THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 94-789

1995 TERM

MAY SESSION

PATRICIA SHIEL-FRIEDLINE

v.

DAVID FRIEDLINE

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF APPELLANT/DEFENDANT, DAVID FRIEDLINE

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QUESTIONS PRESENTED

QUESTION 1:

May an indigent defendant, in a civil contempt action for non-payment of child support in which the defendant may be incarcerated, be denied court-appointed legal counsel?

QUESTION 2:

Should the court have inquired into and made a finding upon the defendant's ability to pay prior to issuing an order for his incarceration should he fail to make payment of $261 within 24 hours?

QUESTION 3:

Was defendant's child support arrearage of $261 determined accurately?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Mr. Friedline and Patricia Shiel were divorced. At the time this case arose, Mr. Friedline was a child support obligor for his two minor children, and had a support obligation of $64 per week. (Mr. Friedline now has custody of one of the children, and his support obligation has been modified accordingly).

Upon a filling of a support violation and motion for contempt by the Office of Child Support, a hearing was held on October 6, 1994. At that hearing, it was alleged that Mr. Friedline had a child support arrearage. On the same day, the Court ordered the following:

> "After hearing, the Court finds the defendant in contempt for failing to timely make child support payments. Current arrearage is $261. Defendant is to pay this amount in full . . . by 1:00 p.m. on October 7, 1994 or a capias shall issue for his arrest. . . ."

Prior to the hearing, during it, and in his motion to reconsider, Mr. Friedline requested appointment of counsel. His motions were repeatedly denied.

During the hearing, Mr. Friedline attempted to establish his inability to pay. The Court took no cognizance of his argument.

In his motion to reconsider, Mr. Friedline attempted to establish that the amount of his arrearage was less than the Court's finding. The Court took no cognizance of his argument.

This appeal followed.

SUMMARY OF ARGUMENT

The Defendant argues that U.S. Supreme Court cases create a presumption in favor of a right to an attorney in civil cases where the defendant faces a deprivation of his liberty. He then argues that New Hampshire law in this area is outdated, and that due to changes in statutory and constitutional law, should be re-examined. The Defendant points out that other jurisdictions have recognized these changes, and have altered their law accordingly.

The Defendant argues that a consideration of the elements in a due process analysis -- balancing the state's relatively trivial interests against the Defendant's relatively profound interests, and taking into account the benefits of appointed counsel -- compels the right to an attorney.

The Defendant then argues that even under existing law his case was complex enough to warrant an appointed attorney, and that the Court erred in not making a determination of that issue.

The Defendant argues that the distinction between civil and criminal contempt is not relevant to the jailed contemnor, and that therefore cases where a person faces incarceration, regardless of the label, should be measured against the standards for appointment of counsel generally reserved for criminal cases.

The Defendant, citing scholars in the area, proposes less restrictive sanctions than incarceration that may be imposed without an attorney.

Finally, the Defendant argues that the Court's finding regarding the amount of his arrearage was in error, because there

was little basis on which to make a decision, and because the equally credible bases were, at best, conflicting.

ARGUMENT

I. Right to Appointed Counsel Extended to Civil Cases

The United States Supreme Court recognized in 1963 that the Sixth amendment to the United States constitution requires appointment of counsel to indigent defendants in state felony trials.[1] Gideon v. Wainwright, 372 U.S. 335 (1963). Gideon was expanded by Argersinger v. Hamlin, 407 U.S. 25 (1972), in which the Supreme Court found that a defendant's 6th amendment right attaches as a matter of law in any criminal proceeding where a defendant may be imprisoned.

In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court refused to extend to civil proceedings the "per se rule" it had enunciated in Gideon and Argersinger, which required appointed counsel as a matter of due process whenever the possibility of incarceration exists. See also, e.g., Vitek v. Jones, 445 U.S. 480 (1980); In re Gault, 387 U.S. 1 (1967). Instead, the Court allowed a case-by-case approach dependent upon the facts of the case and type of proceeding. The Court reiterated this view in Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981) reh'g denied, 453 U.S. 927. However, in Lassiter, the Court made clear

[1]There is a preliminary question not disputed here: whether a person has a right to have an attorney present, regardless of whether that attorney appointed or privately paid. See Re Oliver, 333 U.S. 257 (1948); Re Neff, 20 Ohio App. 2d 213, 254 N.E.2d 25 (1969); See *Right to Counsel in Contempt Proceedings*, 52 A.L.R. 3d 1002.

that when there is the possibility of incarceration, the right to appointed counsel is a presumption:

> "[T]he 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. It is against this presumption that all the other elements in the due process decision must be measured."

Lassiter, 452 U.S. at 26-27.

Thus, the cases suggest that there are two varieties of the right to an attorney. See Robert Monk, The Indigent Defendant's right to Court Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support, 50 U. CHI. L. REV. 326, 337-44 (1983). In some proceedings, a person has a per se right to an appointed attorney. See e.g., Argersinger v. Hamlin, 407 U.S. 25 (1972) (criminal proceedings where possibility of incarceration exists); In re Gault, 387 U.S. 1 (1967) (juvenile proceedings even though technically labeled civil); Vitek v. Jones, 445 U.S. 480 (transfer of prisoner to mental institution). In other proceedings, courts may undertake a case-by-case evaluation to determine whether the right attaches with a presumption of counsel when there is a possibility of incarceration. See e.g., Lassiter, 452 U.S. 18.

The "elements in the due process decision" to which Lassiter refers, 452 U.S. at 27, and which must be evaluated to determine whether a right to an appointed attorney exists, are the three

elements contained in Mathews v. Eldridge:

> "[f]irst 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 interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail."

Mathews v. Eldridge, 424 U.S. 319, 335 (1976); see Right to Counsel in Civil Contempt, 50 U. CHI. L. REV. at 337-44.

The New Hampshire Supreme Court has employed a similar analysis growing out of the New Hampshire Constitution. The right to an attorney is per se in some proceedings. State v. Scarborough, 124 N.H. 363, 368 (1983) (criminal case where defendant faces imprisonment); State v. Clough, 115 N.H. 7 (1975) (same); see also RSA 169-B:12, I (right to attorney in juvenile delinquency proceedings, deemed civil). In others, the court may make a case-by-case determination. State v. Cook, 125 N.H. 452 (1984) (habitual offender proceedings); Duval v. Duval, 114 N.H. 422 (1974) (civil contempt). The determination uses the three due process elements. State v. Cook, supra; Duval, supra.

Before reaching the due process issue in detail, however, this brief will digress to argue that previously decided law in this area should be re-examined.

II. Duval v. Duval Should be Re-Examined

Using the due process analysis, the New Hampshire Supreme Court has before reached and decided the precise issue now on appeal. In Duval v. Duval, 114 N.H. 422 (1974), the court was faced with a divorced man who had run up a support arrearage of $5,840 (equal to $19,648 in 1994, a vastly larger arrearage than the $261 at issue here)[2]. Like the Defendant here, Henry Duval was found in contempt and threatened with incarceration if the arrearage was not paid. The Court first determined that because the contempt proceedings were civil rather than criminal, the Sixth Amendment did not apply. Likewise, construing the word "offense" in the New Hampshire Constitution, Pt. I, Art. 15, to mean public rather than private wrongs, the Court found also that the State constitution does not create a right to an appointed attorney such as it does in the criminal context. Finally, this Court determined that lower courts must examine support contempt proceedings on a case-by-case basis. Counsel should be appointed to provide a "competent presentation" of the case if the issues are of "sufficient complexity" or "could baffle and confuse" a lay-person. Id., 114 N.H. at 426.

A. The Duval Rule is No Longer Sufficient Because the

[2]Calculated using the average Consumer Price Index for the first nine months of 1973 and the average CPI for the first nine months of 1994.

Legal Landscape has Changed

At the time Henry Duval was found in contempt in September 1973, the only known sanction for failure to pay child support was of court. This has changed. Beyond contempt, the sanctions available to a court upon a finding of unpaid child support now include:

- Interception of federal tax refunds;
- Garnishment of social security benefits;
- Garnishment of unemployment compensation benefits;
- Garnishment of wages, RSA 161-C:121; RSA 458-B;
- Liens against delinquent parent's property, RSA 161-C:10;
- Required reporting to consumer reporting agencies, RSA 161-C:26-a;
- Reporting to the federal parent locator service.

See generally Douglas & Douglas, 3A NEW HAMPSHIRE PRACTICE: FAMILY LAW 2ND ED., § 22.09. The State and Federal government will probably impose further sanctions. A bill likely soon to become law would revoke a person's driver's license, or any state-issued license, for failure to pay child support.[3] A Wisconsin statute prevented people who had not paid child support from obtaining a marriage license. Zablocki v. Redhail, 434 U.S. 374 (1978) (statute found

[3] House Bill 551, which passed the New Hampshire House in 1995 is scheduled to be voted on by the New Hampshire Senate in May, 1995. The Governor has expressed support.

unconstitutional). News coverage of, and public attention to, the "dead-beat dad" issue will probably bring about other innovative sanctions as well.

As a policy matter, these sanctions may be wise. However, for the purposes of this case, the advent of these sanctions since Duval was decided suggests that Duval is now outdated. A "competent presentation," Duval, 114 N.H. at 426, of a defendant's case in child support hearing should include evidence and arguments, not necessary in Duval's time to prevent the sanctions above listed. Such litigation might involve:

- Constitutional and federal privacy rights, and state and federal consumer protection statutes to prevent interception of tax refunds, garnishment of wages and reporting to consumer credit agency or to the federal government;

- Constitutional and other property rights issues, due process rights, constitutional entitlement, and litigation on mitigation or competing harms to prevent garnishment of social security, unemployment compensation, and wages;

- Constitutional and other property rights issues, due process rights issues, securities laws, or other statutory lien and contract rights, to prevent liens on property;

- Inability to comply with the court order or other defects in the order of which the defendant is allegedly in contempt;

- Effect of a finding of contempt upon other legal interests of the alleged contemnor, such as child custody arrangements and termination of parental rights proceedings. See Lassiter, 452 U.S. at 27, fn. 3.

These are not simple matters, even for a competent attorney.

Raising these matters, per se, requires counsel.

Not only has the State and Federal government imposed new sanctions since Duval was decided, but the government has enforced these laws with a vigor Henry Duval in 1973 did not know. For example, in a 1984 study of a single county in New Mexico, 131 men were jailed for contempt arising out of their non-payment of child support. Hermann and Donahue, Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings, 14 N.M. L. REV. 275, 277 (1984).

As the sanctions have gotten stiffer, and the government has gotten more diligent in its prosecution, defendants' interests and need for representation has gotten commensurately greater. By providing for heightened prosecution of "dead-beat dads," it has been the stated purpose of the federal and state governments to systematically and schematically increase the interest a supporting parent has in paying child support.[4] Simultaneous

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[4]See e.g. RSA 161-B:1 ("The failure of parents to provide adequate financial support and care for their children is a major cause of financial dependency on this state."); RSA 161-B:2 ("The purpose of this chapter is to provide this state . . . a more effective and efficient way to effect the support of dependent children by the person or persons who, under the law, are primarily responsible for such support and to lighten the heavy burden of the taxpayer . . . ."); RSA 161-C:1 ("Common law and statutory procedures governing the enforcement of support for dependent children by responsible parents have not proven sufficiently effective or efficient to cope with the increasing incidence of financial dependency. It is hereby declared that he common law and statutory remedies pertaining to desertion and nonsupport of dependent children shall be augmented by additional (continued...)

with heightened prosecution comes heightened risks and interests for a person prosecuted. This heightened interest brings with it heightened due process rights, including the right to an attorney.

B. Trends in Other States' Recognition of Right to Attorney in Support Cases

Courts have begun to recognize these heightened due process rights and that the case-by-case determination of whether counsel should be appointed is no longer viable. Thus, there has been a trend moving toward a per se right to an attorney in child support contempt cases.

The question whether due process requires an automatic appointment of counsel for an indigent facing incarceration in a civil contempt proceeding has been reached in seven federal circuits; all have found there is such a right. Hausler, The Right to Appointment of Counsel for the Indigent Civil Contemnor Facing Incarceration for Failure to pay Child Support, 16 CAMPBELL

[4](...continued)
remedies directed to the real and personal property of the responsible parents. In order to render resources more immediately available to meet the needs of dependent children, it is the purpose of this chapter to provide additional remedies for the support of dependent children, which remedies shall be in addition to, and not in lieu of, existing law. It is declared to be the public policy of this state that this chapter be construed and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through welfare programs.").

L. REV. 127, 137, fn. 74 (1994), and cases cited therein. Of the 29 states that have addressed the question, 17 have reached the same conclusion. Two additional states have declared that due process prohibits incarceration for indigent civil contemnors who cannot pay their support. Id. at 138, fn. 76, and cases cited therein; see also In re Harris, 446 P.2d 148 (Cal. 1968); Mastin v. Fellerhoff, 526 F. Supp. 969 (S.D. Oh, W.D. 1981) and Young v. Witworth, 522 F. Supp. 759 (S.D. Oh, W.D. 1981) (defendant in a support case has right to attorney even when proceeding initiated by private party). Only 10 states (including New Hampshire) have decided that due process does not protect indigent civil contemnors. Right to Counsel, 16 CAMPBELL L. REV. at 137-38, fn. 75, and cases cited therein. Only two of these decisions, i.e., Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973) and Otton v. Zaborac, 525 P.2d 537 (Ak. 1974), are as old as Duval and the holdings in both are opposite.

> "Thus, the clear trend of the federal and state case law [has been] to interpret due process to require the appointment of counsel to an indigent civil contemnor facing incarceration in a nonsupport proceedings."

Right to Counsel, 16 CAMPBELL L. REV. at 137 (1994). Compare particularly Jolly v. Wright, 265 S.E.2d 135 (N.C. 1980) with McBride v. McBride, 431 S.E.2d 14 (N.C. 1993) (North Carolina court modified its position from that of Duval to the modern rule) and also compare particularly Sword v. Sword, 249 N.W.2d 88

(Mich. 1976) with Mead v. Batchlor, 460 N.W.2d 493 (Mich. 1990) (Michigan court modified its position from that of Duval to the modern rule).

The trend toward finding a right to an attorney in civil proceedings goes beyond non-support contempt cases. See Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Action, 52 A.L.R. 4th 1063 (civil actions generally); Right of Indigent Parent to Appointed Counsel in Proceedings for Involuntary Termination of Parental Rights, 80 A.L.R. 3d 1141 (trend toward appointment of counsel in termination proceedings); Right of Indigent Defendant in Paternity Suit to have Assistance of Counsel at State Expense, 4 A.L.R. 4th 363 (trend toward appointment of counsel in paternity proceedings); Appointment of Counsel for Indigent Husband or Wife in Action for Divorce or Separation, 85 A.L.R. 3d 983 (in some jurisdictions, attorney appointment of counsel in divorce proceeding if facts of case warrant).

III. Procedural Due Process Requires that the Defendant have an Appointed Attorney

As noted above, the procedural due process determination of whether Mr. Friedline has a constitutional right to an appointed attorney involves a balancing of three factors: 1) the

government's interest in having no attorney appointed; 2) Mr. Friedline's interest that is effected by the State's action; and 3) the likelihood of an erroneous deprivation of Mr. Friedline's interests that might occur without the right to an attorney, and the value that an attorney might bring to the proceeding. See Mathews v. Eldridge, 424 U.S. at 335; Lassiter, 452 U.S. 18 at 27; State v. Cook, 125 N.H. 452 (1984).

A. Due Process: The Government's Interest

The State in its statutes has enunciated several interests in recovering money from financially responsible parents: 1) minimizing taxpayer burden, see RSA 161-B:1 ("The failure of parents to provide adequate financial support and care for their children is a major cause of financial dependency on this state."); RSA 161-B:2 (purpose is to "lighten the heavy burden of the taxpayer . . . ."); 2) augmenting enforcement of support orders, see RSA 161-C:1 ("Common law and statutory procedures governing the enforcement of support for dependent children by responsible parents have not proven sufficiently effective or efficient to cope with the increasing incidence of financial dependency); 3) meeting the needs of dependent children, see id.; 4) helping abandoned parents, see RSA 161-B:3, I. However, these efforts themselves must be tempered by fiscal interests. See RSA 161-B:3, III (authorizing regulations to limit application for

support enforcement services, which consider income, property, and other resources available to support the child); RSA 161-B:3, IV (authorizing that a fee be changed for support enforcement).

The State also presumably has a fiscal interest in not appointing counsel, see Lassiter, 452 U.S. at 48 (Blackmun, J. dissenting), and an interest in exploiting the expertise which the Division's attorneys have acquired. See id. 452 U.S. at 43.

B. Due Process: Mr. Friedline's Interests Effected by the State's Action

The right Mr. Friedline asserts here is his right to physical liberty -- "our most cherished value," Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Because interference with Mr. Friedline's physical liberty may not be arbitrary, Wolff v. McDonnell, 418 U.S. 539, 558 (1974) or purposeless, Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), the possibility of his incarceration raises Mr. Friedline's due process rights. Mathews v. Eldridge, 424 U.S. at 332; Joint Antifascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-62 (1951) (Frankfurter, J., concurring). In fact, the liberty interest at stake here is greater than termination of parental rights at issue in Lassiter, because actual physical custody is the result. McBride, 431 S.E.2d at 18.

Mr. Friedline's liberty interests also go beyond the

incarceration itself. Stigmas such as injury to reputation, honor, and integrity accompany a jail sentence. Wisconsin v. Constantineau, 400 U.S. 433 (1971) (statute allowing names of alcohol abusers to be posted in liquor store, without notice or hearing of those named, violated due process because "[w]here a person's good name, reputation, honor, or integrity is at state because of what the government is doing to him, [due process is] essential"); Goss v. Lopez, 419 U.S. 565, 574-75 (1975) (injury to students' reputations, honor, and integrity stemming from in-school suspensions sufficient to trigger due process protection of liberty interests).

As noted on page 8 supra, the state has enacted a panoply of sanctions that could effect Mr. Friedline upon a finding of non-payment of child support. Each of these sanctions bring forth for Mr. Friedline an additional liberty interest.

None of these interests are at all effected simply because a non-support contempt proceeding is called "civil." United States v. Sun Kung Kang, 468 F.2d 1368, 1369 (9th Cir. 1972) ("Threat of imprisonment is the coercion that makes a civil contempt proceeding effective. The civil label does not obscure its penal nature.").

C. Due Process: The Likelihood of an Erroneous Deprivation of Mr. Friedline's Interests by not Affording him an Attorney, and the Value of Appointing an Attorney

1. Nature of the Proceeding

The risk of an erroneous deprivation of interests is heightened by erroneous factual determinations and legal conclusions. This is the reason a fair hearing is necessary. In order to have fair hearing, the parties must be able to conduct one. Landon v. Plasencia, 459 U.S. 21 (1982); Parratt v. Taylor, 451 U.S. 527 540 (1981); Mathews v. Eldridge, 424 U.S. at 333; Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Conducting a fair hearing is difficult for the lay-person, thus requiring counsel. Mascolo, Procedural Due Process and the Right to Appointed Counsel in Civil Contempt Proceedings, 5 W. NEW ENG. L. REV. 601 (Spring 1983).

The more formal the hearing, the more the risk of an erroneous decision, and the more an attorney is necessary. If a proceeding is commenced with a summons, conducted according to the rules of evidence, and is adversarial, then the risk is high because a non-attorney probably cannot perform well. See Lassiter, 452 U.S. at 42-43 (Blackmun, J. dissenting). In New Hampshire, a support contempt hearing is commenced with a served violation notice, Douglas & Douglas, 3A NEW HAMPSHIRE PRACTICE: FAMILY LAW 2ND ED., § 22.09 at 138, is probably subject to the rules of evidence, N.H. R. Evid. 1101; and is highly adversarial.

2. Litigating Ability to Pay

The elements of contempt are: 1) a valid court order existed; 2) the defendant had notice and time to comply; 3) the alleged contemnor has the ability to comply; and, 4) the alleged contemnor failed to comply. State v. Wallace, 136 N.H. 267 (1992); State v. Linsky, 117 N.H. 866 (1977); Due Process and the Right to Counsel, 5 W. NEW ENG. L. REV. at 608.

Inability to comply is an affirmative and complete defense to civil contempt. State v. Wallace, 136 N.H. 267 (1992); U.S. v. Rylander, 460 U.S. 752 (1983); Maggio z. Zeitz, 333 U.S. 56, 76 (1948); Fortin v. Commissioner of Mass. Dept of Public Welfare, 692 F.2d 790, 796 (1st Cir. 1982); Houle & Dubose, The Nonsupport Contempt Hearing: Constitutional and Statutory Requirements, 14 N.H. B.J. 165 (Spring 1973); Due Process and the Right to Counsel, 5 W. NEW ENG. L. REV. 601.

The Court, after all, cannot coerce that which is beyond a person's power to perform. Accordingly, incarceration for civil contempt is dependent upon the ability of the person to comply, Shillitani v. U.S., 384 U.S. 364, 371 (1966); see Maggio v. Zeitz, 333 U.S. 56, 76 (1948), and upon the competence of the person to present evidence to the court of his inability to comply. Fathers Behind Bars, 14 N.M. L. REV. at 303-07.

In criminal contempt, there is a burden shifting of the burden of proof.

"[O]nce the defendant introduces evidence regarding

> inability to comply in a criminal contempt proceeding, the burden then shifts to the State to prove beyond a reasonable doubt that the defendant intentionally did not comply."

State v. Wallace, 136 N.H. at 271. However, in civil contempt, there is no such shift. The civil contempt defendant bears the entire burden of showing inability to comply. State ex rel. Britton v. Workman, 346 S.E.2d 562 (Va. 1986). Paradoxically then, the burden for the defendant in civil contempt is greater than the burden in criminal contempt, while the outcome -- incarceration -- is the same.

Despite lofty pronouncements about the defendant holding the "keys to the jail," Town of Nottingham v. Cedar Waters, Inc., 118 N.H. 282, 285 (1978), an indigent civil contemnor has no keys when he is unable to pay. McBride, 431 S.E.2d at 18; Right to Counsel, 16 CAMPBELL L. REV. at 137.

> The 'keys to the prison' argument makes sense when the contemner may satisfy the court by revealing sources or producing subpoenaed evidence.[5] When the contemner needs money to comply with the court order, however, it makes little sense to incarcerate him if he is truly unable to pay, for no amount of coercion will enable him to comply.'

David L. Kern, Due Process in the Civil Nonsupport Proceeding: The Right to Counsel and Alternatives to Incarceration, 61 TEX. L. REV. 291, 300 (1982). Thus, in "these circumstances, it has

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[5]Courts have found a right to an attorney when a person is charged for contempt for failure to produce records. See e.g., U.S. v. Anderson, 553 F.2d 1154, 1155-56 (8th Cir. 1977).

been stated that it is 'absurd to distinguish criminal and civil incarceration; from the prospective of the person incarcerated, the jail is just as bleak no matter which label is used.'" Right to Counsel, 16 CAMPBELL L. REV. at 141, fn. 94 (quoting Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985), cert. denied, 474 U.S. 1061 (1986)).

Because the civil contempt defendant bears such a high burden, and because the consequences of an erroneous finding are so severe, litigating the ability to pay is exactly the type of situation that requires an attorney. McBride, 431 S.E.2d at 19; Right to Counsel, 16 CAMPBELL L. REV. 127.

In the present case, the Defendant attempted to present his inability to pay to the Court. Transcript at 8-14, 22. The Court however, made no finding on his ability to pay, but rather assumed an ability to pay. When the Court fails to make such a finding, a remand is required. Wallace, 136 N.H. at 271; see also McBride, 431 S.E.2d at 15. Had the Defendant been represented by competent counsel, the attorney would have ensured the court made a ruling on this determinative point.

3. Complexity of the Issues

a. Facts of this Case are Complex Enough to Warrant an Appointed Attorney

Even under Duval v. Duval, an alleged non-support contemnor

sometimes has a right to an attorney. Duval, 114 N.H. at 426. The issues in the present case are sufficiently complex to merit an attorney.

As noted, the transcript reveals that Mr. Friedline attempted to litigate his ability to pay. The transcript shows that Mr. Friedline attempted to make his point, but not effectively. His attempt was so ineffective, in fact, that the Court ignored it altogether. While Mr. Friedline managed to put some of his financial records in evidence,[6] he made not a single reference to the information contained in them, nor did he make any effort to testify or present testimony regarding their relevance or significance. Mr. Friedline attempted to tell the Court that he had sporadic and unpredictable income, and that his

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[6]The Merrimack County Superior Court clerk's file shows that the following documents are in possession of the court:

- 1992 federal income tax draft return and calculation sheet;
- Self-made document called "Comments on Patricia's Affidavit & Comparison with Mine";
- Self-made calculation sheets showing visitation days, cost of meals and food;
- Self-made document called "Direct Expenses [sic] for Children," attached to "Scenario 1" and Scenario 3";
- Self-made calendar called "David's Periods of Physical Custody Are in Red" from January through December, unknown year;
- Bill from Concord Hospital regarding Patricia Shiel, dated 11/7/92;
- Pre-printed "Child Support Guidelines Worksheet" form, 3/21/93, filled out by Mr. Friedline, pro se;
- Mr. Friedline's 1993 IRS 1040 form;
- Mr. Friedline's 1994 Income Summary (year-to-date), 10/1/94.

expenses were high. Absent from the record, however, is the simple statement, "I make this much but I spend that much, and therefore am unable to pay."

It is otherwise clear that Mr. Friedline is an intelligent and articulate man. His inability to make this seemingly simple point is compelling evidence that it is not a simple point to make, and that effectively presenting and arguing detailed financial matters is too intricate and complex for even an intelligent lay-person unversed in the ways and methods of court procedure.

Moreover, Mr. Friedline had additional evidence to present to the court. At the end of the hearing, he attempted to address the court, but was disallowed from doing so. Transcript at 24, Notice of Appeal at 24.[7] It is also clear in that exchange, as well as throughout the hearing, that Mr. Friedline provoked the patience of the Court. <u>See</u> <u>Lassiter</u> 452 U.S. at 54 (Blackmun, J. dissenting).

Regardless of the facts of the present case, however, <u>all</u> support contempt cases are too complex for the lay-person. As the list of possible matters of litigation on page 9 demonstrates, there are a multitude of issues that ought to be raised in any support contempt hearing. All of these involve

[7]Mr. Friedline planned to submit evidence of an additional payment which apparently was not recorded by the Division.

complex matters of constitutional, statutory, and common law rights that the ordinary lay-person cannot be expected to know.

b. Peculiar Complexity of Presenting Financial Records

Finally, as with many citizens, Mr. Friedline's financial records are not in as good a shape as they might be. The Office of Child Support purports to keep records of supporting parents' support payments. These records, as would be expected for an agency whose business it is to keep and present such information, are kept in an organized and presentable fashion, thus making them the most credible source of the information, regardless of their accuracy. This leaves Mr. Friedline, and presumably most supporting parents, in the unenviable position of having their most credible financial records in the hands of a legally adverse party. This compounds the unfairness: One party has representation by the state, by an attorney who practices exclusively in this area, and who has possession of all credible records; while the other party is pro se, inexperienced in court procedure, and has disorganized financial information. As a matter of due process, Mr. Friedline should have had an attorney.

The New Mexico study cited above shows the value attorneys bring to support contempt proceedings. About three-quarters of the defendants in that study were unrepresented, and about one-quarter had counsel. Although there were some uncertainties in

the data, the study found that "the contemnor who was unrepresented spent an average of fourteen days in jail while those represented by counsel spent an average of three days in jail." Fathers Behind Bars, 14 N.M. L. REV. at 277. The study also found that "[t]he transcripts of [the unrepresented] cases are particularly significant because they show defendants who are too confused and inarticulate to explain their allegedly contemptuous behavior." Id. at 278-79 (reviewing several case histories at 279-285).

The State has discretion regarding whether to represent the parent who is the recipient of child support, RSA 161-B:3, III; the State is not required to represent all comers. It must be assumed then, that at some point a determination was made by the State to represent, by an attorney, the plaintiff in this matter. Insofar as Ms. Shiel's interests were important enough to warrant the assistance of counsel, there is no reason to believe that the defendant's interests were any different, or less complex. In fact, the interests of the two parties -- a certain sum of money --, from the standpoint of an independent decision-maker, were identical. Thus, at the time the state determined it would represent the plaintiff, the defendant's right to an attorney commensurately attached.

D. Due Process Balancing

The State's interests in minimizing taxpayer burdens, augmenting enforcement of support orders, meeting the needs of dependent children, and helping abandoned parents must be balanced against the Defendant's interests in his physical liberty and other statutory sanctions. Both parties, of course, have an equal interest in an accurate and just decision by the court in any support enforcement action. Lassiter 452 U.S. at 27-28. It seems clear that the State's interests are relatively trivial compared to the Defendant's which are relatively profound.

The value of added procedure -- an appointed attorney -- is to afford the Defendant an opportunity to present a complete defense to contempt; to properly present complex financial information to the court; to litigate rarefied issues of statutory and constitutional law; and most important, to give the Defendant a much lower likelihood of going to jail. Right to Counsel in Civil Contempt, 50 U. CHI. L. REV. at 326.

The value of having an attorney against the Defendant is clear, at least to the State. The State apparently determined that Patricia Shiel, the mother of the children, warranted a state-appointed attorney in the person of the Office of Child Support. Insofar as the State determined that her case is important or complex enough to warrant representation, there is no reason to suppose that the other party, the Defendant, has any

less important or complex a case.

"Indeed, the State here has prescribed virtually all the attributes of a formal trial as befits the severity of the loss at stake in the . . . decision -- every attribute, that is, except counsel of the defendant . . . ." Lassiter 452 U.S. at 44 (Blackmun, J. dissenting).

> "The assistance of counsel can be crucial to the outcome of a contempt hearing. . . . [T]he defendant [is] brought into court on a 'show cause' order, requiring him, in practical effect, to shoulder the burden of persuading the court why he should not be found in contempt after his noncompliance has been established. His attorney can conduct a thorough investigation of the defendant's financial condition and obtain the witnesses to support his story. In addition, counsel will be able to research the legal issues involved in the case, and to bring to his client's cause professional expertise in the procedural and substantive complexities of the law. Thus, at the hearing, counsel will be able to marshal witnesses and offer evidence supportive of the defendant's position and to present a coherent and credible defense in behalf of his client. Accordingly, the presence of counsel will serve to reduce the potential for erroneous deprivation of the defendant's physical liberty, a function also served by the presence of counsel in criminal cases, and to affect significantly the outcome of the proceeding. Finally, in the event of a finding of contempt, counsel may be able to work out a payment plan, or a schedule of payments, that will be sufficiently satisfactory to the court to keep the defendant out of prison."

Due Process and the Right to Counsel, 5 W. NEW ENG. L. REV. at 622-23. See also Bruno, The Right to Counsel in Civil Contempt Cases, 16 N.H. B.J. 126 (1974).

IV. The Court Erred in Not Conducting a Duval Hearing

The Court erred in not providing Mr. Friedline with a Duval hearing regarding the complexity of his case. Duval requires that the Court inquire into the complexity of the matter and make a determination whether counsel is required. The law simply does not allow the court clerk to automatically deny counsel as occurred here. Duval, 114 N.H. at 426-27.

This failure was in the face of a concerted effort by Mr. Friedline to have the court make a finding. The transcript reveals that before beginning to explain his side of the case to the Court, the following exchange took place:

> "MR. FRIEDLINE: Your Honor, first I would like to make a note that I made a request with the clerk that I be provided legal counsel in this case.
>
> THE COURT: All right. Well that's denied. Okay. Go ahead.
>
> MR. FRIEDLINE: But I made a point of quoting a ruling of the US Supreme court in Lassiter v. State of North Carolina [sic], which the Supreme Court of the United states said that at any hearing in which you're [sic] physical liberty is in jeopardy, that the Court must appoint legal counsel if the defendant cannot afford it and I made that request. I think the court or the clerks denied it at their level without even submitting it to the Court[8] and I would like you to take note that my request remains in effect.
>
> THE COURT: Well, you're not entitled to counsel. This is a marital case and your request is denied."

Transcript at 6.

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[8]Clerk's notice regarding request for counsel, Notice of Appeal at 15.

The failure of the Court to make a Duval finding is apparently common.

> "The survey of cases in Bernalillo County [New Mexico] did not reveal a single instance in which a [Duval] inquiry was held or counsel was assigned. Had the mandated procedures been followed, and [Duval] inquiries been held, it may be that all indigent pro se defendants would have received counsel because of the confusion and complexity surrounding [their cases]."

Fathers Behind Bars, 14 N.M. L. REV. at 303.

Unlike many defendants, as demonstrated in the New Mexico study, Mr. Friedline was articulate and even was prepared with copies of a United States Supreme Court case, which he gave to the State and to the Court. Ironically, the holding of the case he presented, Lassiter, is nearly identical to that of Duval -- the Court must make a case-by-case determination of whether counsel is required[9]. Even with this level of preparation, the Court refused to make a finding on the need for representation, even though New Hampshire law requires such a finding.

From this case, as well as those in New Mexico, it is apparent that the case-by-case determination of the need for counsel does not work, on its face. A per se rule that counsel be automatically appointed in child support cases is the only workable alternative.

[9]An important difference between the two cases, however, is that Lassiter recognizes a presumption of a right to an attorney.

V. The Right to Counsel in the 6th Amendment to the United States Constitution, and Part I, Article 15 of the New Hampshire Constitution Applies to Civil Contempt

It is glaringly apparent to an incarcerated contemnor that he is incarcerated, regardless of whether the law calls his jail a civil jail or a criminal jail. Because the distinction is irrelevant, the law should recognize it as irrelevant. Right to Counsel in Civil Contempt, 50 U. CHI. L. REV. 326. Courts have acknowledged this and found a right to counsel in contempt cases because they saw no constitutional difference between civil and criminal incarceration. Otton v. Zaborac, 525 P.2d 537, 539-40 (Ak. 1974); Tetro v. Tetro, 86 Wash. 2d 252, 254-55, 544 P.2d 17, 19-20 (1975) (en banc).

In construing the New Hampshire Constitution, this Court has determined that the word "offense" in Part I, Article 15 "refers to public; not private wrongs." Duval, 114 N.H. at 426 (citing Jour. N.H. Const. Conv. 177-82 (1964)). Since the time Duval was decided, there have been many societal and governmental changes. There has been a vast expansion in sanctions enacted by the legislature purporting to act for the public benefit, there has been the establishment of a public agency that exists to do nothing except collect child support, and the legislature has clearly enunciated its purpose to provide for the prosecution of people in Mr. Friedline's situation explicitly for the purpose of protecting the public taxpayer's burden. Thus, while the failure

to pay support could once be considered a "private wrong" it is now a public wrong.

Accordingly, the provisions of Article 15, including the right to an attorney, apply to Mr. Friedline.

VI. There are Constitutional and Less Restrictive Alternatives to Incarceration

While courts "must appoint counsel for [indigent contempt] defendants if they wish to preserve the option of confinement," Right to Counsel in Civil Contempt, 50 U. CHI. L. REV. at 352, this Court need not fear a new mandate on the public purse; there are less restrictive alternatives. Mr. Friedline is not here arguing that an attorney must be appointed in every case; he is arguing only that an attorney be appointed when the defendant faces incarceration. Thus, the State could constitutionally impose many types of sanctions upon the Defendant, short of incarceration, without an attorney present.

New Hampshire has, as many states have, enacted a number of sanctions, listed above. Any of these, including garnishment, wage assignment, liens on property, state tax refund set-offs, security or bond requirement, and criminal non-support laws are less restrictive alternatives. Due Process in the Civil Nonsupport Proceeding, 61 TEX. L. REV. at 309-318 (providing a detailed assessment effectiveness of these less restrictive alternatives, and proposing a scheme for constitutional

enforcement of them). By deciding in favor of Mr. Friedline in this case, the Court would not be undermining child support enforcement. New Hampshire already has in place, by statute, many of the most effective, and constitutional, support enforcement mechanisms.

VII. The Court Erred in Finding that Defendant had an Arrearage of $261

At the October 6, 1994 hearing on Mr. Friedline's support arrearage, the State alleged that the arrearage was in the amount of $261. Transcript at 2. In its pleadings, the State alleged that the arrearage was in the amount of $208. Notice of Appeal at 19. In Mr. Friedline's motion to reconsider, he admitted an arrearage, but argued that it was less. Notice of Appeal at 24.

The Office of Child Support's monthly statement reveals still a different amount. Appendix to Notice of Appeal at 56. It shows that Mr. Friedline made a payment on October 5, 1994, the day before the Court's hearing and order. It shows that Mr. Friedline's arrearage was $167. The Office of Child Support admitted that Mr. Friedline had made a payment on October 3, three days before the hearing. Notice of Appeal at 3. The Office of Child Support made no further mention of this payment, and the Court did not enquire. Thus, the exact amount of the arrearage was either indeterminate, or not before the Court.

It is of course understandable that the Office of Child

Support's bookkeeping system creates a delay. However, at the October 6 hearing, the Superior Court, and apparently the Office of Child Support, had no idea whether Mr. Friedline had a arrearage as it claimed; or whether Mr. Friedline had a possible vast credit due to, say, a recent overpayment.

In any case, it is clear that the Court's finding of a $261 arrearage was in error, that the Office of Child Support knew it was in error, and that the Court and the Office of Child Support erred in failing to correct that error. Accordingly, the case should be remanded for a finding of fact. See Duval.

CONCLUSION

Based on the forgoing, Mr. Friedline requests this Honorable Court to:

A. Remand for a finding of fact on the issue of the amount of Mr. Friedline's arrearage;

and either

B. Reverse the Court's order because upon seeking incarceration in this support contempt proceeding, the defendant had a right to appointed counsel;

or in the alternative,

C. Remand for failure to conduct a Duval hearing regarding the need for an attorney in this case;

or,

D. Remand for failure to make a finding regarding the Defendant's ability to pay his arrearage.

Respectfully submitted,
David Friedline
By his Attorney

Dated: December 27, 2000

____
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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Mr. Friedline requests that he be allowed 15 minutes for oral argument.

I hereby certify on this 27th day of December 2000, a copy of the foregoing is being forwarded to Bill McCallum, Assistant Attorney General.

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