rodriguez has done with the business to this point. In addition, the district court made passing reference to Rodriguez's living arrangement and the level of support received from his mother, but made no specific factual findings of indigency. In this case, the

> district court should fully examine the facts underlying its conclusion that petitioner is underemployed and determine whether he is indigent given the relevant factors above ... The district court sentenced Rodriguez to serve 25 days in jail with the possibility of early release upon his payment of a portion of the support payments in arrears. While we express no opinion on the $ 10,000 figure selected by the district court, we note that without specific findings regarding Rodriguez's current financial status, or the status of the business awarded to him in the divorce, we are concerned whether Rodriguez actually possesses the ability to secure his freedom. As previously noted, this is an important distinction between civil and criminal contempt.

Rodriguez, 120 Nev. at 807-08, 102 P.3d at 47-48.

The overwhelming authority from the United State Supreme Court and other state and federal courts, combined with the lack of procedural protections in Nevada demonstrate the need for this court to find a right to counsel, at least in the context where the State is prosecuting the action.

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IV. CONCLUSION

For the reasons stated above, *Amicus Curiae* American Civil Liberties Union of Nevada respectfully requests that this court find in favor of Appellant, Michael Foley.

DATED on this 2nd day of August, 2017.

/s/ Amy M. Rose
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font, Times New Roman style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6881words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: August 2nd, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this **Amicus Brief of American Civil Liberties Union Of Nevada In Support Of Appellant** was filed electronically with the Nevada Supreme Court on August 2, 2017 and electronically served on the following parties:

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