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Turner v. Rogers: Why the Supreme Court is a Day Late and a Dollar Short

posted by John Pollock

The Supreme Court's ruling in *Turner v. Rogers* might appear at first blush to be a bellwether decision on the right to counsel in civil cases. But the fact is that it arrives three decades after the fight to establish the right to counsel in basic human needs cases left the federal constitutional battlefield and shifted to the state constitutions. Indeed, since the *Lassiter* decision in 1981, courts in various states have found rights to counsel under their state constitutions for proceedings involving custody, protective orders, paternity, civil contempt, waivers of parental consent for abortion, and other matters.

In finding these rights, state courts have shown a remarkable independence from the U.S. Supreme Court when necessary to protect the needs of the disenfranchised. Perhaps this is not surprising, given that even *Lassiter* recognized that "wise public policy … may require that higher standards be adopted than those minimally tolerable under the [U.S.] Constitution." Time and again, state courts have recognized their ability to interpret their own due process and equal protection clauses more broadly than the U.S. Supreme Court, and they will undoubtedly continue to do so. As the one-time Chief Justice of the Idaho Supreme Court said, "Idaho's Constitution stands on its own, and though the Idaho Supreme Court may look to rulings of federal Courts on the United States Constitution for guidance in interpreting Idaho constitutional guarantees, this Court interprets a separate and, in many respects, independent Constitution." *Hellar v. Cenarrusa*, 682 P.2d 539, 543 (Idaho 1984). A prime example of this independence from the Supreme Court occurred when, in the wake of *Lassiter*, no less than eleven states that had found a federal constitutional right to counsel in termination of parental rights cases prior to *Lassiter* revisited the issue and affirmed the right under their own state constitution.

Sometimes, state courts have found that independent analysis of due process or equal protection is not even necessary, relying instead on the much more simple concept of fairness. Such was the conclusion of the Supreme Court of Minnesota when it determined it was unnecessary to even reach the question of the due process right to counsel question in contempt because it found counsel had to be appointed in such cases "pursuant to our supervisory powers to ensure the fair administration of justice." *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984).

Based on these developments, I believe the state courts will continue to increasingly recognize what the Supreme Court could not: litigants should not be expected to fend for themselves when extremely important interests (be they physical liberty, or parenting, or physical safety, or others) are at stake. With regard to civil contempt, the state courts interpreting their own constitutions to find a right to counsel have refused to follow the Supreme Court down the *Turner* path of creating a wall between criminal and civil cases, and instead have focused on the actual liberty interest at stake. We can hope to continue to see the same approach after *Turner*.

A few words must be said, though, about the *Turner* Court's hurry to gloss over the complex realities of contempt cases, as only such a rush job could

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justify its finding of no right to appointed counsel.

These complexities are not merely theoretical or occasional (although it is true, as some commenters have already said, that additional studies would help back up this perception with hard data); some were present in Mr. Turner's case. As Mary Mergler's post recognizes, the Court appeared to ignore the reality that complex legal issues (in addition to the more patent factual ones) are frequently at stake in determining indigence, issues that cannot be solved by merely remedying procedures. For instance, the issue of imputed income routinely comes into play in contempt cases and is not one that an indigent litigant can effectively dispute. In Mr. Turner's case, an income of over $1,300 per month was imputed to him at the same time that the court documented his employment status as "unemployed". Also routine are allegations of ability to borrow funds and intentional underemployment, both of which can play into the question of ability to pay. Even a trial court's improper application of prior court precedent concerning indigence can come up frequently. In *Rutherford v. Rutherford,* 464 A.2d 228 (Md. 1983), the Court of Appeals of Maryland (which is Maryland's high court) not only found a right to counsel in civil contempt, but reversed not one but two lower court contempt decisions because the trial courts had misapplied an earlier high court opinion regarding past versus present inability to pay.

The Court also erred in suggesting that the only issue at stake (legal or otherwise) in a civil contempt proceeding is indigence. It is also the willfulness of that indigence that is a critically important legal issue. In this case, Mr. Turner was struggling with a drug problem, and whether spending money on drugs constitutes "willful" nonpayment of child support where the obligor has an acknowledged addiction problem could be a significant legal question. At least, it has been in contexts outside of child support. See e.g. *McNabb v. Department of Revenue*, 2005 WL 1604923 at *2 (Or. Tax Magistrate Div. 2005) (unpublished) ("many courts have considered whether substance abuse or addiction constitutes willful misconduct under [various] federal statutes"); *Town of Stratford v. Administrator,* 1991 WL 272861 at *3 (Conn. Super. 1991) (unpublished) (in unemployment benefits case, court notes that "conduct directly resulting from drug addiction cannot be categorized as 'willful' conduct.")

Finally, in denying a right to counsel based partially on the fact that Mr. Turner's opponent was neither the state nor represented, the Court ignored the asymmetry of interests at stake in a civil contempt proceeding. For one, the mother did not stand to lose her physical liberty if she did not prevail in the contempt proceeding. And it is questionable whether her interest in financially supporting her children and the state's interest in saving money were best served by sending Mr. Turner to jail, as doing so imposed incarceration costs on the state and also ensured that Mr. Turner would not be able to earn money to pay off his child support obligations. Interestingly, state courts evaluating the right to counsel in civil cases have not relied heavily on whether the opposing party in a civil case is the state or represented by counsel. For instance, every state high court confronted with the propriety of providing counsel in state-initiated termination of parental rights cases but not in privately-initiated involuntary adoptions has found that such a scheme violates their state equal protection clause, regardless of whether the opposing party is represented. Their focus, as it should have been, was on that which the litigant stood to lose.

As with many cases, it will probably be difficult to predict the full impact of *Turner* until we start to see how the courts react to it. But *Turner* may not be the last word even on the federal constitutional right to counsel in civil cases any more than *Betts v. Brady* was the last word on the right to counsel in criminal cases. Should the procedures outlined by the Supreme Court prove inherently inadequate to protect the rights of defendants (as was the case with the *Betts* case-by-case approach to right to counsel), we may see this issue rise again, and soon. Nor is it easy to imagine how the use of forms and better questioning could possibly protect the rights of

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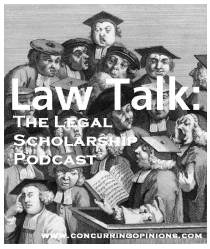

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litigants in even more complex types of cases, such as foreclosure, or immigration, or Medicaid, especially where (as is the case in most of these types of cases) the other side is typically represented. In other words, what *Turner* does not address, or does not address with finality, is significantly broader than what it does. But regardless, the states have shown themselves up to the task of protecting the rights of indigent litigants when the U.S. Supreme Court has failed to do so, and I remain optimistic that they will do so again.

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1. Richard Zorza - June 22, 2011 at 8:02 pm

   I particularly like your idea that this, Betts like, is the beginning of a process that may lead in many directions. The problem with Lassiter was that it seemed to be read in a way that cut off ongoing litigation. While I am not sure that was the only or inevitable way to read Lassiter, after that opinion there seems to have been little attempt to question on what kind of facts the presumption of lack of counsel might be overcome. Surely the impact of Turner should be the opposite — the decision is an invitation to continued exploration (not only by litigation) of how to optimize, as well as the appropriateness and sufficiency of, alternative protections, indeed in many contexts.

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