COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-12784

DEPARTMENT OF REVENUE
CHILD SUPPORT ENFORCEMENT DIVISION
And
RADELIS POLENCO,
Plaintiffs-Appellees,
v.
JOSHUA GRULLON,
Defendant-Appellant.

ON APPEAL OF A PROBATE AND FAMILY COURT
CIVIL CONTEMPT ORDER OF INCARCERATION

AMICUS CURIAE BRIEF
IN SUPPORT OF REVERSAL
SUBMITTED BY

MASSACHUSETTS BAR ASSOCIATION
BOSTON BAR ASSOCIATION
PROFESSOR MARK SPIEGEL

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IDENTITY AND INTEREST OF AMICUS CURIAE
BOSTON BAR ASSOCIATION

The Boston Bar Association ("BBA") traces its origins to meetings convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston Massacre and went on to become the nation's second president. The BBA's interest in this case arises from its work to advance the highest standards of excellence for the legal profession, to serve the community at large, and, especially relevant in this case, to advocate for access to justice. As expressed most clearly in our 2008 report, *Gideon's New Trumpet* (see Addendum), the BBA's support for representation at public expense in adversarial proceedings where particular basic human needs are at stake explicitly extends to civil contempt hearings where incarceration is a possibility.

IDENTITY AND INTEREST OF AMICUS CURIAE
MASSACHUSETTS BAR ASSOCIATION

The Massachusetts Bar Association ("MBA"), founded in 1910, is a non-profit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence, diversity and unity in the legal profession, and respect for the law. The MBA is the largest bar association in

Massachusetts. Its House of Delegates consists of a president, president-elect, one vice-president, treasurer, secretary, the two most immediate, living past presidents, 18 regional delegates, seven at-large delegates, chairs of the 19 section councils, and others. The House of Delegates also has representative seats for every county bar association and many other statewide legal associations focused on specific practice areas, along with all major diversity bar associations in the Commonwealth.

The mission of the MBA is to provide professional support and education to members, and advocacy on behalf of lawyers, legal institutions, and the public. As part of its advocacy goal, the MBA has previously filed Amicus Briefs in this Court in significant cases.

Together with other bar associations, the MBA has long been involved in right to counsel issues (see Addendum). Upon the recommendation of its Amicus Curiae Committee, and with the approval of the Association's President and Chief Legal Counsel, the MBA House of Delegates authorized submission of this amicus curiae brief supporting a right to counsel in this and similar cases.

IDENTITY AND INTEREST OF AMICUS CURIAE

PROFESSOR MARK SPIEGEL AND AMICUS CLINIC STUDENTS

Mark Spiegel, Esq., is a member of the Massachusetts Bar. He is a Professor of Law at Boston College Law School, Newton, Massachusetts, where he teaches in the fields of Civil Procedure and Federal Courts. For many years he was Director of the Boston College Legal Assistance Bureau. Prior to his teaching career he worked in legal services in Chicago as a Reginald Heber Smith Fellow. His scholarly interests and publications have been in the fields of Legal Services, Professional Responsibility and Civil Procedure. He has academic and professional interests in the law governing provision of counsel to indigents in civil cases. He represents no institution, group or association in this matter and has no economic interest in the outcome of the case.

Professor Spiegel had the assistance of Logan Hovie, Jacob Stansell and Mark S. Nooth who are students at Boston College Law School studying in its Amicus Curiae Practicum, a clinical course designed to allow faculty and students to assist courts in resolving important legal issues of the day.

RULE 17 (c) (5) DECLARATION OF AMICI AND COUNSEL

Amici and their counsel declare that they are independent from the parties and have no economic interest in the outcome of this case. None of the conduct described in Appellate Rule 17 (c) (5) has occurred. More specifically:

A. No party or party's counsel authored this brief in whole or in part;

B. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;

C. No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and

D. No amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues; no amicus curiae or its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ISSUES PRESENTED ADDRESSED BY AMICI

Whether, pursuant to the United States Constitution, the Massachusetts Constitution, or this Court's authority over the administration of justice in the courts of the Commonwealth, this Court should recognize a right to court-appointed counsel for indigent defendants facing a realistic risk of incarceration for civil contempt due to non-payment of child support in judicial proceedings in which attorneys for the Commonwealth of Massachusetts Department of Revenue Child Support Enforcement Division appear?

POSITION OF AMICI

The Order below should be reversed. The record not only reveals fundamental Due Process violations that warrant reversal in this particular case, but also reflects systemic flaws in the processing of civil contempt matters in the Probate and Family Court. The case illustrates the need for indigent defendants to receive court-appointed counsel when facing government attorneys in a civil contempt case for nonpayment of child support in which there is a realistic risk of loss of personal liberty by imprisonment for debt.

SUMMARY OF ARGUMENT

The judiciary, not the executive, has the power of imprisonment as a remedy for failure to obey its orders, and the judiciary bears the non-delegable duty to assure that parties facing imprisonment for debt in court proceedings receive their Due Process rights. (pp 15-16)

Due Process under our federal and state constitutions is described in similar language but its requirements can be interpreted differently in particular cases; federal and state standards would both require court-appointed attorneys in the circumstances of this case. (pp 16-19)

IA. Because Mr. Grullon was not given the specific alternate procedures that might dispense with a need for legal counsel to satisfy federal due process, as described in the Supreme Court's holding in *Turner v. Rogers*, the order to incarcerate Mr. Grullon should be reversed. (pp 19-22)

1B. Moreover, because of the involvement of government attorneys in this case, Justice Breyer's opinion for the majority in *Turner* actually supports the necessity of a right to court-appointed counsel. (pp 23-24)

II. Because the Due Process guarantees of the Massachusetts Constitution mandate the appointment of court-appointed counsel in the circumstances of Mr. Grullon's case, the order to incarcerate Mr. Grullon should be reversed. (pp 25-38)

IIA. Supreme Judicial Court precedents interpreting the requirements of Due Process under our Massachusetts Constitution mandate court-appointed counsel in the circumstances of Mr. Grullon's case. (pp 25-28)

IIB. The record demonstrates that when government attorneys advocate imprisonment of unrepresented indigent defendants for debt, the risk of error is unacceptable, and the value of court-appointed defense counsel is indisputable. (pp 29-38)

IIB (1) deprivation of personal liberty because of inability to pay a debt is a serious violation of a fundamental right. (pp 29-30)

IIB (2) Alternate Procedures Failed to Protect Mr. Grullon and the record Demonstrates that attorneys are essential to offset the high risk of an erroneous deprivation of liberty in these cases. (pp 30-33)

II B (3) No legitimate governmental interests, or financial or administrative burdens, outweigh the need for court-appointed

attorneys to defend indigents whom the government seeks to imprison for debt. (pp 34-38)

Recognizing that thousands of civil contempt complaints are filed in the Probate and Family Court each year and all but a small percent of such complaints are resolved without incarceration, Amici suggest that the constitutional right to counsel should attach when an indigent defendant is facing government lawyers and a realistic risk of incarceration of imprisonment for debt. (pp 36-37).

IIB (4) In addition, this Court may wish to take further remedial steps, in the exercise of its supervisory powers over the administration of justice and its Equity Jurisdiction. (pp 38-39)

ARGUMENT

Introduction

The judiciary, not the executive, has the power of imprisonment as a remedy for failure to obey its orders. G.L. c. 215, §34. The judiciary, not the executive, bears the non-delegable duty to assure that parties facing imprisonment for debt in court proceedings receive due process of law. Judges must enforce court-ordered child support obligations, but at the same time must take care that the courts of Massachusetts do not incarcerate individuals for debts they are unable to pay.

The Department of Revenue Child Support Enforcement Division, supported by multimillion dollar budgets and attorneys compensated by the State, zealously litigates to enforce child support payment obligations and is a major presence in the Probate and Family Courts of the Commonwealth. The Probate Court Docket discloses that the Mittimus to incarcerate Mr. Grullon issued on 11-1-18 (A7) after a hearing in the "Lawrence DOR Session" (A5) before the "DOR Judge" (A5), in which a DOR attorney recommended that Mr. Grullon should be incarcerated. (A26).

There is no substitute for having competent attorneys on both sides of a case to increase the probability of a correct decision and to avoid the slightest appearance that particular litigants or attorneys obtain preferential treatment or wield undue influence over the outcome of court proceedings. Past problems with guardianships in Probate Courts and debt collection practices in District Courts serve as reminders that constant vigilance over fair process and the appearance of fair process are essential to preservation of the integrity and reputation of our courts.

Accordingly, Amici urge the court to reverse the order of incarceration for contempt (RA 31-32) and to recognize a constitutional right to court-appointed counsel for indigents facing government lawyers and a realistic risk of imprisonment for debt.

Applicable Due Process Standards

In *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), the Supreme Court of the United States adopted the following analysis under the federal Due Process Clause:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action;

> second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., Goldberg v. Kelly, *supra*, at 263-271.

The Supreme Judicial Court has adopted similar language in construing Due Process protections of the Massachusetts Constitution. In *Noe v. Sex Offender Registry Bd.* 480 Mass. 195, 202 (2018), the Court stated:

> "To determine whether this standard and burden of proof violate due process, we apply the familiar test outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires that we balance "the private interests affected, the risk of erroneous deprivation, the probable value of additional or substitute safeguards, and the governmental interests involved."

In *L.B. v. Chief Justice of the Probate and Family Court Department*, 474 Mass 231, 237 (2016), the Court stated:

> "In determining what process is due ... this court 'must balance the interests of the individual affected, the risk of erroneous deprivation of those interests and the government's interest in the efficient and economic administration of its affairs.'" *Commonwealth v. Barboza,* 387 Mass. 105, 112, 438 N.E.2d 1064, cert. denied, 459 U.S. 1020, 103 S.Ct. 385, 74 L.Ed.2d 516 (1982), quoting *Thompson v. Commonwealth,* 386 Mass. 811, 817, 438 N.E.2d 33 (1982). See *Care & Protection of Robert,* 408 Mass. 52, 58–59, 556 N.E.2d 993 (1990). When balancing the interests, we bear in mind that "[t]he

> requirements of procedural due process are pragmatic and flexible, not rigid or hypertechnical." *Roe v. Attorney Gen.,* 434 Mass. 418, 427, 750 N.E.2d 897 (2001). Due process "calls for such procedural protections as the particular situation demands." *Id,* quoting *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593 (1972)."

Despite the use of similar language to describe due process, the Supreme Judicial Court will not necessarily reach the same outcome in interpreting the Massachusetts Constitution as the Supreme Court does in interpreting the federal constitution. In matters of personal liberty, the United States Constitution is a floor, not a ceiling. *See Goodridge v. Dept. of Pub. Health*, 440 Mass. 309, 328 (2003) ("The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language"). *See also Commonwealth v. Mavredakis*, 430 Mass. 849, 858 (2000) ("standards under a state constitution that are more strict than the 'lowest common denominator' determined under the United States Constitution may be appropriate in the special circumstances of a given state or by a different measure of what essential fairness requires", quoting Herbert P. Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to the Cognate Provisions of the United States

Constitution, 14 Suffolk U.L. Rev. 887, 921 (1980)). As amici demonstrate*, infra*, this Court has often recognized a more expansive state constitutional right to counsel in civil matters involving deprivation of fundamental rights than the Supreme Court has been willing to recognize under the federal constitution, especially when the government or its lawyers is involved in the proposed deprivation.

I. Under the United States Constitution, Due Process Requires Appointment of Counsel for an Indigent Defendant Facing Attorneys for the Commonwealth and a Realistic Risk of Incarceration in a Civil Contempt Proceeding.

In *Turner v. Rogers*, 564 U.S. 431 (2011), the Supreme Court of the United States reversed a state court decision in which an unrepresented noncustodial parent was incarcerated upon a finding of civil contempt in a child support proceeding brought by the unrepresented custodial parent. The Court concluded that the incarcerated parent's rights under the Due Process Clause had been violated, but stopped short of recognizing that a right to counsel is "*automatic*ally" required in all civil contempt hearings. *Id*. at 448. Among other concerns, the Court noted that asymmetry of representation between purely private parties might skew the playing field, and expressed a belief that procedural protections other than a

per se right to counsel would be adequate to satisfy federal due process standards in most private cases. *Id*. at 446-448.

A. Mr. Grullon Was Not Afforded Alternate Procedural Safeguards Described by the Supreme Court in *Turner*.

The alternative safeguards detailed in *Turner* were not provided in the present case. Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay. *Id*. at 448-449. Of these procedural safeguards, Massachusetts presently mandates only item 2, the financial information form.

The record demonstrates that Mr. Grullon did not receive the benefit of these substitute procedural safeguards. First, neither the Court Form for a Complaint for Civil Contempt (RA14) nor the Court Form of Summons in DOR cases (RA15) gives notice to a defendant that "ability to pay" would be a critical issue in the contempt proceeding. The Sheriff's return makes no mention that any other notice was delivered to the defendant. RA16. In any event, it is

questionable whether notice from a source other than the Court itself would satisfy due process in this instance.

Second, although Rule 401 of the Supplemental Rules of Domestic Procedure requires a financial form and Mr. Grullon did fill out the necessary disclosure form (App. Vol. 2, p.3), the transcript reveals that at Mr. Grullon's hearing, the judge expressly speculated that he had enough sources of money to pay for school and support himself (despite his testimony that veterans' benefits under the post 9-11 GI Bill were paying for his schooling (RA25)). RA27.

Third, although Mr. Grullon had an opportunity to address questions about his finances, the hearing was abrupt (RA 20-28) and Mr. Grullon's efforts to explain his attempts to get various veterans benefits for his family were interrupted (RA 27).

Finally, the judge made no express finding that Mr. Grullon had an ability to pay either the terms of the order or the purge amount. RA31-32. The judge did not check the box on ability to pay (RA 32), and the record lacks sufficient evidence to support a finding of ability to pay. Indeed, the transcript suggests that Mr. Grullon went to jail not because of willful disobedience of an order he was able to pay, but

because of what the judge perceived as a "poor attitude." RA 27-28. An attorney representing Mr. Grullon would certainly have spoken up, and more importantly would have prevented the client from inadvertently "shooting himself in the foot" in the first place. RA 28.

B. Alternate Procedural Safeguards Standing Alone Are Insufficient to Satisfy Federal Due Process Standards Under *Turner* When Government Attorneys Appear Against Indigent Defendants.

Writing for the majority in *Turner*, Justice Breyer expressed concern for the asymmetry of legal representation that would result from the defendant in a child support civil contempt hearing being appointed counsel while the custodial parent was unrepresented by counsel. *See* 564 U.S. at 447 ("The custodial parent...may be relatively poor, unemployed, and unable to afford counsel."). Concern for this asymmetry informed the Court's rejection of a right to counsel in all cases: Federal Due Process "does not *automatically* require the provision of counsel...." *Id*.

Yet Justice Breyer's *Turner* analysis also recognized that the risk of erroneous deprivation of liberty in civil contempt proceedings is greater in cases where the opposing party employs counsel throughout the proceedings, creating an asymmetry of legal representation to the prejudice of the defendant. *Id*. at 447. He noted in particular that it would be a different case if government attorneys were involved in debt collection. *Id*. at 449.

The Legislature authorized DOR's Child Support Enforcement Division to deploy legal counsel against Mr. Grullon, as it does in all cases where it accepts full service clients, both when collecting to reimburse the Commonwealth for assistance given and when collecting for selected individuals in order to keep them off the rolls in the first place. The DOR attorney specifically advocated that the court sentence Mr. Grullon to jail for civil contempt (RA 25-26). The DOR's use of legal counsel to advocate the interests of Ms. Polanco throughout the proceedings created an asymmetry of legal representation, exacerbated by the weight and influence attributable to the government's intervention on behalf of one party.

The pervasive involvement of government attorneys in actively prosecuting child support civil contempt complaints decisively distinguishes *Turner*. Fairly read, justice Breyer's opinion in *Turner* makes it clear that counsel should be required in circumstances like these in which a realistic risk of incarceration is present and government attorneys are involved. *Cf., State v. Stone*, 165 Wash. App. 796, 268 P.3d 226 (2012).

II. Under the Massachusetts Constitution, Due Process Requires Appointment of Counsel for Indigent Defendants Facing Attorneys for the Commonwealth and a Realistic Risk of Incarceration for Nonpayment of Child Support in a Civil Contempt Proceeding.

Even if the United States Constitution did not mandate a right to counsel in this case, the Massachusetts Constitution would require that counsel be appointed. This Court has often recognized a more expansive state constitutional right to counsel in civil matters involving deprivation of fundamental rights than the Supreme Court has been willing to recognize under the federal constitution, especially when the government or its lawyers is involved in the proposed deprivation.

A. This Court's Precedents Provide a More Expansive Constitutional Right to Counsel Than Those of the Supreme Court and Due Process Requirements Under Our Massachusetts Constitution Mandate Appointment of Counsel in Cases Where Indigent Defendants Are Facing Government Attorneys and a Realistic Risk of Incarceration for Nonpayment of Child Support in Civil Contempt Proceedings.

In *Department of Public Welfare v. J.K.B.*, 379 Mass. 1, 3-4 (1979), this Court determined that when the government is seeking to terminate parental rights, the parents have a right to counsel. More recently, in *Adoption of Meaghan*, 461 Mass. 1006, 1007 (2012), where the legal guardians of a child sought to adopt the child, but the

child's indigent birth father objected, the Court expanded the right to counsel to all proceedings terminating parental rights. Id at 1006-07. *See also Guardianship of V.V.,* 470 Mass. 590, 593–94 (2015). (in addition to a right to counsel in parental termination proceedings, parents have this same right where another party seeks to be appointed as the child's guardian); *L.B. & Another v. Chief Justice of The Probate and Family Court Department & Others*, 474 Mass. 231, 242 (2016) (parent seeking to remove a guardianship has a right to counsel as long as the parent presents a meritorious claim for removal). These rulings stand in stark contrast to the Supreme Court decision in *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981), which held that the federal Due Process Clause does not require the appointment of counsel in all parental termination proceedings).

In *Commonwealth v. Gomes*, 407 Mass. 206 (1990), this court recognized that a defendant had a right to a hearing with appointed counsel prior to his imprisonment for failure to pay a fine stemming from a violation of the town's open container law. *Gomes*, 407 Mass. 206, 207, 211. At the initial hearing the defendant waived his right to counsel and admitted facts sufficient to allow the district court judge to find him guilty. *Id*. at 207. The case was continued pending the

payment of a $140 fine. *Id*. The defendant failed to appear and pay the fine. *Id*. at 208. When he appeared in court approximately three weeks later on an unrelated matter, the defendant was jailed based on a mittimus issued by the District Court that provided that he be held in jail for a week unless he paid the fine. *Id*.

Although the initial crime of violation of an open container law did not carry the potential for imprisonment, the defendant was unable to pay the fine as a result of his poverty and was therefore imprisoned. His imprisonment was erroneous, however, because there was no finding that his decision to default was willful—poverty is not grounds for imprisonment. *See Gomes*, 407 Mass. at 206. To protect against instances where impoverished parties are found willfully in default and sent to prison, the Court determined that there must be a hearing where the party is entitled to counsel. 407 Mass. at 211.

More recently, in a civil proceeding, this court recognized the importance of the right to counsel when one is faced with imprisonment. *Commonwealth v. Patton*, 458 Mass. 119 (2010). *Patton* involved a defendant's claim of ineffective assistance of counsel stemming from his appointed counsel's representation at hearings regarding whether he violated his probation. *Patton*, 458

Mass. at 121. In assessing whether a claim for ineffective assistance of counsel was viable -- a probation hearing is not considered a criminal prosecution -- the court held that "whenever imprisonment palpably may result from a violation of probation, 'simple justice' requires that … a probationer is entitled to assistance of counsel." Id at 124–25 (internal quotation omitted). This extended the right to counsel under our Massachusetts Constitution beyond what is required under the Due Process Clause of the Fourteenth Amendment. *Id.* at 125. *Contrast Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Mr. Grullon's situation parallels the criminal defendant's circumstances in *Gomes* and the probationer's situation in *Patton*. His physical liberty was at stake and he was imprisoned because he had failed to comply with a court order for payment of money. Moreover, as we demonstrate *infra*, the *Mathews* factors, as this Court applies them, compel the conclusion that indigent defendants should receive court-appointed counsel when facing attorneys from the Child Support Enforcement Division of the Department of Revenue and a real risk of a Judge ordering their incarceration for debt.

B. The *Mathews* Due Process Factors, As This Court Applies Them, Compel The Conclusion That Indigent Defendants Are Constitutionally Entitled to a Hearing Represented by Counsel When Facing Government Attorneys and a Real Risk of Incarceration for Non-Payment of Child Support.

Contrary to the DOR position on appeal that the violations of due process which occurred in this case can be adequately dealt with by continuing business as usual, the failures exhibited here demonstrate precisely why an indigent defendant like Mr. Gullon needed court-appointed counsel when facing imminent incarceration in a proceeding against him conducted by government attorneys. Relying on an interested party such as DOR to provide the Judge with the information and argument she needs is no solution. The theoretical availability of alternate protections utterly failed to protect this defendant against the demands of the government's attorney that he be incarcerated. The presence of an attorney for the defendant in the hearing is the only procedure that will reliably offset the fundamental unfairness demonstrated here.

(1) Deprivation of Personal Liberty Because of Inability to Pay a Debt is a Serious Violation of a Fundamental Right.

As to the first *Mathews* factor, the private interest that will be affected by the official action, deprivation of personal liberty because of inability to pay a debt is a serious violation of a fundamental right.

The interest in securing that freedom from bodily restraint lies at the core of the liberty protected by Due Process of Law.

(2) As the Record Demonstrates, Alternate Procedures Did Not Adequately Protect Mr. Grullon Against a High Risk of Erroneous Deprivation of His Liberty, and the Procedural Protection of Court-Appointed Attorneys Is Essential in Court Proceedings in Which Indigent Defendants Face Government Lawyers and a Real Risk of Imprisonment for Debt.

As to the second *Mathews* factor, had an attorney been present representing Mr. Grullon at the hearing in the case at bar, it is highly unlikely the various errors below would have occurred or gone unnoticed. (see description Argument IA above). Mr. Grullon was helpless without counsel at his side. If he had counsel, the DOR attorney's comment ("I haven't verified. I'm taking father's answer at face value." (RA21), regarding Mr. Grullon's statement that he had been incarcerated for almost all of the delinquency period, would have been offset by proof adduced by Mr. Grullon's attorney. If he had counsel, the DOR attorney's response to the judge's query whether defendant had sought modification, "Not that I'm aware of" (RA 21), would have been forcefully rebutted by pointing out that a counterclaim seeking modification because of inability to pay had been sitting in the Court file since October 22nd (RA 17) and had

been served on DOR (RA 19). If Mr. Grullon had counsel, the insinuations that he must have unreported income sources (RA 27) would not have been allowed to go unchallenged, and proof of inability to pay would have been presented competently.

Moreover, the issues in civil contempt cases are sufficiently complex to require the assistance of counsel. See Charles P. Kindregan, Jr., *et al*., 3 Mass. Prac., Family Law and Practice § 92 (2019 supp). In order to find a defendant in civil contempt for violation of a support order, the person must have the present ability to pay. *See*, e.g., *Sodones v. Sodones*, 366 Mass 121, 130 (1974), holding that a person judged in civil contempt and ordered to pay a compensatory sum of money may not be sentenced to prison if he shows that he is unable to comply; to do so would be a denial of due process of law.

Assessing ability to pay in contempt cases is far from a simple mathematical calculation, however, because it often encompasses disputes over imputed income. These are not easy assessments. They involve complicated judgments. In order to impute or attribute income, a judge must assess whether "[the payor] is capable of working and is unemployed or underemployed." *See also, e.g., P.F v.*

Department of Revenue, 90 Mass. App. Ct 707,710 (2016); *Emery v. Sturtevant*, 91 Mass. App. Ct. 502 (2017) (whether resigning from one job and accepting a lower paying job should result in attribution of income); *Crowe v. Fong*, 45 Mass. App 673 (1988) (involving issues of both imputation and attribution of income).

In the case at bar, the judge implicitly imputed income to Mr. Grullon on thin inference. RA 27.Mr. Grullon's attorney, if he had one, would have produced proof to rebut that inference, could have argued that going to school to get a license to drive trucks was far better than delivering pizza, and would also have pointed out that incarceration jeopardizing his ability to graduate in a few weeks was extremely counterproductive.

In addition, the DOR attorney suggested a $500 purge amount, about 10% of the total arrearage (RA 31), with no explanation of how he arrived at it (RA 26). An attorney for Mr. Grullon could have advocated for a purge amount he would be able to meet.

Finally, it should not be overlooked that imprisonment in these cases is not mandatory. The judge has discretion in choosing a remedy for the civil contempt. Just as counsel for the defendant in a criminal

case may have the greatest impact at sentencing, so also the attorney for the defendant in a civil contempt case may have the greatest impact at the remedial stage by convincing the judge that sound exercise of equitable discretion points away from imprisonment and toward more constructive paths to enforce the Court's decrees.

Self-represented indigent defendants are no match for attorneys of the Department of Revenue Civil Support Enforcement Division seeking to incarcerate them for civil contempt. "[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*." *Turner* at 449.

(3) The Commonwealth's Interests, Including the Function Involved and the Fiscal and Administrative Burdens That the Procedural Requirement of Court-Appointed Counsel for Indigents Might Entail, Do Not Justify Denying Counsel to Indigent Defendants in a Hearing Where They Face Government Attorneys and a Real Risk of Incarceration for Debt They Are Unable to Pay.

The third part of the *Mathews* test relates to the government's interest "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *See Mathews*, 424 U.S. at 335.

Because an inability to pay means that the defendant does not "have the keys to the prison in his pocket," an erroneous ruling obliterates the fundamental dividing line between civil and criminal contempt. The incarceration is no longer a coercive remedy, but has instead become punitive; punishment is the hallmark of criminal contempt, and the defendant has a well-recognized constitutional right to counsel in a criminal contempt case. *Cf., Turner*, 564 U.S. at 441. By the time it becomes clear that someone who has been incarcerated for non-payment of child support is in fact unable to pay, it's too late for counsel to do much good, and the system doesn't have a ready remedy at hand to restore lost liberty. Although there are technical differences between civil and criminal contempt, the outcome of a

mistaken conclusion of ability to pay is so closely connected to an effectively improper criminal conviction that fairness requires appointment of counsel when it could help prevent an injustice being done. There is no legitimate governmental interest in imprisoning people for debts they cannot pay.

Of course, the government's legitimate interests include enforcement of court orders, and collection of child support payments, in order either to repay taxpayers for assistance amounts unnecessarily advanced in lieu of the obligor's fulfilling his support obligation or to obtain specific performance of court-ordered support payments so as to avoid the payee's being added to assistance rolls in the first place. Minimizing unnecessary cost is a legitimate governmental goal. But incarcerating Mr. Grullon did not advance that goal. His sentence did not result in any child support payment to Ms. Polenco and created an expense for the Commonwealth. In its 2019 annual report, the Essex County Sheriff's Office estimated an average cost per day of $126 for each prisoner.

That unproductive result would be the same in any case in which the defendant is unable to pay the purge amount. Fulfillment of the government's interest depends upon a correct determination of the

obligor's ability to pay, and therefore this interest is best satisfied by a procedure that assures an accurate court decision and eschews the asymmetry of representation that results when unrepresented indigents face governmental attorneys in court.

Recognizing that thousands of civil contempt complaints are filed in the Probate and Family Court each year (Fiscal 2019 Probate Court statistics show 14,703 contempt filings) and that the great bulk of civil contempt complaints are resolved without the remedy of incarceration, Amici do not seek appointment of counsel at the beginning of every such proceeding. We suggest instead that the constitutional right to counsel should attach when a realistic risk of incarceration arises in civil contempt hearings in which government lawyers appear. *Cf. Commonwealth v. Patton*, 458 Mass. 119, 125 (2010) (appointment of counsel to be made "whenever imprisonment palpably may result" from proceedings). Amici are informed and believe that it is a widespread practice in the Probate Court to give defendants advance warning when a Judge has decided to seriously contemplate imprisonment as a remedy. At that point, the Judge can continue the proceeding to allow for the appointment and effective assistance of counsel.

In other right to counsel situations, the Court has taken advantage of the flexibility afforded by due process analysis to identify differing stages for appointment of counsel tailored to the particular type of case. Amici are well aware that there are financial and other limits on the availability of appointed counsel. Because our position in this case is limited to cases involving government lawyers, and then only when a realistic risk of contemplated incarceration has arisen, it will not have an impact on the great bulk of these cases.

The ruling requested by Amici will be a modest step toward the ideals of Civil Gideon, toward which Amici continue our efforts on many fronts. Although this brief is limited to cases where government lawyers are involved, Amici recognize that the Probate and Family Court is inundated with self-represented litigants and we intend to continue to work with the Court and the legislature to ameliorate the situation.

The case at bar, however, presents much more than aspirational concerns. Court ordered imprisonment for a debt one cannot pay, at the request of government attorneys in a judicial proceeding at which an indigent defendant had no legal counsel, violates the due process of law guaranteed by our Massachusetts Constitution.

(4) The Court May Wish to Take Further Action in the Exercise of Its Supervisory Powers Over Administration of Justice in the Courts of the Commonwealth.

The Court might wish to take further remedial steps, in the exercise of its supervisory powers over the administration of justice, but such steps should be additional to and not in substitution for a constitutional right to court-appointed counsel for indigent defendants faced with government lawyers and a realistic risk of imprisonment. *See, e.g., ARTICLE: Protecting the Liberty of Indigent Civil Contemnors in the Absence of a Right to Appointed Counsel,* 46 Colum. J.L. & Soc. Probs. 431 (2012). The process and procedures for implementing a right to counsel may benefit from more widespread consideration by affected courts and others impacted by the decision.

Among additional steps the court might consider are changes to rules and forms so that the court form of civil contempt complaint conspicuously states that defendant's ability to pay will be an issue in the contempt proceeding. As has been done in other particularly important matters, Judges might be required, prior to any order of incarceration, to make specific findings on the record sufficient to support a conclusion of willful disobedience and ability to pay. Written standards might be developed for establishing realistic purge

amounts. The Court might also consider tasking a working group to evaluate current practices and make recommendations for improvements, beginning with collection of adequate data from the courts and other involved governmental agencies, which shall be made publicly available.

CONCLUSION

The Court should hold that in civil contempt proceedings in which attorneys for the Commonwealth of Massachusetts Department of Revenue Child Support Enforcement Division have appeared, indigent defendants facing a realistic risk of incarceration for contempt for nonpayment of child support are constitutionally entitled to the effective assistance of court-appointed counsel prior to imprisonment. The Court should make such further rulings and orders as it deems meet and just pursuant to its Equity Jurisdiction and its general powers over the administration of justice in the courts of the Commonwealth.

For the foregoing reasons, the order of incarceration of Mr. Grullon should be reversed.

Respectfully submitted,

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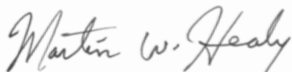
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ADDENDUM

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M.G.L.A. 215 § 34

§ 34. Enforcement of orders, sentences, judgments and decrees; punishing contempts; effect of arrearages on support orders; unemployment of defendant

Probate courts shall have like power and authority for enforcing orders, sentences, judgments and decrees made or pronounced in the exercise of any jurisdiction vested in them, and for punishing contempts of such orders, sentences, judgments and decrees and other contempts of their authority, as are vested for such or similar purposes in the supreme judicial or superior court in relation to an action in which equitable relief is sought pending therein. A judge of the probate court sentencing a person to jail or ordering a person to participate in a program of community service for failure to obey an order or judgment of the court relative to the support of his wife or minor children may order that the sentence be served or that the community service be performed during such hours as will permit such person to continue his employment. The failure of a defendant to comply with an order of the court for the support of spouse or minor children at a time when the defendant possessed the ability to make the support payment as ordered by the court may be punished as a criminal contempt. At the hearing of a complaint for civil contempt, the defendant shall have the burden of proving his or her inability to comply with the pre-existing order or judgment of which the complaint alleges violation.

When a judge of the probate court finds that a defendant is in civil contempt for failure to obey any order or judgment of the court relative to

support of a spouse or child, the judge shall issue an order for the defendant to do one or more of the following:

(1) serve a sentence in jail; provided, however, that such sentence shall be stayed if the defendant purges himself of the contempt by taking such action as may be specified in the order, including one or more of the actions specified in clauses (2) to (6), inclusive;

(2) pay the full amount due under the order or judgment for support;

(3) make regular payments of current support and an additional specified amount towards arrears, pursuant to a payment schedule ordered by the court that requires payment of not less than the amount required under section 12 of chapter 119A and that meets all other requirements of said section 12 of said chapter 119A;

(4) actively seek paid employment and report at regular intervals, as specified in the order, to a probation officer on actions taken to seek employment;

(5) participate in a program of community service, as specified in the order, for up to 40 hours per week and report at regular intervals to a probation officer to present proof of participation in such program; or

(6) participate in an appropriate job readiness or job training program, as specified in the order, and report at regular intervals to a probation officer to present proof of participation in such program.

An order or judgment in a contempt proceeding for payment of an arrearage shall not be contingent on a reduction in the amount of current support payable under an existing order or judgment for support of a spouse, former

spouse or child absent a finding that a substantial change of circumstances has occurred. Neither the existence of an arrearage nor the amount of any arrearage shall constitute a substantial change of circumstances or grounds for modification of an outstanding order or judgment for support.

In addition to any other remedy available pursuant to this section or chapter 119A to enforce an order or judgment for support, if the defendant is unable to comply with an order to make current payments of support, is unemployed and is not disabled, a judge of the probate court shall order such defendant to; (i) actively seek paid employment and report at regular intervals, as specified in the order, to a probation officer on actions taken to seek employment; (ii) to participate in a program of community service for up to 40 hours per week and to report at regular intervals, as specified in the order, to a probation officer to present proof of participation in such program; or (iii) to participate in an appropriate job readiness or job training program and to report at regular intervals, as specified in the order, to a probation officer to present proof of participation in such program.

BBA Civil Gideon Report

(www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf)

NEWS

FOR IMMEDIATE RELEASE:
May 24, 2007

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MBA HOUSE OF DELEGATES UNANIMOUSLY SUPPORTS PRINCIPLE OF CIVIL *GIDEON*

SPRINGFIELD, Mass. — The Massachusetts Bar Association House of Delegates (HOD) voted unanimously yesterday to support a civil *Gideon* resolution, urging the state to provide legal counsel to low income people in civil matters involving basic human needs.

The discussion surrounding civil *Gideon* highlighted the May 23 meeting, held in Springfield at the MassMutual Center, at which MBA President Mark Mason symbolically passed the gavel to President-elect David W. White Jr., whose term officially begins Sept. 1, 2007.

Michael S. Greco, past president of both the American Bar Association and the Massachusetts Bar Association, called on the MBA to endorse ABA Resolution 112A. The resolution calls for the government to provide free legal counsel to the indigent in a limited number of civil cases involving basic human needs such as shelter, sustenance, safety, health and child custody.

"It is shameful that in the most bountiful country in the world, that 80 percent of the legal needs of the poorest Americans go unmet year after year," Greco told the group, advocating that the right to counsel should not be limited to criminal cases.

"Imprisonment is not just being behind bars," said Greco. "It can be living in poverty day after day. This issue is the defining issue for the legal profession, for the organized bar, for society."

The resolution does not address how the initiative should be funded or implemented. Mason said it's an important first step in providing equal justice in civil cases. "This was truly history in the making," said Mason. "We have much to be proud of."

Incorporated in 1911, the Massachusetts Bar Association is a non-profit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence and respect for the law. The MBA represents a diverse group of attorneys, judges and legal professionals across the commonwealth.

– MBA –

RULE 17 COMPLIANCE CERTIFICATION

Pursuant to Rule 17(c) of the Massachusetts Rules of Appellate Procedure, undersigned counsel hereby certifies that this brief complies with the rules of court that pertain to filing amicus briefs. Amici complied with Rule 20(a)(3)(E) by using the Microsoft Office (2016) Word program and Times New Roman font in size 14.

According to that program, the number of non-excluded words is 5,445.

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Thomas J. Carey, Jr.

CERTIFICATE OF SERVICE

I hereby certify under the penalties of perjury that I today served this amicus brief by emailing a pdf copy to counsel of record, and will upon receipt from the printer mail two printed copies, first class, postage prepaid, to counsel for each party.

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Thomas J. Carey, Jr.