IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 893 MDA 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

WILLIAM DIAZ,

Appellant.

BRIEF FOR AMICUS CURIAE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL

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STATEMENT OF INTEREST OF AMICUS CURIAE

Formed in 2004, the National Coalition for a Civil Right to Counsel ("NCCRC") advocates for the recognition of the right to appointed counsel for indigent litigants in civil cases involving basic human needs, such as shelter, safety, sustenance, health, child custody, and physical liberty. The NCCRC includes civil legal services attorneys, public defenders, nonprofit attorneys, and members of the private bar, academy, state/local bar associations, and access to justice commissions from 38 states.

The NCCRC supports litigation, legislation, and advocacy regarding the civil right to counsel in basic human needs cases, and has submitted amicus briefs in a number of state and federal appellate court cases addressing the right to counsel. Additionally, among other efforts, the NCCRC worked closely with the American Bar Association's Presidential Task Force on Access to Justice on its unanimous 2006 Resolution addressed to federal, state and territorial governments regarding the right to counsel in basic human needs cases.[1]

No person or entity other than the amicus curiae, its members, or counsel either (i) paid in whole or in part for the preparation of the amicus curiae brief or (ii) authored in whole or in part the amicus curiae brief.

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[1] American Bar Association, *Resolution 112A* (Aug. 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

SUMMARY OF ARGUMENT

Amicus agrees with Appellant that there is a constitutional right to counsel for government-initiated civil contempt cases.[2] The U.S. Supreme Court suggested in *Turner v. Rogers*, 564 U.S. 431 (2011), that the asymmetry of representation present in such cases militates in favor of recognizing a right to counsel, a rationale followed by numerous courts in Pennsylvania and elsewhere. In fact, more than a dozen states have recognized a federal or state constitutional due process right to counsel in civil contempt cases regardless of the nature of the plaintiff.

Recognizing a right to counsel in government-initiated civil contempt proceedings would be in line with decisions from Pennsylvania courts that have focused on the interest at stake, as opposed to the criminal or civil label of the case, when weighing whether a right to counsel exists. Some such cases have recognized a right to appointed counsel even where the rights at stake were more limited than those in the instant case.

Finally, the presence of counsel is necessary in ability-to-pay hearings in order to ensure that civil contempt proceedings serve their proper purpose. Incarceration is appropriate in civil contempt cases only where the contemnor actually possesses the present ability to pay. When courts fail to make this proper

[2] Amicus also agrees with Appellant that Pa.R.Crim.P. 122, as interpreted by *Commonwealth v. Farmer*, 466 A.2d 677, 678 (Pa. Super. Ct. 1983), requires the appointment of counsel for any indigent individual facing incarceration for failure to pay court-imposed fines or fees. However, amicus does not address that particular issue in this brief.

inquiry (as occurred in the instant case), the incarceration risks becoming punitive instead of coercive because the contemnor may remain in jail indefinitely. It is also not uncommon for trial courts to issue sentences to unrepresented defendants that are an improper blend of criminal and civil contempt, or not clearly one or the other. An attorney will ensure that sentences are properly and clearly imposed.

ARGUMENT

I. The Asymmetry of Representation in Government-Initiated Cases Involving Incarceration for Failure to Pay Fines and Fees Necessitates the Appointment of Counsel.

While the U.S. Supreme Court in *Turner* declined to recognize a categorical right to counsel in child support contempt proceedings between two private parties due to its fear of creating asymmetrical representation, it strongly suggested it would come to a different conclusion for contempt cases initiated by the State:

> 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. The proceedings at issue in the instant case (which are the type of "debt-collection proceedings" referred to in *Turner*) create a completely different asymmetry of representation: they pit an unrepresented and indigent obligor against the vast resources and expertise of the State in a proceeding in which the defendant risks losing his or her fundamental right to personal liberty. Providing a right to appointed counsel for the defendant would correct the very kind of asymmetry that so concerned the *Turner* Court.

This court would be in good company in recognizing a right to counsel for government-initiated contempt proceedings. Prior to *Turner*, state supreme courts in Delaware, Michigan, and Wisconsin recognized such a right to counsel in the child support context, which involves ability-to-pay determinations that are effectively identical to fees and fines cases. *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), which took a case-by-case approach, to establish a categorical right in government-initiated child support contempt cases, in part because "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.");[3] *State v. Pultz*, 556 N.W.2d 708, 715 (Wis. 1996) (concerning contempt for violation of permanent injunction; court recognizes right to 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] Because *Turner* expressly declined to address this situation, these decisions are still good law. Moreover, one of the few courts to address the right to counsel specifically in the fees and fines context has explicitly recognized a right post-*Turner*, relying in part on the asymmetry of representation concern.[5]

In other contexts involving government-initiated civil proceedings, Pennsylvania courts have pointed to a similar asymmetry in representation as a reason for recognizing a constitutional right to appointed counsel. For instance, for termination of parental rights, the Supreme Court of Pennsylvania observed that

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[3] In *Sturgis v. Sturgis*, 2016 Mich. App. LEXIS 1977, *9 (Mich. App. 2016), the Court of Appeals stated that the Michigan Supreme Court's holding in *Mead* was "abrogated by *Turner*." But given that *Mead* specifically confined its holding to a situation that *Turner* did not address, this statement in *Sturgis* is inaccurate.

[4] See also *Sheppard v. Sheppard*, 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* ..., which provided that 'where the state in the exercise of its 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.'").

[5] *State v. Stone*, 268 P.3d 226, 223 n.9 (Wash. App. 2012) (finding right to counsel for failure to pay legal financial obligations and stating *Turner* is distinguishable from *Tetro* because "LFO defendants faced a state prosecutor, not an unrepresented private party.")

> Since the state is the adversary . . . there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel ... it would be grossly unfair to force appellant to defend against the appellees' case without the assistance of someone, trained in the law, who could test the appellees' case by the rules of evidence and the techniques of cross-examination.

In re Adoption of R.I., 312 A.2d 601, 602-03 (Pa. 1973) (citation omitted).[6] See also *Corra v. Coll*, 451 A.2d 480, 487 (Pa. Super. Ct. 1982) (recognizing right to appointed counsel in paternity proceedings in part because "here in Pennsylvania, a complainant in a support action at which paternity is disputed shall, 'upon the request of the court or a Commonwealth or local public welfare official' be represented by the district attorney ... A paternity proceeding often becomes an adversary contest between a complainant, backed by the resources of a skilled attorney, and the uncounselled accused father. Under these circumstances, the contest is undeniably tilted in favor of the complainant.")

[6] While *Adoption of R.I.* preceded the U.S. Supreme Court's decision in *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (no federal categorical right to counsel in termination of parental rights cases), it has been reaffirmed by Pennsylvania courts several times since *Lassiter*, meaning it rests on the state constitution's due process clause. See e.g. *Adoption of L.J.B.*, 995 A.2d 1182 (Pa. 2010) (per curiam) (remanding to trial court "for a determination of whether Petitioner is eligible for the appointment of counsel. See *In re Adoption of R.I.* ... Should the trial court determine that Petitioner is eligible for the appointment of counsel, then counsel shall be appointed by the trial court"); *In the Interest of J.T.*, 983 A.2d 771, 774 (Pa. Super. Ct. 2009) (observing that *Adoption of R.I.* held that "an indigent parent in a termination of parental rights case has a constitutional right to counsel.")

II. Numerous States Have Recognized a Right to Counsel in Civil Child Support Contempt Proceedings, Which Are Functionally Identical to Fines and Fees Civil Contempt Proceedings.

The weight of authority from other jurisdictions has favored recognizing of a right to counsel in civil contempt cases. See e.g. *Russell v. Armitage*, 697 A.2d 630, 634 (Vt. 1997) ("[E]very federal circuit court of appeal that has addressed the issue has determined that due process prohibits incarceration of an indigent defendant in a civil contempt proceeding absent appointment of counsel ... And the vast majority of state courts have reached the same result.")

First, at least seven states have recognized a right to counsel in child support contempt cases (which, like failure to pay fees and fines cases, focus on the defendant's ability to pay) under the due process clauses of their state

constitutions.[7] While such decisions are not subject to *Turner* due to state courts being "entirely free to ... reject the mode of analysis used by [the U.S. Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee", *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 293 (1982), nearly all of these courts have nonetheless explicitly reaffirmed this right since *Turner*.[8]

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[7] *Otton v. Zaborac*, 525 P.2d 537, 538 (Alaska 1974); *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 contempt proceedings where person will be incarcerated, and observing that "Indiana has long recognized a person's right to have counsel appointed under such circumstances"); *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*. 464 A.2d 228, 237 (Md. 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"); *State v. Churchill*, 454 S.W.3d 328, 335 (Mo. 2015) (citing to *State ex rel. Family Support Div. - Child Support Enforcement v. Lane*, 313 S.W.3d 182, 186 (Mo. App. 2010), which found right to counsel in child support contempt cases, for proposition that "[F]or 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"); *Pasqua v. Council*, 892 A.2d 663, 673 (N.J. 2006) (relying on New Jersey Constitution 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 child support civil contempt cases); *State v. Stone*, 268 P.3d 226, 223 n.9 (Wash. App. 2012) (stating *Tetro* was decided under both state and federal constitutions); *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 extending right to child support contempt cases).

[8] *Id.*

Second, more than a dozen courts recognized a federal constitutional right to counsel in various kinds of civil contempt proceedings prior to *Turner*.[9] As to contempt proceedings initiated by the government (the situation expressly left unaddressed by *Turner*), these opinions are still good law.

The sheer number of opinions demonstrates a broad understanding that counsel should be required for such proceedings. Moreover, most of these

[9] *See County of Santa Clara v. Superior Court*, 5 Cal. Rptr. 2d 7, 10-12 (Cal. App. 1992) (civil contempt for child support) (dicta); *People v. Lucero*, 584 P.2d 1208, 1214 (Colo. 1978) (civil contempt involving witnesses) (dicta); *Padilla v. Padilla*, 645 P.2d 1327, 1328 (Colo. Ct. App. 1982) (applying *Lucero* to child support civil contempt); *Dube v. Lopes*, 481 A.2d 1293 (Conn. Super. 1984) (addressing both state and federal constitution in finding right to counsel in child support civil contempt cases); *Emerick v. Emerick*, 613 A.2d 1351, 1353-1354 (Conn. App. Ct. 1992) (child support civil contempt); *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), which established right to counsel for civil contempt proceedings involving failure to produce child); *McNabb v. Osmundson*, 315 N.W.2d 9, 11-14 (Iowa 1982) (civil contempt for child support), Cf. *Spitz v. Iowa Dist. Court for Mitchell County*, 881 N.W.2d 456 (Iowa 2016) (declining to find Fourteenth Amendment right to counsel for civil contempt related to visitation by finding *Turner* safeguards were provided, but government was not party to case); *Johnson v. Johnson*, 721 P.2d 290, 294 (Kan. Ct. App. 1986) (civil contempt for child support) (dicta); *Wright v. Crawford*, 401 S.W.2d 47, 49 (Ky. 1966) (civil contempt for failure to pay civil judgment); *Allen v. Sheriff of Lancaster County*, 511 N.W.2d 125, 127 (Neb. 1994) (civil contempt for failure to pay private debt), *overruled on other grounds by Smeal Fire Apparatus Co. v. Kreikemeier*, 782 N.W.2d 848 (Neb. 2010); *McBride v. McBride*, 431 S.E.2d 14, 19 (N.C. 1993) (civil contempt for child support); *D'Alessandro v. D'Alessandro*, 762 S.E.2d 329 (N.C. App. 2014) (relying on *McBride*), *Cf. Tyll v. Berry*, 758 S.E.2d 411 (N.C. App 2014) (mentioning *Turner* case-by-case approach and not mentioning *McBride*); *Ullah v. Entezari-Ullah*, 836 N.Y.S.2d 18, 22 (N.Y. App. Div. 2007) (civil contempt for failure to pay mortgage arrears); *Peters-Riemers v. Riemer*s, 663 N.W.2d 657, 664-665 (N.D. 2003) (civil contempt for failure to comply with property distribution); *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc*., 661 N.W.2d 719, 724-725 & n.3 (S.D. 2003) (civil contempt for failure to produce shareholder records), *abrogated in part on other grounds, Sazama v. State ex rel. Muilenberg*, 729 N.W.2d 335 (S.D. 2007); *Bradford v. Bradford*, 1986 Tenn. App. LEXIS 3556, at *12 (Tenn. Ct. App. 1986) (civil contempt for child support); *Ex parte Walker*, 748 S.W.2d 21, 22 (Tex. App. 1988) (civil contempt for child support); *Choiniere v. Brook*s, 660 A.2d 289, 289 (Vt. 1995) (civil contempt for child support).

opinions, whether about child support or some other context, speak expansively to the right to counsel for any kind of civil case when incarceration is at stake, and their holdings would thus not be limited to their particular context but rather should be applicable in the fees and fines context.[10]

III. In Determining Whether a Constitutional Right to Counsel Exists, Pennsylvania Courts Routinely Eschew the Criminal/Civil Distinction.

Where physical liberty has been at stake, Pennsylvania courts have held that the technical "criminal" or "civil" case label is not the primary determinant of whether a right to appointed counsel exists and have extended the right to counsel outside of the traditional criminal context.[11]

First, the Supreme Court of Pennsylvania held that there is a right to counsel in parole revocation proceedings. *Commonwealth ex rel. Rambeau v. Rundle*, 314

[10] See e.g. *McNabb v. Osmundson*, 315 N.W.2d 9, 11-14 (Iowa 1982) (focusing exclusively on sentence of incarceration, and not on facts specific to child support); *May v. Coleman*, 945 S.W.2d 426, 427 (Ky. 1997) (right to counsel extends to "civil contempt proceedings where imprisonment is a potential punishment ....")

[11] Pennsylvania courts have eschewed the criminal/civil distinction even where physical liberty has not been present. For instance, in *In re Adoption of R.I.*, 312 A.2d 601 (Pa. 1973), in recognizing a right to counsel for parents in termination of parental rights proceedings, the Supreme Court of Pennsylvania stated, "whether the proceeding be labelled 'civil' or 'criminal,' it is fundamentally unfair, and a denial of due process of law for the state to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel. . ." (citation omitted).

A.2d 842 (Pa. 1973).[12] In *Bronson v. Commonwealth Bd. of Probation & Parole*, 421 A.2d 1021, 1026 (Pa. 1980), the Court parted ways with *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), which had held that parole revocation proceedings are not criminal and therefore not entitled to the same constitutional guarantees as criminal cases, by stating, "[W]hether a parole violation proceeding is properly classified as criminal, quasi-criminal or civil, we have recognized it to be a proceeding of the nature where the right to counsel is required to comport with our fundamental concepts of fairness." *Bronson*, 421 A.2d at 1026.

Second, this court in *Commonwealth ex rel. Finken v. Roop*, 339 A.2d 764, 770 (Pa. Super. Ct. 1975) (en banc) examined the civil commitment statute in existence at the time and noted, "[Section 406 of the Mental Health Act] does not require that the subject of a civil commitment petition be represented by counsel ... If [not] read into the statute, § 406 would be blatantly unconstitutional."[13] As with

[12] *Rambeau* came down 2 months before *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), where the U.S. Supreme Court held that appointment of counsel in parole revocation proceedings under the federal constitution is on a case-by-case basis. However, in *Commonwealth v. Fowler*, 412 A.2d 614, 615 n.3 (Pa. Super. 1979), this court examined *Rambeau* in light of *Gagnon* and stated, "In this respect Pennsylvania law goes further than the United States Constitution." Moreover, in *Bronson v. Commonwealth Bd. of Probation & Parole*, 421 A.2d 1021, 1026 (Pa. 1980), the Supreme Court of Pennsylvania cited to *Rambeau* and stated, "assistance of counsel is required at a parole revocation hearing because [a] substantial right of the parolee may be affected." Cf. *Coades v. Commonwealth, Pennsylvania Bd. of Probation & Parole*, 480 A.2d 1298, 1304 (Pa. Cmwth. Ct. 1984) (stating *Bronson* did not resolve question of state constitutional right to counsel in parole revocation cases, and finding no such right).

[13] This holding was technically dicta, since the appellant was actually represented by counsel.

Bronson, the *Roop* court focused on the interest at stake rather than the label of the proceeding: "The serious deprivation of liberty and the unfortunate stigma which follow involuntary commitment render the distinction between 'criminal' and 'civil' proceedings meaningless." *Roop*, 339 A.2d at 772-73.

Finally, in *Corra v. Coll*, 451 A.2d 480, 482 (Pa. Super. Ct. 1982), this court held that paternity defendants have a right to appointed counsel. The court observed that the establishment of a child support order stemming from the paternity could lead to future incarceration for failure to pay. In recognizing a right to counsel, this court cited to *Roop* and other Pennsylvania cases while commenting, "a resolution of this question cannot be reached by applying a wooden civil/criminal distinction ... That approach has long since been abandoned in favor of emphasis on the nature of the threatened deprivation." *See also Gardner v. Gardner*, 538 A.2d 4, 9 (Pa. Super. 1988) ("Although today the proceedings pertaining to support and paternity are found in the Pennsylvania Rules of Civil Procedure, the civil-criminal distinction is unavailing in determining whether competent counsel is constitutionally required. Where paternity is denied and a trial is held on that issue, such counsel is necessary.")

Notably, the liberty interests at stake in *Rambeau* and *Corra* were more limited than the liberty interest at stake in the instant case. For instance, parole revocation proceedings involve a "conditional" liberty interest. *Morrissey*, 408

U.S. at 480. And in *Corra*, this court acknowledged that paternity proceedings could not directly result in incarceration, but rather could "result in the future loss of physical liberty" by virtue of a failure to comply with a support order entered in connection with the paternity determination. *Corra*, 451 A.2d at 485. Yet these courts did not hesitate in recognizing a categorical right to appointed counsel.

This eschewing-the-case-label approach is consistent with the few cases nationwide to squarely address the issue of the right to counsel in the fees/fines context. For instance, in *Colson v. Joyce*, 646 F. Supp. 102, 107-08 (D. Me. 1986), a federal court review considered the right to counsel in Maine's "section 1304 hearings" (which are proceedings to incarcerate for failure to pay fees and fines). It found they were a "hybrid form combining aspects of the natures of both a civil contempt proceeding and a deferred sentencing proceeding", but that "regardless [] of whether section 1304 is characterized as a contempt or a deferred sentencing proceeding", the right to counsel attached because the physical liberty interest was "substantial" and "the assistance of counsel would appreciably decrease the risk of an erroneous decision." See also *State v. Stone*, 268 P.3d 226, 235 (Wash. App. 2012) ("regardless of whether we label the LFO enforcement proceedings as civil or criminal, Stone had a due process right to appointed counsel...")

IV. The Procedural Safeguards Outlined in *Turner* Are Insufficient to Protect Unrepresented Defendants.

Turner suggested that the implementation of "procedural safeguards" could sufficiently protect the rights of unrepresented defendants in certain civil contempt proceedings. Specifically, it recommended

> (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.

Turner, 564 U.S. at 447-48. Courts have expressed skepticism at the value of such safeguards.[14] There are reasons for such skepticism: for instance, such safeguards do not protect against a trial court judge improperly conflating civil and criminal contempt, such as where a judge imposes punitive incarceration within the context of a civil contempt proceeding. This is not a theoretical problem: courts across the country have struggled with the thin line between criminal and civil contempt,

[14] See e.g. *Pasqua*, 892 A.2d at 673-74 ("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.")

appellate courts have often reversed trial courts that impermissibly mixed the two, and pro se litigants are unlikely to identify such a problem.[15]

Additionally, the *Turner* procedural safeguards have not achieved their desired effect in Pennsylvania. *Turner* 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 has been six years since *Turner*, yet a 2017 state-created commission report examining found that court data

> clearly demonstrates that Pennsylvania courts routinely fail to assess a defendant's ability to pay before imposing incarceration ... in the absence of clear standards on how to determine ability to pay, judges are not appropriately taking into account a defendant's actual financial resources,

[15] 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'").

and it shows that judges across the state are still unconstitutionally jailing defendants for their poverty.[16]

Such failure was evident in the instant case as well. It stands to reason, then, that where the state has failed for years to provide such procedural safeguards in the civil contempt context, the right to counsel must attach.

CONCLUSION

For the reasons stated above, amicus respectfully requests that this court recognize a right to counsel in government-initiated contempt proceedings involving the failure to pay court-imposed fees, fines, and restitution.

Respectfully submitted,

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[16] The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, *Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform* 14 (2017), *available at* https://www.aclupa.org/files/9915/0479/7731/Interbranch_Commission_Ending_Debtors_Prisons_in_PA_Report.pdf.

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CERTIFICATE OF COMPLIANCE

I Robert J. LaRocca, Esquire, certify that the foregoing brief does not exceed the word limitation of Pa. R.A.P. 531(b)(3), as it contains 4,541 words.

Robert J. LaRocca,
October 18, 2017

CERTIFICATE OF SERVICE

I Robert J. LaRocca, Esquire, certify that on October 18, 2017, I caused two (2) true and correct copies of the foregoing Brief of Amicus Curiae Pennsylvania Association for Justice to be served upon the below listed individuals via first class mail, postage prepaid, as follows:

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