



An Additional Recommendation from the Constitution Project's National Right to Counsel Committee Regarding Counsel in Civil Contempt Proceedings

To be added to the existing recommendations in  
*Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*

Approved by the Committee on June 28, 2010

**Recommendation 23: Except in direct summary contempt proceedings, states should ensure that, in the absence of a valid waiver of counsel, quality representation is provided to all persons unable to afford counsel in proceedings that result in a loss of liberty regardless of whether the proceeding is denominated civil or criminal in nature.**

The United States Supreme Court has held that in criminal cases the Sixth Amendment requires that, "absent a knowing and intelligent waiver [of counsel], no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Following *Argersinger*, the Supreme Court emphasized that actual imprisonment is what triggers the right to counsel. In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court held that the Sixth Amendment is not violated when a defendant faces possible imprisonment but is only fined. "[W]e believe that the central premise of *Argersinger* – that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointed counsel." *Id.* at 373.

Despite the Supreme Court's right to counsel decisions in the criminal and juvenile areas, a minority of state courts – including South Carolina, Georgia, Florida, Maine and Ohio – have determined that indigent persons may be incarcerated arising from certain non-criminal proceedings during which persons are not offered the opportunity to be represented by counsel. For example, in the states listed, persons may be incarcerated after civil contempt proceedings in family court for failing to pay court-ordered child support. These states have created *de facto* "debtor's prisons" in which individuals too poor to pay their fines or court-ordered obligations are incarcerated based on their inability to pay, without being afforded the opportunity to be represented by counsel. While theoretically these incarcerated individuals "hold the keys to jailhouse door" by paying their fines or obligations, in reality, they are too poor to do so, and thus their incarceration violates the central teaching of the Court's right to counsel decisions.

The National Right to Counsel Committee believes the relevant question is whether indigent persons suffer a loss of liberty without being afforded the opportunity to be represented by counsel, *not* whether the state labels the proceeding "civil" or "criminal." Fundamental fairness dictates that indigent individuals not be imprisoned without the assistance of counsel in proceedings resulting in their incarceration. States should, therefore, absent a knowing and intelligent waiver of counsel, appoint well-qualified lawyers to represent indigent persons during judicial proceedings, including civil contempt hearings, which result in persons being incarcerated, with the exception of direct summary contempt proceedings.