SUPREME COURT OF NEW JERSEY
DOCKET NO. 56,944

ANNE PASQUA, et. al., Plaintiffs – Petitioners -vs- HON. GERALD J. COUNCIL, et. al., Defendants – Respondents	:	**CIVIL ACTION** ON PETITION FOR CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF of AMICUS CURIAE LEGAL SERVICES OF NEW JERSEY

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INTRODUCTION

Legal Services of New Jersey offers this brief as *amicus curiae* because of its central role in providing legal assistance to New Jersey's disadvantaged in civil cases. Our perspectives are: (1) child support obligors cannot be incarcerated for failure to pay unless they have access to counsel; (2) those obligors who are in fact unable to pay are at greatest risk of spending unjustified time in jail if they are denied counsel, and are least likely to be able to respond affirmatively to the coercive pressures from incarceration; (3) there is scant social science evidence concerning the effectiveness of incarceration on those least able to pay; (4) at current resource levels, Legal Services can provide counsel in only a very small fraction of child support enforcement matters, and in the great majority of cases will represent the obligee; and (5) as a result, absent a clear plan to provide counsel, incarceration of obligors must be used sparingly, if at all.

This brief is divided into three sections: an examination of the controlling federal law, which bars incarceration unless indigent defendants are afforded the opportunity to have counsel; analysis of the practicalities of representation in child support enforcement proceedings; and some recommendations concerning possible future approaches.

PROCEEDINGS BELOW AND STATEMENT OF FACTS

Amicus will rely on the statements of proceedings and facts submitted by the parties.

LEGAL ARGUMENT

POINT I

INDIGENTS FACING COERCIVE INCARCERATION FOR NON-PAYMENT OF CHILD SUPPORT HAVE THE RIGHT TO APPOINTED COUNSEL DURING ENFORCEMENT HEARINGS.

There is a presumptive right to appointed counsel for an indigent who may be deprived of his or her liberty if he or she does not prevail in a judicial action. Lassiter v. Dept. of Social Services, Durham County, N.C., 452 U.S. 18, 26-27 (1981) (holding that the Constitution does not demand appointment of counsel for indigent parents in every parental termination proceeding). The type of proceeding (civil versus criminal) is not the dispositive factor in determining an obligor's right to counsel, contrary to Scalchi v. Scalchi, 347 N.J.Super. 493 (App. Div. 2002). Rather, it is the potential deprivation of liberty which evokes the presumption of a heightened level of due process. Lassiter, supra, at 27. While it is possible to overcome this presumption through weighing of the factors detailed in Mathews v. Eldridge, 424 U.S. 319 (1976), United States federal courts have yet to do so in cases of coercive incarceration of child support obligors. Moreover, Scalchi is in the distinct minority of state court decisions that have either ignored or deviated from Lassiter by denying indigents'

right to appointed counsel in nonsupport contempt proceedings that could result in incarceration.

A. THE FOURTEENTH AMENDMENT AND U.S. SUPREME COURT PRECEDENT REQUIRE APPOINTMENT OF COUNSEL TO INDIGENT OBLIGORS DURING ENFORCEMENT PROCEEDINGS THAT COULD RESULT IN A DEPRIVATION OF LIBERTY.

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Amen. XIV, U.S. Const. As the Supreme Court has explained, "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951). The underlying requirement of the Due Process Clause is a "fundamental fairness" whose "meaning can be as opaque as its importance is lofty." Lassiter v. Dept. of Social Services, 452 U.S. 18, 24 (1981).

Guidelines on how to apply due process properly have emerged over the years from various U.S. Supreme Court rulings. For example, the Court has established that the Due Process Clause requires the states to provide counsel to all indigents charged with felonies. Gideon v. Wainwright, 372 U.S. 335 (1963). In re Gault, 387 U.S. 1 (1967), held that the Due

Process Clause compels the states to furnish counsel for juveniles in delinquency proceedings which, though *civil* and not criminal in nature, "may result in commitment to an institution in which the juvenile's freedom is curtailed." Id. at 41 (emphasis supplied). In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court held that under the Due Process Clause, counsel must be appointed for any indigent who may be sentenced to prison, even for the most petty of crimes and the briefest of prison terms. Due process concerns regarding an indigent's interest in physical freedom also underlay the Court's decision in Vitek v. Jones, 445 U.S. 480 (1980), where four of the five justices who reached the merits agreed that counsel must be appointed to indigent prison inmates facing involuntary transfer to state mental hospitals.

In 1981, the Supreme Court decided Lassiter, supra, which posed whether an indigent parent should be appointed counsel in a parental termination hearing. The Lassiter Court, in its due process analysis, discussed its previous cases, and noted the importance of an indigent's interest in physical liberty regardless of the nature of the proceeding in which the indigent is involved (i.e., civil or criminal). 452 U.S. at 25. The Court concluded that:

> [i]n sum, the Court's precedents speak with one voice about what "fundamental fairness" has

> meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.
>
> Id. at 26-27.

The Court indicated this presumption should be considered alongside the three-part balancing test formulated in Mathews v. Eldridge, 424 U.S. 319 (1976), to determine the extent to which due process protections apply (the three elements being the private interest at stake, the government's interest, and the risk of erroneous deprivation): "We must balance these elements against each other, and then set their net weight in the scales against *the presumption that there is a right to appointed counsel* only where the indigent, if he is unsuccessful, may lose his personal freedom." Lassiter, 452 U.S. at 27 (emphasis supplied). Yet the Court never actually applied this balancing test to a situation in which an indigent faced potential incarceration. As the issue in Lassiter was a parental termination hearing (which did not threaten the loss of personal freedom), the Court simply went through the three Eldridge factors before deciding that, in the case at hand, appointment of counsel was not required.[1]

1. Even before Lassiter was heard, several federal courts had already held that indigent persons who faced

In nonsupport contempt proceedings, where personal freedom *is* threatened, the overwhelming majority of state courts have interpreted Lassiter and the Fourteenth Amendment as mandating the right to appointed counsel for indigent obligors. Most of these courts cited Lassiter in their decisions, or at least viewed due process concerns as driven by the threat of incarceration, regardless of the civil or criminal nature of the proceedings.[2] See, e.g., County of Santa Clara v. Santa Clara County Super.Ct., 5 Cal.Rptr.2d 7, 8 (Cal.Ct.App.1992); Padilla

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incarceration in a contempt proceeding must be appointed counsel. The Ninth Circuit, for instance, affirmed that an indigent father could not be sentenced to incarceration at a child support nonpayment contempt proceeding "absent the representation of counsel." Henkel v. Bradshaw, 483 F.2d 1386, 1388 (9th Cir. 1973). U.S. v. Anderson, 553 F.2d 1154 (8th Cir. 1977), while not a support nonpayment contempt case, did establish that "[d]eprivation of liberty has the same effect on the confined person regardless of whether the proceeding is civil or criminal in nature. We agree with the decisions cited above and hold that the Constitution requires that counsel be appointed for indigent persons who may be confined pursuant to a finding of civil contempt." Id. at 1156. The Second Circuit concurred that the right to counsel "must be extended to a contempt proceeding, be it civil or criminal, where the defendant is faced with the prospect of imprisonment." In re Di Bella, 518 F.2d 955, 959 (2nd Cir. 1975); see also U.S. v. Bobart Travel Agency, Inc., 699 F.2d 618, 620 (2nd Cir. 1983) (explaining that this right encompasses the right to appointed counsel for indigents).

Various state courts had also established, pre-Lassiter, that an indigent obligor has a right to appointed counsel in a contempt for nonsupport proceeding. Com. ex rel. Brown v. Hendrick, 220 Pa. Super. 225 (Pa. Super. Ct. 1971); Otton v. Zaborac, 525 P.2d 537 (Alaska 1974); Brotzman v. Brotzman, 91 Wisc.2d 335, 337-38 (Wis. Ct. of App. 1979); Tetro v. Tetro, 544 P.2d 17, 19-20 (Wash.1975).

2. Several state courts have reached the same holding, but have cited state law and precedent, instead of Lassiter and 14th Amendment due process concerns, in their decisions. See, e.g., Lewis v. Lewis, 875 S.W.2d 862, 863-4 (Ky.1993) (holding that "the statutes of the Commonwealth require that an indigent person has a right to appointed counsel in civil contempt proceedings prior to the execution of an order of incarceration"); Brown v. Taylor, 728 So.2d 1058, 1062 (La.App. 1999), and State v. Creamer, 528 So.2d 667 (La.App. 1988) (relating that nonpayment of support in that state is already a criminal matter under law and thus the right to counsel attaches); Commissioner of Social Services v. Rodriquez, 725 N.Y.S.2d 393, 394 (N.Y.A.D.2001) and Gaudette v. Gaudette, 692 N.Y.S.2d 809, 811, (N.Y.A.D.1999) (citing Family Court Act §§261-62 in holding that indigents accused of willful violation of a child support order are entitled to appointed counsel); Ex parte Acker, 949 S.W.2d 314, 316 (Tex. 1997) (citing Tex. Fam. Code §157.163(b) for same holding); Matter of Marriage of Meyer, 125 Or.App. 15, 20 (Or.App.1993) (citing laws, though already repealed at the time, that established same holding); Moore v. Hall, 176 W. Va. 83, 85 (W. Va.1986) ("[W]e believe the principle is firmly established in our jurisdiction that an indigent defendant is entitled to a court-appointed attorney where he is charged by way of contempt for failing to pay court ordered alimony or support payments."). See also Ala.Code § 15-12-20 (1975).

v. Padilla, 645 P.2d 1327, 1328 (Colo.Ct.App.1982); Dube v. Lopes, 481 A.2d 1293, 1294 (Conn.Super.Ct.1984); Emerick v. Emerick, 613 A.2d 1351, 1353 (Conn.App.Ct.1992); Black v. Div. Child Support Enforcement, 686 A.2d 164, 167-68 (Del. 1996); In re Marriage of Stariha, 509 N.E.2d 1117, 1121-22 (Ind.Ct.App.1987); Rutherford v. Rutherford, 464 A.2d 228, 234, 237 (Md.1983); Mead v. Batchlor, 460 N.W.2d 493, 498 (Mich.1990); Cox v. Slama, 355 N.W.2d 401, 402-03 (Minn.1984); McBride v. McBride, 334 N.C. 124 (N.C. 1993); State ex rel. Gullickson v. Gruchalla, 467 N.W.2d 451, 453 (N.D.1991); Schock v. Sheppard, 453 N.E.2d 1292, 1294-95, (Ohio.App.1982); Thomerson v. Thomerson, 387 N.W.2d 509, 513 (S.D. 1986); Bradford v. Bradford, 1986 WL 2874 (Tenn.Ct.App.1986); Choiniere v. Brooks, 163 Vt. 625, 625 (Ver.1995).[3]

In addition to the numerous state courts mentioned above, *all* of the federal cases involving indigent obligors facing imprisonment for nonsupport have also established that these

3. State courts in Iowa and Missouri have also upheld an indigent's right to appointed counsel in a nonsupport contempt proceeding that could result in incarceration. McNabb v. Osmundson, 315 N.W.2d 9, 11, 14 (Iowa 1982); Hunt v. Moreland, 697 S.W.2d 326, 328 (Mo.App.1985). These two courts did, however, add one further stipulation: prior to a contempt hearing, the trial judge should first conduct a "predictive evaluation" in each case to "determine whether there is a significant likelihood that if the indigent is found in contempt the judge will sentence him or her to a jail term." McNabb, 315 N.W.2d at 14. In other words, unless the trial judge predetermines that the contempt charge is of "insufficient gravity" to justify the imprisonment of an individual found guilty, the accused, if indigent, must be appointed counsel. Moreland, 697 S.W.2d at 329-30. Neither the McNabb nor the Moreland decision, however, provides any further guidance on the procedural aspects that should be followed in this sort of evaluative predetermination.

obligors have the right to appointed counsel.[4] Like the states, the federal courts placed great emphasis on both the Lassiter opinion and the concern for potential deprivation of liberty. The courts specifically eschewed the practice of deciding the right to counsel issue based on the label attached to the proceeding (i.e., civil or criminal). For instance, the Fifth Circuit stated in Ridgeway v. Baker, 720 F.2d 1409, 1413-14 (5th Cir.1983) that

> [t]he right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as "criminal" or "civil". . .. Moreover, the line between civil and criminal contempt is rarely as clear as the state would have us believe. In some instances, the proceeding has a dual character.

(citing In Re Gault, Vitek v. Jones, and Lassiter).

The Sixth Circuit agreed with this reasoning in Sevier v. Turner, 742 F.2d 262, 267 (6th Cir.1984):

> As indicated by the Supreme Court in Lassiter, the relevant question in determining if a defendant is entitled to counsel during this type of contempt proceeding is not whether the proceeding be denominated civil or criminal, but rather is whether the court in fact elects to incarcerate the

4. Note that the First Circuit in Wilson v. State of N.H., 18 F.3d 40 (1st Cir. 1994) did deny the obligor in that case the right to appointed counsel; this was because there was no "actual (or imminent) incarceration" ordered or involved in the proceeding at issue.

defendant.

See, also, Walker v. McLain, 768 F.2d 1181, 1185 (10th Cir.1985); McKinstry v. Genesee County Circuit Judges, 669 F.Supp. 801 (E.D.Mich. 1987); Lake v. Speziale, 580 F.Supp. 1318 (D.Conn. 1984). Mastin v. Fellerhoff, 526 F.Supp. 969, 972 (S.D.Ohio 1981); Young v. Whitworth, 522 F.Supp. 759 (S.D. Ohio 1981); Johnson v. Zurz, 596 F.Supp. 39, 46 (N.D.Ohio 1984).

Some of the above courts have interpreted Lassiter to mean that *whenever* there is a threat of incarceration in a proceeding, no further consideration is necessary: there is automatically a right to appointed counsel for indigents in such proceedings. County of Santa Clara v. Santa Clara County Super.Ct., 5 Cal.Rptr.2d 7, 8, 12 (Cal.Ct.App.1992); Mastin v. Fellerhoff, 526 F.Supp. 969, 972 (S.D.Ohio 1981); Johnson v. Zurz, 596 F.Supp. 39, 46 (N.D.Ohio 1984). In other words, no case-by-case analysis involving the Eldridge factors is required when a potential deprivation of physical liberty is involved, as that potentiality alone is enough to trigger the right to appointed counsel:

> Appointment of counsel is an absolute requirement of due process whenever the proceeding may result in imprisonment of that defendant. See Lassiter, Argersinger, Gideon, supra. We believe the balancing factors set forth in Eldridge apply only in cases

> where the right is not absolute, and the Court must determine whether there is a right to counsel under a particular set of facts.

Fellerhoff, 526 F.Supp. at 973.

Other courts have explicitly applied the balancing test laid out in Lassiter. See Mead v. Batchlor, 460 N.W.2d 493, 498 (Mich.1990); Schock v. Sheppard, 453 N.E.2d 1292, 1294-95, (Ohio.App.1982); Walker v. McLain, 768 F.2d 1181, 1185 (10th Cir.1985). These courts found that the "fundamental"[5] private interest in physical liberty and the risk that this liberty will be erroneously deprived without the benefit of counsel overpowers any interest the state has in avoiding the financial and administrative burden associated with the duty to appoint counsel. Of course, the state also has a strong interest in ensuring compliance with its child support orders. While this interest is admittedly an important one, the Mead Court noted that:

> [t]oday a variety of effective means are available to compel compliance--if the defendant has the ability to pay--e.g., income withholding, federal tax intercept, state tax intercept, establishing a lien against an individual's real or personal property or requiring a hearing in front of a referee. Indeed, when methods other than incarceration are used, there is reason to believe

5. Mead, 460 N.W.2d at 502

> that regular child support payments are more likely to continue.

Mead, 460 N.W.2d at 503-04.

Thus, the court determined that the Eldridge balance swings heavily in favor of the private interest in physical liberty and the protection of this interest from erroneous deprivation. This weight, combined with the presumption in favor of appointed counsel outlined in Lassiter, necessitates that indigents facing imprisonment in nonsupport contempt proceedings have the right to appointed counsel. Id. at 504-05.

In contrast to the numerous cases listed and discussed above, there are only a handful of cases that have denied the right to appointed counsel for indigents facing incarceration in a support nonpayment contempt proceeding. Several of these cases were heard before the United States Supreme Court decided Lassiter, and thus now seem without precedential force. Meyer v. Meyer, 414 A.2d 236 (Me.1980); Duval v. Duval, 322 A.2d 1 (N.H.1974); In re Calhoun, 350 N.E.2d 665 (Ohio 1976). The remaining cases that rejected the right to appointed counsel are equally as weak, though for different reasons. Some post-Lassiter courts that reached this holding did not even mention Lassiter or the Fourteenth Amendment at all. Rittel v. Rittel, 485 A.2d 30 (Pa.Super.Ct.1984); Scalchi v. Scalchi, 347

N.J.Super. 493 (N.J.Super.A.D.2002) (the Scalchi decision will be analyzed in further detail below).

The Rittel court dismissed the right to counsel issue in a mere footnote, falling back on the outdated distinction between civil and criminal cases to justify its decision. Rittel, 485 A.2d at 34 n.5.[6] The court relied on the argument that the right to appointed counsel for indigents facing incarceration is only afforded in the criminal context. It concluded that in the civil context, the imprisonment is coercive, not punitive in nature, and ceases with the compliance of the jailed obligor. As discussed, this civil/criminal distinction has been shunned by the United States Supreme Court when important due process concerns are implicated, in such cases as Lassiter and In Re Gault.

The other two courts that have outright denied the right to appointed counsel in nonsupport contempt proceedings briefly mentioned Lassiter, but made no further attempt to go through the corresponding balancing test or at least weigh the three Eldridge factors. Andrews v. Walton, 428 So.2d 663 (Fla.1983); In re Marriage of Betts, 558 N.E.2d 404 (Ill.App.Ct.1990).[7] Both

6. Fortunately, Hendrick, 220 Pa. Super. 225 supra, is still good law in Pennsylvania.

7. Betts stands in direct conflict with a decision of another Illinois Appellate District, Sanders v. Shephard, 185 Ill.App.3d 719, 730 (1989): "In our view a respondent imprisoned for failure to produce a minor child is in similar circumstances to those individuals incarcerated for ...failure to make court-ordered child support payments. In each situation, the individual facing imprisonment for indirect civil contempt should be accorded counsel to represent him, including appointed counsel if the respondent is indigent."

decisions lack any reference to the Lassiter presumption in favor of appointing counsel. Instead, both the Andrews and the Betts courts brushed aside Lassiter and, like the Rittel court, focused on distinguishing between civil and criminal proceedings - again, a practice that is unsupported by, and in conflict with, United States Supreme Court precedent.

One last group of cases did not absolutely reject the right to appointed counsel, but rather upheld a case-by-case discretionary standard under which an indigent *could* have the right to appointed counsel depending on the complexity of the case.[8] Rodriguez v. Eighth Judicial Dist. Court ex rel. County of Clark, 102 P.3d 41 (Nev. 2004); Krieger v. Com., 38 Va.App. 569 (Va.App.2002); State ex rel. Dep't of Human Servs. v. Rael, 642 P.2d 1099 (N.M.1982) (in effect overturned by Walker v. McLain, 768 F.2d 1181 (10th Cir.1985)). These courts considered the issues involved in a nonsupport proceeding (i.e., "whether the court order exists and is currently effective, whether the defendant knew of the order but failed to comply, and whether he has the ability to comply") to be "typically straightforward and easily resolved." Rael, 642 P.2d at 1103. Yet they did acknowledge that in *some* nonsupport cases, the legal and factual

8. This holding has been specifically rejected by the California Court of Appeals, Sixth Division: "In Lassiter..., the U.S. Supreme Court made clear that complexity, as a determinant of what due process requires, will come into play only in a situation in which there is no risk the [individual] will lose his or her personal freedom. Where personal freedom is at stake, a due process basis for appointment of counsel is established without consideration of other possible determinants." County of Santa Clara, 5 Cal.Rptr.2d at 12.

components of the case may be sufficiently complex to warrant a right to appointed counsel:

Questions such as whether the defendant had a reasonable opportunity to present his case in prior proceedings or whether he has available certain defenses such as res judicata or the statute of limitations could baffle and confuse persons who are inexperienced in the law, and it would be unfair to deny such persons the benefit of counsel if they were unable to retain a lawyer because of their financial condition. Rael at 1104; see also Rodriguez, 102 P.3d at 51.

While each denied the right to appointed counsel in the respective case at hand, the Rael, Rodriguez, and Krieger courts did, at least, acknowledge Lassiter and go through the procedure outlined therein. The courts first weighed the Eldridge factors and concluded that the state's interests in enforcing child support orders and avoiding costs were greater than the interest in personal freedom. They did not consider this private interest to be a "full-blown" liberty interest, as the obligor "holds the keys to his freedom through willful compliance [with the support order]." Rael, 642 P.2d at 1103; Rodriguez, 102 P.3d at 51; Krieger, 38 Va.App. at 581. As a result, the "historical presumption in favor of the appointment of counsel is weakened" in a nonsupport contempt hearing. Rael, 1103.

This reasoning ignores the very obvious dangers that an indigent obligor will be erroneously imprisoned when there is in fact no ability to pay. In no real sense does such an obligor "hold the keys" to freedom, and therefore there is no reason to consider that person's interest in physical liberty to be diminished or anything other than "full-blown." As the Fifth Circuit noted in Ridgeway v. Baker, supra:

> The state's argument that the contemnor imprisoned only for civil contempt has, in the aphoristic phrase, "the keys of his prison in his own pocket," ignores two salient facts: that the keys are available only to one who has enough money to pay the delinquent child support and that, meanwhile, the defendant, whatever the label on his cell, is confined. If the court errs in its determination that the defendant has the means to comply with the court's order, the confinement may be indefinite. Such an error is more likely to occur if the defendant is denied counsel. Viewed in this light, a civil contempt proceeding may pose an even greater threat to liberty than a proceeding labeled "criminal," with a correspondingly greater need for counsel.

720 F.2d at 1413-14.

The Tenth Circuit further emphasized the necessity of counsel in order to avoid erroneous deprivations of liberty:

> The fact that [petitioner] should not have been jailed if he is truly indigent only highlights the need for counsel, for the assistance of a lawyer would have greatly aided him in establishing his indigency in ensuring that he was not improperly incarcerated.

Walker, 768 F.2d at 1184.

Thus, in a nonsupport contempt proceeding where an indigent faces imprisonment, the Eldridge balance must reflect the appropriate, undiminished weight of the indigent's private interest in personal liberty and the risk that this liberty may be erroneously deprived. This weight, coupled with the Lassiter presumption in favor of the right to appointed counsel, should lead any court to uphold this right for all indigents threatened with incarceration for contempt of a child support order.

B. THE NEW JERSEY SUPREME COURT SHOULD FOLLOW THE CONSTITUTIONAL INTERPRETATION OF FEDERAL COURTS WHICH PRESUMES A RIGHT TO COUNSEL WHEN THE DEFENDANT'S LIBERTY IS IN JEOPARDY.

As previously stated, it is the possible deprivation of the

obligor's liberty, rather than the category of proceeding (civil v. criminal), that gives rise to the child support obligor's right to counsel during enforcement proceedings. Lassiter at 27. This presumption of a right to counsel can be overcome only by an important state interest, contrasted with a lesser private interest and minor risk of erroneous deprivation. Lassiter at 27. In Lassiter, the Court ruled that pecuniary state interests were "hardly significant enough to overcome" the interest of a parent in his/her parental rights. Id. at 28. The final factor considered is whether the risk that an individual will be deprived of such a right, be it parental or one's liberty, because he was not represented by counsel. Id. With this last element, the Court examines the complexity of the proceeding and the possibility of a defendant being incapable of properly proceeding without the presence of counsel. Id. at 30.

While the court in Lassiter did not find a right to counsel for that particular defendant, the circumstances were quite different than those of an enforcement hearing for a child support obligor. A child support obligor, unlike the defendant of a parental termination hearing, does stand to be deprived of his liberty, even if for a short time. Therefore, there is an immediate presumption of a right to counsel in an enforcement hearing. While the state's pecuniary interests in Lassiter were

not extremely compelling, case-specific facts (defendant's demonstration of disinterest in attending the hearing) precluded the defendant's parental interest and risk of erroneous deprivation from overcoming the initial lack of presumption for a right to counsel. Id. at 33.

Though the New Jersey appellate decision in Scalchi was decided long after the U.S. Supreme Court decision in Lassiter, neither the Lassiter case nor its reasoning was mentioned in the Scalchi opinion. Scalchi v. Scalchi, 347 N.J.Super. 493 (2002). The Scalchi court instead relied on the discredited distinction between criminal and civil proceedings to support its decision of not requiring appointment of counsel to indigent child support obligors. Id. at 496.

Defendants' contention that the Scalchi court did allude to the Fourteenth Amendment through discussion of the Sixth Amendment as it applies to the states is correct but of no consequence. The context of Scalchi's "discussion" of the Fourteenth Amendment was limited to a criminal setting, and the question posed the applicability of the Sixth Amendment, which is an insufficient range of analysis for the consideration of whether there is a right to counsel in a civil matter. The court made no effort to analyze the applicability of the Due Process clause to civil defendants through the Fifth and

Fourteenth Amendments. Mere citation of federal cases that include such discussion is hardly sufficient to claim that Fourteenth Amendment Due Process in civil proceedings was addressed by the court. By contrast, the trial court below was correct in making this distinction and considering the due process required by the Fourteenth Amendment. Pasqua v. Poritz, MER-L-406-03 (NJ Law Div., Mercer County, April 24. 2003).

Pursuing a due process analysis, indigent child support obligors cannot be presumed to "hold the keys" to their cells because some of them will be incapable of complying with their court order. Walker, Supra, at 1184. For these individuals, their interest in personal liberty is not conditional and is not at all diminished. Additionally, defendants below contend that since the incarceration period is temporary, the liberty interest is lessened. Brief for Defendants at 9. There is no support from federal or New Jersey courts for such an assumption, and it should not be credited by this Court. This argument was rejected with regard to criminal proceedings by the U.S. Supreme Court in Argersinger v. Hamil, 407 U.S. 25, which held that counsel must be provided for the indigent before he is sentenced to prison, regardless of the brevity of the prison term.

The state's interest in obtaining child support monies from

obligors, while relevant, cannot overcome the personal liberty interests of the obligors. Furthermore, the administrative interests of the state, including efficiency of the proceeding and the burden of providing counsel, cannot outweigh the private liberty interests of the obligors. Lassiter, at 28. Additionally, it is assumed that the state shares the interest of a truly indigent individual in defending his liberty against accusations of willful neglect of a court order. Walker, at 1185.

The last factor to consider, the risk of erroneous deprivation of one's liberty, also fails to overcome the presumption of a right to appointed counsel for child support obligors. Defendants state that because of the alleged simplicity of the enforcement hearing proceedings, there is little risk that an individual will be erroneously incarcerated because he is denied counsel. Brief for Defendants, 9. While the proceeding may not be as complicated as a parental termination proceeding, such as in Lassiter, the U.S. Supreme Court has stated that "Even the intelligent and educated layman has small and sometimes no skill in the science of law. . .. He lacks both skill and knowledge to adequately prepare his defense, even though he has a perfect one." Powell v. Alabama, 287 U.S. 45, 69 (1932). It is inappropriate to assume that

every indigent defendant will be able to navigate their way through a proceeding that involves possible incarceration. The specifics of the child support guidelines, the details of the accrual of debt and crediting of payments, the possible relevance of explanatory or mitigating factors, and other considerations all raise these proceedings to a level of complexity requiring the assistance of counsel. The risk that an obligor will not be able to articulate information to the court properly is very real and should not be disregarded in situations where personal liberty is at stake.

Analysis of Mathews v. Eldridge factors thus confirms the initial presumption of these indigent individuals' right to appointed counsel in an enforcement proceeding. The Due Process Clause demands that the possible loss of liberty trigger such a presumption and the prospect of coercive incarceration provides that possibility. The subsequent considerations of state interests do not outweigh individual liberty interests coupled with the risk of an erroneous decision. Defendants' attempts to lessen the liberty interest involved are unpersuasive. The liberty interests of these indigent plaintiffs is quite compelling and affords them a right to appointed counsel in an enforcement proceeding.

POINT II

PRACTICAL IMPEDIMENTS LIMIT THE UTILITY OF COERCIVE INCARCERATION TO ENFORCE CHILD SUPPORT.

A. NO SOCIAL SCIENCE RESEARCH SUPPORTS INCARCERATION OF THOSE UNABLE TO PAY.

Surprisingly, judging by the published literature almost no research has been done on the efficacy of coercive incarceration in enforcing child support, and none specifically focusing on indigent obligors. Only a 2001 Virginia study of 359 cases over three years (1998 to 2000) attempted to assess the actual effect of incarceration. Swank, *Incarceration's Impact on Child Support Compliance*, 2001 Int'l. Fam. L. 131 (2001). That review concluded that "deferred sentences" (where a sentence is imposed but then stayed for a matter of months, seeking compliance) were most effective in coercing payment (69%), followed by "served sentences" (45%) and "suspended sentences" (39%). For current purposes, however, the study did not take ability to pay into account at all; it presents no evidence that incarceration is of any value in coercing those who cannot pay to do so.[9]

9. Other articles discussing incarceration and child support do solely from a theoretical perspective, unsupported by empirical research. In addition, all but one predates the very significant federal and state child support enforcement reforms of the mid-1990's. See Hermann and Donahue, Fathers Behind Bars: the Right to Counsel in Civil Contempt Proceedings, 14 N.M.L. Rev. 275 (1984); Monk, *The Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support,* 50 U. Chi. Rev. 326.; *The Right to Appointment of Counsel for the Indigent Civil Contemnor Facing Incarceration for Failure to Pay Child Support – McBride v. McBride,* 16 Campbell L. Rev. 127, 131 (1994); Bourda, *Indigent Contemnors Beware: In Florida, You May Be Incarcerated Without Being Appointed Counsel,* 9 St. Thomas L. Rev. 767 (1997). See also Swank's follow up article, *Enforcing the Unenforceable: Child Support Obligations of the Incarcerated,* 7 U.C. Davis J. Juv. L. &

B. COERCIVE INCARCERATION DOES NOT SERVE THE PUBLIC INTEREST WHERE THERE IS NO ABILITY TO PAY.

Anecdotal experience with child support enforcement yields ample numbers of cases in which incarceration appears to cause obligors to comply and pay. By definition, however, these are situations where the defendant *does* have the actual ability - the resources - to comply: the proof is in the payment. In contrast, those without means have no such ability, and incarceration, which precludes meaningful earnings from employment, cannot and will not produce payment. The challenge, plainly, is to identify accurately and unerringly those who have the current means to pay, and to avoid penalizing those who do not. Making such a judgment concerning deprivation of liberty without the protection of counsel compounds the possibility of error and unfairness. If an obligor cannot in fact pay from resources at hand, and is too impecunious to raise the money through credit, no useful public policy is served by incarceration.

C. RECENT CHILD ENFORCEMENT REFORMS HAVE RENDERED INCARCERATION A MUCH LESS IMPORTANT REMEDY.

The sweeping federal and state child support enforcement reforms of the 1990's brought a wealth of new coercions and

Pol'y 61 (2003).

tools to reach those obligors with the means to pay. New liens, tax and other intercepts, license blocks and other devices can put enormous pressure on non-compliant obligors who have any means or ability to pay. The old "pay or stay" days have faded in importance, now less necessary to secure enforcement. Once again, the tautology emerges: those *with* means are affected meaningfully by these newer remedies (as well as by coercive incarceration); those without means are not impacted successfully. With the advent of these new approaches, the stakes for obligees and the state in the coercive incarceration debate would appear to have declined significantly.

D. CURRENT RESOURCES CANNOT ENSURE COUNSEL FOR INDIGENT CHILD SUPPORT OBLIGORS.

As a 2002 social science study confirmed, at present only one out of every six low-income New Jerseyans with a civil legal problem requiring the help of a lawyer will actually receive that assistance. Legal Problems, Legal Needs: The Legal Assistance Gap Facing Lower Income People in New Jersey, Poverty Research Institute of Legal Services of New Jersey (2002). Every day Legal Services programs, the state's system for providing civil legal assistance to the disadvantaged, must make exceedingly difficult triage decisions concerning those whom

they will and will not be able to assist. Even as compelling a situation as the unjust coercive incarceration of a child support obligor without means may well not be as critical as the family about to be evicted or denied essential welfare cash assistance and food stamps, the battered spouse whose life is in imminent danger, or, indeed, even the mother and two children whose entire financial security is dependent upon the effective *enforcement* of a child support order. At current resource levels, Legal Services simply cannot come close to meeting the representational needs of indigent child support obligors.

Nor, in amicus' opinion, is mandatory pro bono a desirable or effective remedy. Its sweep and compulsion inevitably will put lawyers who are not familiar with, adept at, or perhaps even sympathetic to these cases on the front lines, without a legal support system. Throughout its history Legal Services of New Jersey has been skeptical of and generally not in support of *mandatory* pro bono assignments. We just do not believe that lawyers unfamiliar with a legal area, who have not chosen to be there, and are without mentors, are likely to be the most effective advocates for clients.

For the reasons already expressed, amicus is doubtful that significant reliance on coercive incarceration as a child support enforcement strategy is necessary on good public policy.

It would appear *never* to be useful for obligators who are truly indigent. Appointed counsel are not a desirable strategy.

POINT III

ALTERNATIVE APPROACHES HOLD SOME PROMISE FOR PROTECTING APPLICABLE DUE PROCESS RIGHTS.

To the extent that coercive incarceration is to be continued, means must be found to provide counsel for those who are indigent and unrepresented. It is, perhaps, tempting to consider some sort of administrative proceeding to determine indigency. Amicus cautions, however, that any form of administrative adjudicatory determination which is in actuality a step on the road to possible coercive incarceration falls prey to the same problem as a judicial proceeding - counsel must be available for those who cannot afford them at the time the determinative finding as to ability to pay is made. Absent a specific additional appropriation for this exclusive purpose, at current and foreseeable funding levels Legal Services is not in a position to provide representation in all or most of these cases, although it can do so in some.

Given the unquestionable applicability of a right to counsel for indigents through the Due Process Clause, amicus suggests that if coercive incarceration is to be continued at

all, absent a funded system for providing counsel the presumptions and burdens must be reversed. A preliminary inquiry (which could be judicial or administrative) could establish whether there is *clear* evidence of actual means to pay: identified assets, actual current earnings or other income stream, or existing access to adequate lines of credit which are plainly sufficient to secure counsel. The standard would have to be clear and convincing evidence.

If this preliminary determination as to the ability to secure counsel is affirmative, then the individual is left to his or her choice as to whether to secure counsel, and whether or not counsel are present a judicial determination concerning possible coercive incarceration can proceed. If, by contrast, the finding is that there is not clear evidence that counsel can be secured, presumably there will also not be clear evidence of the ability to meet the child support obligation, and in such cases, the path toward possible coercive incarceration would end. If, however, in some small number of cases the clear evidence pointed to the unlikely duo of an inability to secure counsel but an ability to meet the child support obligation, then coercive incarceration could be utilized only if counsel were secured from some other source. Absent a new revenue source, amicus would be pleased to advise and work with the

Judiciary (1) to develop feasible standards and processes for the preliminary determination of ability to secure a lawyer and to pay child support, and (2) to explore alternative means of securing counsel for the very small residual number of cases that would require them under this sort of approach, possibly through voluntary pro bono panels at the county level.

CONCLUSION

For the foregoing reasons, amicus urges this Court to affirm the applicability of a right to counsel in child support enforcement proceedings, and to consider alternative processes and approaches in protecting that right.

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