

IN THE OHIO SUPREME COURT

Michael Liming, :
 :
 Plaintiff-Appellant, : Case Nos. 2011-1170
 : 2011-1985
 vs. :
 : On appeal from the Athens
 : County Court of Appeals
 Denday Damos, :
 : Fourth Appellate District
 : Case No. 10 CA 39
 Defendant-Appellee. :

MERIT BRIEF OF PLAINTIFF-APPELLANT MICHAEL LIMING

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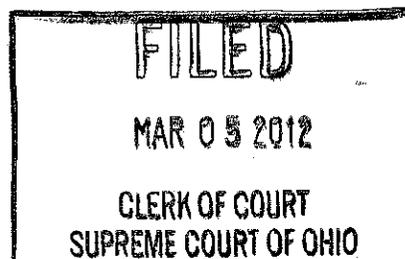


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STATEMENT OF THE CASE AND FACTS

The issue in this case is whether a person may be sent to jail if he is not represented by counsel at the conclusion of contempt hearing. The Athens County Court of Common Pleas held Defendant-Appellant Michael Liming in contempt because he could not satisfy his child support obligations, and it imposed an unconditional jail sentence upon him. The underlying facts are from an unusually complicated divorce action. And in June 2010, when Mr. Liming *tried* to unravel the relevant facts and provide what he thought might be defenses to the court, he was forced to do so without counsel.

Denday Damos and Michael Liming were married in 1993. Two children were born during their marriage. In 2001, Mr. Liming filed for divorce. Dec. 19, 2001 Complaint for Divorce, ¶ 2. Before the divorce was final, in April 2002, the Athens County Child Support Enforcement Agency ("CSEA") filed a motion asking the court to order Mr. Liming to pay child support. Apr. 12, 2002 Mot. for Support and/or Other Appropriate Relief. On that same day, the court granted the Athens County Department of Job and Family Services' motion to intervene because Mr. Liming's children were receiving Aid for Dependent Children ("ADC") from the State of Ohio. Apr. 12, 2002 Mot. and Order to Intervene; Apr. 12, 2002 Order. In July, CSEA withdrew its motion because the children stopped receiving ADC support. July 1, 2002 Entry and Order, ¶ 4. Ms. Damos did not independently seek child support, and a child

support order was not put into place. Moreover, Mr. Liming and Ms. Damos were sharing their parenting responsibilities as set forth by the court's temporary orders.

In November 2002, Mr. Liming filed a Chapter 13 bankruptcy petition in the United States District Court for the Southern District of Ohio. July 21, 2003 Notice Directly to the Judge of the Filing of Bankruptcy and the Existence of a Stay; *In re Liming*, Case No. 2:02-bk-65198 (S.D. Ohio). In September 2003, the state trial court ordered Mr. Liming to pay \$374.96 per month as a statutory child support award. Sept. 8, 2003 Magistrate's Modified Temporary Orders; Journal Entry, p. 3. But that obligation was stayed pending the bankruptcy proceeding. Aug. 20, 2004, Stipulations Regarding Divorce, Property, and Issues, ¶ 8.

In January 2004, the United States District Court lifted the automatic stay and said that it would allow Mr. Liming and Ms. Damos to "resolve support of [the] parties." *In re Liming*, Case No. 2:02-bk-65198 (S.D. Ohio), Jan. 6, 2010 Order Granting Relief from Automatic Stay (doc. 42). A decision by the state magistrate ruled that "none of [Mr. Liming]'s income could be taken for the purpose" of paying child support. Sept. 27, 2004 Magistrate's Proposed Decision, ¶ 13.¹

In January 2005, the trial court issued a final decree of divorce. Jan. 19, 2005 Decision on Objections; Judgment Entry (Decree of Divorce). Ms. Damos was named as the children's legal custodian. *Id.* at p. 2. The decree affirmed the downward departure

¹ That decision was adopted in pertinent part when the court issued the final decree of divorce that ruled on the parties' objections. Jan. 19, 2005 Decision on Objections; Judgment Entry (Decree of Divorce).

in Mr. Liming's statutory child support obligation, pending conclusion of the bankruptcy proceeding. *Id.* at p. 4-5. Thus, when the marriage was terminated, Mr. Liming still did not have a child support obligation.

In June 2006, Mr. Liming voluntarily dismissed his bankruptcy petition, but he immediately refiled. Dec. 28, 2006 Notice of Status of Plaintiff's Bankruptcy Case. Then, in August 2006, the action was dismissed for technical reasons. *Id.* Mr. Liming moved to reinstate the petition, and in December 2006, his petition for bankruptcy was reinstated. *In re Liming*, Case No. 2:06-bk-53170 (S.D. Ohio). In February 2007, the case was again dismissed. *In re Liming*, Case No. 2:06-bk-53170 (S.D. Ohio), Feb. 16, 2007 Order Denying Confirmation and Dismissing Case (doc. 46). In May 2007, Mr. Liming, again, refiled. *In re Liming*, Case No. 2:07-bk-53949 (S.D. Ohio), June 5, 2007 Order Granting the Debtor's Mot. to Invoke Automatic Stay in Case Filed Within One Year After Dismissal of Two Prior Bankruptcy Cases (doc. 16).

At the same time, in April 2007, CSEA asked the state court to order Mr. Liming to pay child support. Apr. 30, 2007 Mot. for Modification. In June 2007, the United States District Court ruled that Ms. Damos could "seek relief in State Court so as to prosecute all issues associated with the determination and collection of child support." June 5, 2007 Order Granting the Debtor's Mot. to Invoke Automatic Stay in Case Filed Within One Year After Dismissal of Two Prior Bankruptcy Cases (doc. 16). The state court ordered Mr. Liming to pay \$376.99 per month in child support plus any processing fee. Oct. 29, 2007 Magistrate's Decision, p. 8-9. The court backdated the

order so that it became effective on June 5, 2007. Therefore, as of the date that Mr. Liming was first ordered to pay child support, he was already in arrears by more than \$1,884.95. *Id.* He was ordered to pay \$75.40 plus the processing fee each month towards the arrearage. *Id.* at p. 9; July 28, 2010 Judgment Entry on Mot. to Impose. Mr. Liming did not object, and in January 2008, the magistrate's decision was adopted. Jan. 17, 2008 Entry Adopting Magistrate's Decision.

In March 2008, his bankruptcy was converted from a Chapter 13 bankruptcy into a Chapter 7 bankruptcy. *In re Liming*, Case No. 2:07-bk-53949 (S.D. Ohio), Mar. 6, 2008 Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors & Deadlines (doc. 50). Mr. Liming's debts were discharged in August 2008. *In re Liming*, Case No. 2:07-bk-53949 (S.D. Ohio), Aug. 20, 2008, Discharge of Debtor (doc. 77).

In July 2008, CSEA filed a motion requesting that Mr. Liming be held in contempt of court for failing to pay the full amount of the child support award each month and for failing to report changes in his employment status. July 22, 2008 Mot. for Contempt. While that motion was pending, in September 2008, CSEA filed a second motion asking that Mr. Liming be held in contempt of court. Sept. 11, 2008 Mot. for Contempt. That motion alleged that Mr. Liming had not complied with the court's order directing him to participate with the Seek Employment Program. *Id.*

The court scheduled a show cause hearing for both contempt motions. Sept. 11, 2008 Summons and Magistrate's Order; July 22, 2008 Summons and Magistrate's Order. The summons stated that Mr. Liming had the right to a public defender if he was

indigent. Sept. 11, 2008 Summons and Magistrate's Order; July 22, 2008 Summons and Magistrate's Order.

In October 2008, the magistrate held a hearing on CSEA's contempt motions. Oct. 15, 2008 Magistrate's Decision. Mr. Liming appeared at the hearing and was represented by appointed counsel. See June 14, 2010 Hearing Tr. 5. At the conclusion of the hearing, the magistrate recommended that Mr. Liming be held in contempt of court and sentenced to thirty days in jail. But the magistrate also recommended that the sentence be suspended so that Mr. Liming could have a chance to purge the contempt. Oct. 15, 2008 Magistrate's Decision. No objections were filed, and the decision was adopted. Nov. 12, 2008 Entry Adopting Magistrate's Decision. The thirty-day jail sentence was suspended, so long as Mr. Liming complied with the following purge conditions for one year:

- A. Michael Liming shall pay his full monthly current support obligation of \$376.99, plus processing fee, every month.
- B. Michael Liming shall pay \$75.40, plus processing fee, towards arrears every month.
- C. Michael Liming shall make a full payment of \$461.44, inclusive of processing fee, within thirty (30) days of an entry adopting the Magistrate's Decision.
- D. If unemployed, Michael Liming shall immediately contact the seek work coordinator and fully cooperate with the program.
- E. Michael Liming shall make timely monthly payments.
- F. Michael Liming shall report all address and employment changes to the ACCSEA.

Id.

Mr. Liming made his first child support payment in November 2008. June 14, 2010 Hearing Tr. 12; July 28, 2010 Judgment Entry on Mot. to Impose, p. 3. In light of Mr. Liming's financial status, the child support award was excessive. While his payment record reflects that he tried to become current, he quickly fell further in arrears. June 14, 2010 Hearing Tr. 11. He made payments, including on the arrearage, from November 2008 to and through February 2009. He also made payments in April, June, July, September, and November 2009. July 28, 2010 Judgment Entry on Mot. to Impose, p. 3. But he simply could not afford to make payments in March, May, August, October, and December 2009. *Id.*

In September 2009, CSEA wanted Mr. Liming's thirty-day jail sentence imposed because he had not purged the finding of contempt. Sept. 15, 2009 Mot. to Impose Sentence and Notice of Hearing. But at the same time, CSEA also recognized that the financial obligation imposed on Mr. Liming was too burdensome. *See* Dec. 14, 2009 Administrative Review. CSEA eventually moved to reduce the monthly amount of the award. *See id.*; May 27, 2010 Magistrate's Am. Decision; June 16, 2010 Judgment Entry Adopting Magistrate's Decision. Unfortunately, CSEA did not request the reduction until Mr. Liming was substantially behind in the support payments.

In June 2010, three years after the effective date of the initial award, the trial court granted CSEA's motion to reduce Mr. Liming's child support obligation. June 16,

2010 Judgment Entry Adopting Magistrate's Decision. The order was retroactive to January 1, 2010. *Id.* But the modification did not address the arrearage. July 28, 2010 Judgment Entry on Mot. to Impose, p. 2. Consequently, Mr. Liming paid the full amount of the reduced award from January 2010 until May 2010, but he did not make any payments towards the arrearage. June 14, 2010 Hearing Tr. 7.

On June 14, 2010, the court held a hearing on CSEA's motion to impose the suspended-contempt sentence. Attorney Keith Wiens appeared on behalf of CSEA. June 14, 2010 Hearing Tr. 3. Denday Damos was not present. *Id.* Mr. Liming was present but was not represented by counsel. *Id.* at 4.

At the time of the hearing, Mr. Liming was working full-time as a self-employed courier, and he was indigent. *Id.* at 26. At the beginning of the hearing, Mr. Liming asked the court to appoint him counsel, which it refused to do:

MR. LIMING: Okay. Thank you your honor. Again I am requesting that a public defender be appointed for me. I do not have the funds to uh, hire an attorney and as you were informed on Friday Mr. McGuire does not represent me in this case.

THE COURT: Okay. I'm going to deny that request. There is no authority to appoint people in civil cases.

MR. LIMING: I understand there is a possibility of jail time in this case though your honor.

THE COURT: That was during your, I assume there was a contempt hearing, wasn't there Mr. W[ie]ns?

Id. at 4-5.

Without providing Mr. Liming any assistance, the court directed CSEA to present its case. Attorney Wiens argued that Mr. Liming had missed several child support payments. *Id.* at 5-6. He called Debbie King, an investigator with Athens County Department of Job and Family Services, as witness. *Id.* at 9. She testified that Mr. Liming was \$7,759.67 in arrears. July 28 Judgment Entry on Mot. to Impose, p. 3. Mr. Liming was given an opportunity to cross-examine CSEA's witness. June 14, 2010 Hearing Tr. at 17. Mr. Liming's cross-examination showed that there was some confusion as to how the child support arrearage was to be handled due to the bankruptcy proceedings.

MR. LIMING: And you are, and you are aware that the bankruptcy court had ordered that you could not collect any amounts

-

MS. KING: Yes.

MR. LIMING: While I was in bankruptcy case.

MS. KING: Yes that's correct.

MR. LIMING: But you never submitted a bill to the bankruptcy court asking you be paid from the proceeds of the bankruptcy proceedings?

MS. KING: Like I sa[id] I think they sent something but I think it was too late when we sent it. It was right toward the end of the bankruptcy though.

Id. at 21.

Indeed, even CSEA's attorney commented on how complicated and confusing this case was because of the bankruptcy:

MR. LIMING: Over this five years, this has been a very confusing matter for everybody.

MR. WIENS: Right.

Id. at 30.

During the hearing, CSEA did not allege that Mr. Liming had the ability to pay \$75.40 each month towards the arrearage or that he had willfully missed support payments. CSEA never asked Mr. Liming for his existing income. It did not elicit any testimony or exhibits showing that Mr. Liming had the ability to pay any amount. And there were no questions regarding any change in Mr. Liming's circumstances that may have affected his financial status. Thus, CSEA did not present any evidence of Mr. Liming's present ability to pay. Indeed, the only testimony relating to Mr. Liming's financial status was his own monologue:

I do not, I do not deny that I owe that arrearage. And as I have stated in the previous hearing your honor I was, I have constantly claimed from the very first time that the child support order was issued that the order, that the amount issue[d] was too much. She impugns [sic] to me income, not my actual income and I had requested many times for a hearing or for a re-adjustment to be made based upon my actual income and it took me until last year, November of 2009 to finally receive that hearing and at that hearing they made the, the agency made the determination that I was correct. That I was being asked to pay too much and that the amount that I should pay should be adjusted downward. And from the point that I was notified in June or I'm sorry in January of this year, of the now corrected amount I have religiously paid that corrected amount.

* * *

Again, basically because I was not given a new amount to pay toward the arrearage and I am still struggling. Now that I have, and I did not receive the new amount for the arrearage until the uh, until the order from you

dated June 3, of 2010 and that amount now says that, that I am suppose[d] to pay towards arrearage of \$56.13. I am not quibbling that amount your honor. I agree with that. I guess in my own defense your honor it just seems that it is unfair to ask someone to pay something that they are totally unable to pay. Uh, I have made every possible attempt to pay the previous amount even though it would sometimes take me two months to make a full payment. Mr. W[ie]ns had testified in the earlier hearing that if I had even made partial payments that we would probably not be here today. I was not aware of that option. I was mistaken in the idea that I had to pay the full amount so it would take me sometimes two months to pay the full amount. Which the record shows that I've pretty much paid every two months the full amount. Since the new amount has been made which is almost \$200.00 a month lower then [sic] the original amount more in line with my income. I have paid it without a quibble and on time.

June 14, 2010 Hearing Tr. 38-39.

At the conclusion of the hearing, Mr. Liming again pleaded for counsel: "I believe I am still entitled to an attorney but you don't want to grant me one. I'm not an attorney your honor I don't know what I should argue or not argue." *Id.* at 40. CSEA, in turn, asked that the full thirty-day sentence be imposed. *Id.* at 44. It argued that Mr. Liming had not made a good faith attempt to make any payments towards the arrearage. *Id.*

The court agreed with CSEA. Even though "[t]he modification did not address the issue of child support arrearage payments," it did not justify Mr. Liming's claim that he was waiting for the court to determine a modified arrearage payment. July 28, 2010 Judgment Entry on Mot. to Impose, p. 2, 4. The court reasoned that there was an existing arrearage payment that had been previously put into place and that Mr. Liming

should have complied with that obligation. *Id.* at p. 4. The court did not consider Mr. Liming's financial ability to pay.

Mr. Liming was ordered to unconditionally serve ten days in jail. The other twenty days remained suspended. July 28, 2010 Order of Commitment Southeastern Ohio Regional Jail. His sentence was stayed pending appeal. Aug. 10, 2010 Journal Entry Granting Stay Pending Appeal.

Mr. Liming appealed to the Fourth District Court of Appeals. He raised two assignments of error. Each assignment of error asserted that he was entitled to court-appointed counsel at the purge hearing:

The trial court violated Mr. Liming's right to counsel when it refused to appoint Mr. Liming an attorney to represent him at a hearing in which a jail sentence was imposed.

Because the June 2010 hearing to impose sentence was criminal in nature, Mr. Liming was entitled to counsel.

Liming v. Damos, 4th Dist. No. 10CA39, 2011-Ohio-2726, at ¶ 6.

On May 27, 2011, the court of appeals affirmed the trial court's decision. *Id.* at ¶ 26. It ruled that the contempt proceeding was a civil matter, so the Sixth Amendment of the United States Constitution did not apply. *Id.* at ¶ 2. Further, the court held that Mr. Liming had no due process right to counsel because he had a diminished liberty interest in the thirty days attributable to the suspended sentence.

On June 6, 2011, Mr. Liming moved to certify a conflict, and on November 22, 2011, the Fourth District Court of Appeals certified a conflict on the following question:

Is a purge hearing to impose a suspended sentence for failing to pay child support a civil or criminal proceeding?

Liming, Case No. 10CA39 (Nov. 22, 2011) (certifying conflict), ¶ 7. Mr. Liming also filed a discretionary appeal to this Court, which asserted two propositions of law:

First Proposition of Law

Due process entitles an indigent contemnor to be represented by court-appointed counsel at a “purge” hearing, if, at the conclusion of that hearing, the trial court imposes a term of incarceration.

Second Proposition of Law

When it is impossible for an indigent contemnor to comply with a purge order, the purge hearing is criminal in nature, and the contemnor is entitled to court-appointed representation.

See Memorandum in Support of Jurisdiction filed in *Liming v. Damos*, No. 2011-1170 (July 8, 2011).

This Court accepted jurisdiction over Mr. Liming’s discretionary appeal. *See Entry* filed in *Liming v. Damos*, No. 2011-1170 (Dec. 21, 2011). The Court also determined that a conflict existed on the certified question, and consolidated both cases. *See id.* and *Entry* filed in *Liming v. Damos*, Case No. 2011-1985 (Dec. 21, 2011).

ARGUMENT

I. Is a purge hearing to impose a suspended sentence for failing to pay child support a civil or criminal proceeding?

A. A purge hearing that imposes an unconditional sentence is a criminal proceeding.

1. The distinction between civil and criminal contempt matters.

Courts have struggled to categorize contempt proceedings as civil or criminal. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-42, 31 S.Ct. 492, 55 L.Ed. 797 (1911). Some courts maintain that a contempt action is neither civil nor criminal. See *King v. King*, 9th Dist. 10CA0009-M, 2011-Ohio-513, ¶ 7, quoting *Harvey v. Harvey*, 9th Dist. Nos. 09CA0052, 08CA0054, 2010-Ohio-4170, ¶ 5. But the determination is crucial because it dictates what process is due to the alleged contemnor. *King* at ¶ 7. See also *State v. Kilbane*, 61 Ohio St.2d 201, 205-06, 400 N.E.2d 386 (1980).

If the matter is criminal, than constitutional rights guaranteed to criminal defendants attach, including the Sixth Amendment right to counsel and the right to be found guilty beyond a reasonable doubt. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). But if the matter is civil, then the doctrine of fundamental fairness contained in the Due Process Clause determines the process that is due, including whether the defendant-contemnor may be entitled to counsel. *Turner v. Rogers*, --- U.S. ---, 131 S.Ct. 2507, 2516, 180 L.Ed.2d 452 (2011).

2. Civil contempt proceedings are coercive, while criminal contempt proceedings are punitive.

Civil contempt is different from criminal contempt because it is coercive. Criminal contempt, on the other hand, is punitive. *Turner*, --- U.S. ---, 131 S.Ct. at 2516, 180 L.Ed.2d 452, citing *Gompers* at 442. To determine whether the court is

punishing the contemnor or giving the contemnor a chance to right a wrong, the reviewing court looks at the purpose and nature of the remedy imposed. *United Mine Workers* at 828.

Common characteristics of a criminal action include that the complainant is represented by the State and the matter is brought to punish the contemnor. *Id.* at 828-29. The punishment may be an unconditional prison term or a monetary fine for a specified sum. It may even be both. *Id.* at 828; *Basore v. Basore*, 5th Dist. No. 02-COA-011, 2002-Ohio-6089, ¶ 34.

But what matters is that the remedy does not have a purge condition. *King*, 9th Dist. 10CA0009-M, 2011-Ohio-513, at ¶ 7. The aim is to punish the contemnor for failing to right a previous wrong. The court is also vindicating its authority. *Id.* at ¶ 7-8; *In the Matter of Graber*, 5th Dist. No. 2002CA00176, 2002-Ohio-6177, ¶ 16 (contempt was criminal because trial court was punishing contemnor for failing to abide by support and visitation order, even though contemnor was released from jail before the expiration of the stated prison term).

When the contempt is criminal, all of the rights associated with criminal proceedings attach. *United Mine Workers* at 826. *Accord State v. Brandon*, 2d Dist. No. 06-CA-137, 2008-Ohio-403, ¶¶ 11-12, 14 (reversing trial court's judgment of criminal contempt because contemnor was not advised of his right to counsel), *Oak Hill Banks v. Ison*, 4th Dist. No. 03CA5, 2003-Ohio-5547, ¶¶ 15-17, 23 (reversing trial court's imposition of unconditional thirty-day prison sentence

because it did not afford contemnor the constitutional due process required in criminal contempt proceedings), and *Pheils v. Palmer*, 6th Dist. No. L-98-1092, 1999 Ohio App. LEXIS 1009, at *13-14, 16 (reversing trial court's finding of contempt because the contemnor was not given sufficient time to retain counsel). That includes the right to be found guilty beyond a reasonable doubt, the right to be heard, and the right to counsel. *United Mine Workers* at 826; *Basore* at ¶¶ 33, 35. And the right to counsel may only be waived if the waiver is knowing, voluntary, and intelligent. *Lilo v. Lilo*, 6th Dist. No. H-03-044, 2004-Ohio-4848, ¶ 32.

On the other hand, a contempt action is civil if the court is trying to coerce the contemnor into undertaking some action. *United Mine Workers* at 828. The jail or prison sentence is conditional – that is, it may be lifted, if the contemnor complies with the court's request. But the sentence can be stated as a definite period, such as thirty days, and still remain civil, so long as the entry contains a purge condition that allows the sentence to be shortened if the contemnor complies with the condition. *Id.* at 828. *See King* at ¶ 5. In civil contempt actions, the aim of the sanction is to motivate the contemnor to comply with the court's direction. Thus, it is often said that the contemnor holds the keys to his cell. *United Mine Workers* at 828. *Compare Gagnon v. Scarpelli*, 411 U.S. 778, 784, 789, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (ruling that the aim of the probation revocation proceeding was rehabilitative and not punitive, and applying

fundamental fairness to determine if the accused was entitled to counsel). Unlike criminal contempt actions, due process and the concept of fundamental fairness determine whether the contemnor is entitled to counsel. Further, guilt may be established by clear and convincing evidence. *Basore* at ¶ 33.

An action that begins as a civil contempt proceeding may be converted into a criminal contempt proceeding. *Samantha N. v. Lee A.R.*, 6th Dist. Nos. E-00-36, E-00-37, 2001 Ohio App. LEXIS 540 (Feb. 16, 2001). *Accord Lilo*, 6th Dist. No. H-03-044, 2004-Ohio-4848, at ¶ 31. In *Samantha N.*, the child's father was held in contempt of court for failing to pay child support. *Id.* at *1. The court ordered the father to serve thirty days in jail. But it suspended the sentence and gave the father an opportunity to purge the contempt by satisfying his child support obligations. *Id.* The father did not do so, and the court was requested to impose the previously suspended sentence. *Id.* at *2-3. The court held a hearing at which the father appeared but was not represented by counsel, and imposed the sentence. *Id.* at *3. But the court of appeals determined that the second hearing (the purge hearing) was criminal and that all of the rights associated with a criminal proceeding attached. *Id.* at *8. The appeals court held that the trial court no longer sought to persuade the father to pay his support obligations; rather, it was punishing the him for failing to satisfy those obligations. *Id.*

Finally, an action may be both civil and criminal, depending on the combination of remedies that are ordered. *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253, 416 N.E.2d 610, (1980); *Smith v. Smith*, 9th Dist. No. 95CA0017, 1995 Ohio App. LEXIS 5794, at *5. Crucially, the Sixth Amendment right to counsel attaches to the criminal portion of the proceeding. *Id.* at *7-8. In *Smith*, the court imposed a thirty-day jail sentence for the husband's failure to comply with a condition of his divorce decree. *Id.* at *2. Twenty-seven days of that sentence were suspended subject to the husband's compliance with the divorce decree's condition, but three days of the sentence were unconditional. *Id.* The court of appeals ruled that the unconditional portion of the husband's sentence was a criminal punishment, imposed to punish the husband for failing to comply with the court's prior order to comply with the divorce decree. *Id.* at *5. Therefore, the husband was entitled to all of the constitutional rights available to a criminal defendant, including the right to counsel. *Id.* at *7-8.

Because of the constitutional rights attached to a criminal contempt proceeding, it is critical that the trial court carefully examine the nature of the sanction imposed.

3. Mr. Liming was being punished for ignoring the court's orders.

In October 2007, the court ordered Mr. Liming to pay child support, but a year later Mr. Liming had not made any payments. At that point, CSEA asked the court to

hold Mr. Liming in contempt of court, and in October 2008, the magistrate held a hearing and recommended holding Mr. Liming in contempt. The court adopted the recommendation, and in November 2008 the trial court held Mr. Liming in civil contempt. The court's entry imposed a thirty-day jail sentence, but it suspended that sentence so long as Mr. Liming complied with his support obligations. The nature and purpose of that order was to coerce Mr. Liming into performing some act: paying his child support. So long as Mr. Liming performed as requested, his sentence was conditional. And the court's order worked. In November 2008, the same month as the contempt finding, Mr. Liming made his first support payment.

The nature of the sanction following the October 2008 hearing is distinguishable from the June 2010 hearing. At the conclusion of the June 2010 hearing, the court ordered Mr. Liming to serve an unconditional ten days in jail.² There were no conditions that Mr. Liming could fulfill to purge the contempt finding or reduce his sentence. Like the court in *Smith*, the trial court punished Mr. Liming for failing to pay his support obligations. *Smith*, 9th Dist. No. 95CA0017, 1995 Ohio App. LEXIS 5794, at *5. In short, the June 2010 hearing was a criminal contempt proceeding, and because Mr. Liming was indigent the court was constitutionally required to appoint counsel for that hearing.

² The ten-day, unconditional sentence should be distinguished from the twenty-day suspended sentence. The suspended sentence remained conditional. Those days were not imposed but remained hanging over Mr. Liming's head to try and persuade him to pay his support obligations. That sanction was civil.

B. When a court fails to determine if an indigent contemnor has the financial ability to comply with a support order, the hearing is criminal, and the contemnor is entitled to court-appointed counsel.

At the June 2010 hearing, CSEA made no attempt to prove that Mr. Liming had the ability to comply with the court's support order, and the trial court never determined that Mr. Liming was financially capable of complying with the order. Because the State has the burden of proof, and it did not establish that Mr. Liming could comply with the support order, the June 2010 proceeding was a criminal proceeding.

"A court may not impose punishment 'in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.'" *Turner*, 131 S.Ct. at 2516, 180 L.Ed.2d 452, quoting *Hicks v. Feiock*, 485 U.S. 624, 638 n.9, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988).³ If the defendant does not have the present ability to comply, then he cannot have the keys to his jail cell. *Mead v. Batchlor*, 435 Mich. 480, 460 N.W.2d 493, 494 (Mich. 1990). What may have been nominally thought of as a civil proceeding is in fact a criminal proceeding, because the defendant is no longer being coerced to comply, he is being punished because of his inability to comply. *Id.*

Consequently, when a purge hearing is held to determine if the contemnor should be punished, the contemnor must be permitted to show that it was impossible

³ Incarcerating an individual for failing to pay child support when he or she lacks the ability to pay the support obligation is akin to operating a debtor's prison, which is prohibited by Section 15, Article I of the Ohio Constitution.

for him to comply with the court order. *Turner* at 2520. The determination cannot be made at the initial contempt hearing, because a person's circumstances are always subject to change. Between the time of the contempt hearing and the purge hearing, the contemnor could lose his job, sustain an injury, or suffer from some other event that makes it impossible for him or her to comply with the court's purge order.

There is no dispute that throughout the support proceedings, Mr. Liming was in bankruptcy—he was broke. His financial situation was so dire that even CSEA moved to reduce the amount of Mr. Liming's monthly obligation. But prior to ordering him to jail, the trial court failed to determine that Mr. Liming was financially capable of satisfying the child-support obligation. *Liming*, 4th Dist. No. 10CA39, 2011-Ohio-2726, at ¶ 25. Indeed, the facts that were presented at the hearing show that he was incapable of paying off the arrearage. Therefore, he could not have been coerced into complying with that order, and he did not "hold the keys to his cell." *See United Mine Workers*, 512 U.S. at 828, 114 S.Ct. 2552, 129 L.Ed.2d 642. Consequently, regardless of the court's intention, it was punishing Mr. Liming. For that reason, the contempt proceeding was criminal, and Mr. Liming was entitled to counsel.

II. Due process entitles an indigent contemnor to be represented by court-appointed counsel at a “purge” hearing, if, at the conclusion of that hearing, the trial court imposes a term of incarceration.

The United States Supreme Court held in 2011 that there is no per se right to counsel in a *civil* contempt proceeding when the custodial parent (the one entitled to support) is *not* represented by counsel. *Turner*, 131 S.Ct. at 2512, 180 L.Ed.2d 452. *Turner* was a contempt action brought by a mother to collect child support from the father. The trial court found the father in contempt and sentenced him to prison. But the entry had a purge clause in it, which said the father could be released before the expiration of his stated prison term if he paid his support obligations. *Id.* at 2513. Therefore, it was a civil proceeding.

The Court reversed the finding of contempt because the trial court never determined whether the father was capable of complying with the support order. *Id.* at 2520. The Court also provided instructions to lower courts so they could appropriately decide whether a civil contemnor is entitled to counsel under the Due Process Clause.

The *Turner* Court directed lower courts to weigh the *Eldridge*⁴ factors and then decide if fundamental fairness necessitated counsel under the circumstances. *Id.* at 2518-19. Those factors are:

- (1) “the private interest that will be affected by the official action;

⁴ The *Eldridge* factors were identified by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and are used to test the constitutional sufficiency of the government’s procedures used to deprive of a person of property or liberty under the Due Process Clause.

(2) 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

(3) the “[g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334, 96 S.Ct. 893, 903 47 L.Ed.2d 18. This multi-factored test is used because “due process is flexible and calls for such procedural protections as the particular situation demands.” (Citation omitted and punctuation altered.) *Id.*

As already established, the June 2010 hearing was a criminal contempt proceeding. But for purposes of argument, if that matter had been civil, Mr. Liming still would have been entitled to counsel.

A. Mr. Liming will be deprived of the most fundamental interest protected by the due process clause, his liberty.

Mr. Liming was ordered to serve time in jail. His private interest in remaining free from incarceration is “at the core of the liberty protected by the Due Process Clause.” See *Turner*, 131 S.Ct. at 2518, 180 L.Ed.2d 452, quoting *Focha v. Louisiana* 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437, 448 (1992). Until the Supreme Court’s recent decision in *Turner*, the law seemed relatively well-settled: whenever a person faced the risk of imprisonment at the conclusion of a hearing, that person was entitled to counsel. *Lassiter v. Dep’t of Soc. Servs. of Durham City, N.C.*, 452 U.S. 18, 25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Scott v. Illinois*, 440 U.S. 367, 373-74, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *In*

re Gault, 387 U.S. 1, 36-37, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Sevier v. Turner*, 742 F.2d 262, 267 (6th Cir. 1984); *Johnson v. Zurz*, 596 F.Supp. 39, 45 (N.D. Ohio 1984); *In re Young*, 522 F. Supp. 759 762 (S.D. Ohio 1981); *Matin v. Fellerhoff*, 526 F. Supp. 969, 973 (S.D. Ohio 1981).

Those cases recognize that a term of incarceration is a punishment different in kind from other penalties and carries with it devastating and stigmatizing effects. See *Glover v. United States*, 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed. 604 (2001) (stating that the Court's jurisprudence recognizes "that any amount of actual jail has Sixth Amendment significance"); *Argersinger* at 37 ("the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in . . . serious repercussions affecting [the defendant's] career and . . . reputation."); and *Scott* at 373 (stating that the central premise of *Argersinger* to be that imprisonment is a penalty different from fines or the mere threat of imprisonment.") Mr. Liming's fundamental liberty interest in his freedom weighs heavily in favor of appointing counsel.

B. The court never determined if Mr. Liming had the ability to pay.

The risk that Mr. Liming may suffer an erroneous deprivation of his liberty interest under the existing system is great. If counsel is not appointed, the court must determine that the contemnor has the ability to comply with the court order in question. *Turner*, 131 S.Ct. at 2520, 180 L.Ed.2d 452 (stating that an indigent contemnor is not automatically entitled to counsel when he or she faces incarceration so long as there are

“alternative procedural safeguards” that ensure that the contemnor can satisfy the financial obligation imposed). There is no evidence that the Athens County Court of Common Pleas had any procedures in place to determine if Mr. Liming was capable of complying with the court’s support order.⁵ Moreover, as set forth above, this matter was extremely complicated; a fact further exacerbated by the bankruptcy filings. Finally, there was an asymmetry in these proceedings. CSEA was represented by counsel, which made the proceeding less fair overall. *Id.* at 2519. Because the trial court never made the proper inquiries, the risk of an erroneous deprivation was severe.

C. Appointing Mr. Liming counsel would have saved the government from significant fiscal and administrative burdens.

Appointing counsel to Mr. Liming would have saved the government from significant fiscal and administrative burdens. Had counsel been appointed, a second hearing might not have been required. Counsel could have assisted in framing the issues and insured that the court considered relevant and required issues, such as Mr. Liming’s ability to pay.

On a larger scale, appointing counsel to other indigent contemnors in child support matters will impose minimal burdens on the government. It is the policy of the Office of the Ohio Public Defender to reimburse most counties when counsel is appointed in non-support, contempt cases. Ohio Public Defender, *Standards and*

⁵ In fact, the Fourth District Court of Appeals determined that the only issue considered by the trial court at the purge hearing was whether Mr. Liming met the purge conditions. *Liming* at ¶ 14, 25.

Guidelines for Appointed Counsel Reimbursement, at 6, available at http://www.opd.ohio.gov/Reimbursement/rm_std.pdf (accessed Mar. 2, 2012). Thus, the county government, which is responsible for appointing counsel, may experience a de minimis financial burden. Further, the Office of the Ohio Public Defender receives the majority of its funding through the Indigent Defense Support Fund, and not from the State's General Revenue Fund. Ohio Public Defender Commission, *2010 Annual Report*, at 8-10, available at http://www.opd.ohio.gov/AboutUs/us_2010.pdf (accessed Mar. 2, 2012). Thus, any burden imposed on the government is negligible.

Thus, under *Turner* and *Eldridge*, Mr. Liming has demonstrated that he has a Due Process right to counsel, and that counsel should have been appointed at the June 2010 hearing. All three of the *Eldridge* factors weigh in favor of a right to counsel at the second hearing: first, Mr. Liming's interest in being free from incarceration implicates a fundamental right; second, the risk of deprivation of that right is significant (particularly where only one party is represented and that party fails to prove the contemnor has ability to comply with the court's order); and third, the additional burdens placed on the state are minimal and while the government's interest is substantial, it does not outweigh Mr. Liming's right to be free from unlawful and erroneous incarceration.

The possible justifications for denying counsel are insignificant when compared with the problems caused by the denial of counsel. In situations where an actual denial of physical liberty is at stake, this Court should conclude that there is a right to

counsel based on the Sixth Amendment and on the Fourteenth Amendment Due Process Clause.

CONCLUSION

This Court should reverse the judgment of the court of appeals, and adopt both of Mr. Liming's propositions of law. Mr. Liming's ten-day jail sentence should be vacated, and this action should be remanded so the trial court may appoint Mr. Liming counsel and conduct a new hearing.

Respectfully submitted,

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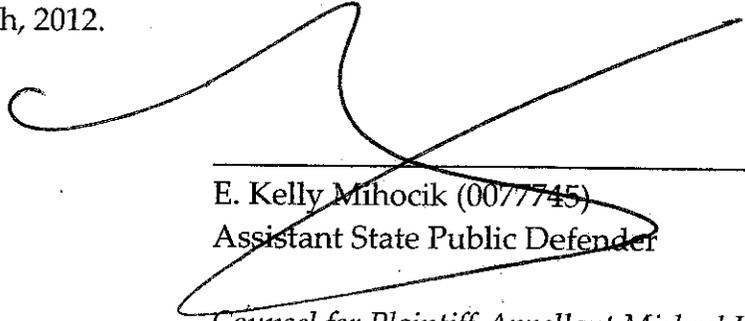
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Counsel for Plaintiff-Appellant Michael Liming

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served, by regular U.S. Mail, upon Keith Wiens, Athens County CSEA, 184 Lancaster Street, Athens, Ohio 45701 this 5th day of March, 2012.



E. Kelly Mihocik (0077745)
Assistant State Public Defender
Counsel for Plaintiff-Appellant Michael Liming

#361337

IN THE SUPREME COURT OF OHIO

Michael Liming,	:	
	:	Case Nos. 2011-1170
Plaintiff-Appellant,	:	2011-1985
	:	
v.	:	On Appeal from the Athens
	:	County Court of Appeals
Denday Damos,	:	Fourth Appellate District
	:	Case No. 10 CA 39
Defendant-Appellee.	:	

APPENDIX TO MERIT BRIEF OF MICHAEL LIMING

IN THE COURT OF APPEALS OF OHIO
 FOURTH APPELLATE DISTRICT
 ATHENS COUNTY

FILED
 ATHENS COUNTY, OHIO

MAY 27 2011

MICHAEL LIMING,
 Plaintiff-Appellant,

Case No. 10CA39

Arthur, CLERK
 COURT OF APPEALS

v.

DECISION AND
 JUDGMENT ENTRY

DENDAY DAMOS (fka LIMING),
 Defendant-Appellee,

APPEARANCES:

Timothy Young, Ohio State Public Defender, and E. Kelly Mihocik, Assistant Ohio State Public Defender, Columbus, Ohio, for appellant.

Keith M. Wiens, Athens County Child Support Enforcement Agency, Athens, Ohio, for Athens County Child Support Enforcement Agency.

Harsha, P.J.

{11} As a condition of his divorce, a court ordered Michael Liming to pay child support for his two minor children. After Liming missed payments, the Athens County Child Support Enforcement Agency (CSEA) asked the court to find him in contempt. At a hearing where Liming had counsel, the trial court found him in contempt and sentenced him to 30 days in jail. However, the court suspended the sentence and gave Liming an opportunity to purge the contempt if he met certain conditions. Later, CSEA alleged that Liming failed to comply with those conditions and asked the court to impose the previously suspended sentence. At the "purge hearing," the court denied Liming's request for court-appointed counsel, found that Liming failed to purge the contempt order, and ordered Liming to serve ten days of his 30 day suspended sentence. Liming now appeals the trial court's denial of his request for counsel.

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{12} Liming contends that he had a right to counsel at the purge hearing under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. However, the purge hearing constituted a civil proceeding, not a criminal proceeding, rendering these constitutional provisions inapplicable. Therefore, we reject this argument.

{13} Liming also contends that indigent civil contemnors who were represented by counsel at the time they were found in contempt have a procedural due process right to counsel at purge hearings under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. However, a civil contemnor has a diminished liberty interest at a purge hearing because the trial court previously found him in contempt and imposed an appropriate sanction, which it simply deferred by conditioning his freedom on compliance with the court's order. Moreover, requiring the government to provide counsel at all purge hearings would impose fiscal and administrative burdens on the state while there is little risk of erroneous decisions when the only remaining issue is the limited question of whether the contemnor purged the contempt. Balancing these interests, we decline to create a categorical rule requiring the state to provide indigent civil contemnors, who were represented by counsel at their contempt hearing, with appointed counsel at purge hearings.

I. Facts

{14} Liming and Denday Damos married in 1993 and had two children. When the couple divorced in 2005, the court named Damos the legal custodian and residential parent of the children and ordered Liming to pay child support. In 2008, CSEA filed motions asking the court to find Liming in contempt for among other things, falling

behind in his child support payments. Liming appeared at the contempt hearing represented by counsel. The magistrate recommended that the trial court hold him in contempt, sentence him to 30 days in jail, suspend the sentence, and give Liming an opportunity to purge the contempt by complying with certain conditions for one year, such as paying his monthly child support obligation on time and making payments towards the arrearage each month. Liming did not file objections to the magistrate's decision, and the trial court adopted the decision.

{15} In 2009, CSEA claimed that Liming failed to purge the contempt and asked the court to impose the previously suspended jail sentence. At the "purge hearing" on the motion, the court denied Liming's request for appointed counsel. The court found that Liming did not pay his current child support obligation or arrearage obligation in March, May, August, October, and December 2009. The court also found that he failed to pay his arrearage obligation from January to May 2010. The court ordered Liming to serve ten days of the suspended sentence and continued to suspend the remaining 20 days of the sentence so long as Liming complied with certain conditions. This appeal followed.

II. Assignments of Error

{16} Liming assigns two errors for our review:

The trial court violated Mr. Liming's right to counsel when it refused to appoint Mr. Liming an attorney to represent him at a hearing in which a jail sentence was imposed. Sixth and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution (July 28, 2010 Judgment Entry on Motion to Impose; Tr. 4.)

Because the June 2010 hearing to impose sentence was criminal in nature, Mr. Liming was entitled to counsel. The trial court erred when it refused to appoint Mr. Liming counsel for that hearing. Sixth and Fourteenth Amendments to the United States Constitution; Sections 10

and 16, Article I of the Ohio Constitution (July 28, 2010 Judgment Entry on Motion to Impose; Tr. 4.)

III. Constitutional Right to Appointed Counsel

{17} In his first and second assignments of error, Liming contends that he had a right under the federal and state constitutions to appointed counsel at the purge hearing. Liming cites the Sixth Amendment to the United States Constitution (made applicable to the states through the Fourteenth Amendment) and Section 10, Article I of the Ohio Constitution as a basis for this right. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." Section 10, Article I of the Ohio Constitution, which outlines the rights of criminal defendants, provides: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel[.]" Therefore, we must initially determine whether the purge hearing constituted a civil or criminal proceeding. We begin our analysis with an examination of the underlying finding of contempt.

{18} "Contempt is a disregard of, or disobedience to, the orders or commands of judicial authority." *McClead v. McClead*, Washington App. No. 06CA67, 2007-Ohio-4624, at ¶32 (per curiam), citing *Cassidy v. Cassidy*, Pike App. No. 03CA721, 2005-Ohio-3199, at ¶20. "Contempt proceedings are often classified as *sui generis*, neither civil nor criminal. However, most courts distinguish between civil and criminal contempt proceedings." *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001-Ohio-15, 740 N.E.2d 265 (internal citation omitted). The distinction largely depends upon the purpose of the sanction imposed. *Id.*

{19} Criminal contempt sanctions "are punitive in nature and are designed to

vindicate the authority of the court." *Eastern Local School Dist. Bd. of Educ. v. Eastern Local Classroom Teachers' Assn.*, Pike App. No. 03CA717, 2004-Ohio-1499, at ¶8, citing *State ex rel. Johnson v. County Court of Perry Cty.* (1986), 25 Ohio St.3d 53, 495 N.E.2d 16. They "are usually characterized by an unconditional prison term or fine." *Id.*, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 254, 416 N.E.2d 610. "Civil contempt sanctions are remedial or coercive in nature and are for the benefit of the complainant." *Id.*, citing *Brown* at 253. "Prison sentences are conditional. The contemnor is said to carry the keys of his prison in his own pocket * * * since he will be freed if he agrees to do as ordered." *Brown* at 253.

{¶10} After making the contempt finding, the trial court sentenced Liming to 30 days in jail but suspended the sentence on the condition that he, among other things, timely pay his current child support obligation and make installment payments toward his arrearage. The court's sanction was coercive and benefited Liming, so we characterize the order as a civil contempt order.

{¶11} Nonetheless, Liming claims the purge hearing related to that order constituted a criminal proceeding. He cites *In re Earley v. Campbell* (Mar. 30, 2000), Stark App. No. 99-CA-256, 2000 WL 329969 and *Samantha N. v. Lee A.R.* (Feb. 16, 2001), Erie App. Nos. E-00-036 & E-00-037, 2001 WL 127343, to support his argument. We find *Earley* inapplicable as it did not involve a purge hearing but instead involved a contempt finding followed by a deferred sentencing hearing. See *Earley* at *2.

{¶12} In *Samantha N.*, the trial court found the appellant in contempt for failing to keep his child support obligations current, but the court suspended his jail sentences on the condition that he follow a particular payment schedule. *Samantha N.* at *1. The

child support enforcement agency alleged that the appellant failed to follow the court's order. *Id.* The appellant did not have counsel at the contempt hearing or purge hearing. *Id.* The appellant complained that he hired an attorney to represent him at the purge hearing, but when the court "could not reach his counsel by telephone to learn why his counsel was not present for the hearing, the trial court forced him to proceed without representation." *Id.* at *2.

{¶13} The Sixth District concluded the trial court "was exercising its criminal contempt powers [at the purge hearing] because it was clearly no longer attempting to coerce appellant to pay his child support arrearages. Instead the trial court was punishing appellant for not complying with its previous orders." *Id.* at *3 (footnote omitted). The *Samantha N.* Court noted that "[o]nce the contempt power is classified as criminal, the contemnor is entitled to those rights and constitutional privileges afforded a defendant in a criminal action. * * * The most important of these are the contemnor's right to due process and to have the complainant prove the contempt beyond a reasonable doubt." *Id.*, quoting *Winkler v. Winkler* (1991), 81 Ohio App.3d 199, 202, 610 N.E.2d 1022. And the court concluded that the trial court denied the appellant his due process rights. *Id.*

{¶14} The *Samantha N.* Court did not address the issue of whether indigent parties have a constitutional right to appointed counsel at purge hearings. Moreover, we disagree with the Sixth District's characterization of a purge hearing as an exercise of criminal contempt powers. The fact that Liming failed to meet the purge conditions to avoid enforcement of his sentence did not convert the purge hearing into a criminal contempt proceeding at which he faced a new risk of imprisonment. See *Segovia v.*

Likens, 179 Ohio App.3d 256, 2008-Ohio-5896, 901 N.E.2d 810, at ¶39. The only issue before the court at the purge hearing was whether Liming met the purge conditions imposed following the civil contempt hearing, i.e., whether he paid his current child support obligations and his arrearage. See *id.* Finding that Liming had not purged the contempt, the trial court did not impose a new sentence. See *id.* "Rather, the court enforced the sentence it had already imposed." *Id.* Thus, we conclude that the purge hearing retained the civil character of the original contempt proceeding. And because the purge hearing did not constitute a criminal prosecution, the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution did not apply to it.

{¶15} The characterization of the purge hearing as civil in nature does not foreclose the possibility that Liming had a procedural due process right to counsel predicated on the Fourteenth Amendment to the United States Constitution or Section 16, Article I of the Ohio Constitution. "When read in conjunction with Sections 1, 2, and 19 [of the Ohio Constitution], Section 16 is the equivalent to the Fourteenth Amendment's due process clause. As a consequence, decisions of the United States Supreme Court can be utilized to give meaning to the guarantees of Article I of the Ohio Constitution." *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, 8, 399 N.E.2d 66 (internal citation omitted).

{¶16} The United States Supreme Court has explained:

For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy* [(1961)], 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of "fundamental

fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Dept. of Social Services (1981), 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640.

{117} Liming claims that he had a due process right to counsel at the purge hearing because he faced the loss of his physical liberty at the hearing. He cites *Lassiter* for the proposition that "[r]egardless of whether the matter is civil or criminal, due process demands that whenever a party faces the deprivation of his or her liberty interest, the party is entitled to counsel." (Appellant's Br. 5). Contrary to Liming's assertion, *Lassiter* did not create a per se right to appointed counsel whenever loss of liberty is possible. *Lassiter* did not even establish a presumption in favor of appointed counsel when incarceration is possible. In rejecting a mother's claimed right to counsel before her parental rights could be terminated, the Court simply found a "presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty[.]" *Lassiter* at 31. *Lassiter* did not involve a potential loss of physical liberty, so the Court had no occasion to hold – and did not hold – that when loss of liberty is at stake, there is a per se right to or presumption in favor of appointing counsel.

{118} Liming also cites *Argersinger v. Hamlin* (1972), 407 U.S. 25, 38, 92 S.Ct. 2006, 32 L.Ed.2d 530 for the proposition that "where imprisonment actually occurs[,] the indigent-defendant must have been appointed counsel." (Appellant's Reply Br. 2). However, the *Argersinger* Court held that "absent a knowing and intelligent waiver, 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* at 37.

Argersinger involved the Sixth Amendment right to counsel in criminal proceedings, not a due process based right to counsel in a civil proceeding, thus we find it inapplicable here.

{119} Thus, we decline to create a per se right to counsel at purge hearings based solely on the possibility of imprisonment after such a hearing. We recognize that this conclusion appears at odds with our decision in *Matter of Estate of Straub* (Feb. 13, 1992), Ross App. No. 1728, 1992 WL 37781, at *8, where we broadly stated that "counsel must be appointed for those unable to afford counsel in any proceedings where incarceration is a possibility, including both civil and criminal contempt proceedings." However, *Straub* did not involve a purge hearing, so we did not have occasion to address the right to counsel in that context.

{120} Liming cites a number of Ohio cases for the proposition that a civil contemnor is entitled to counsel at a purge hearing. However, none of these cases address the specific issue of whether a civil contemnor has a constitutional right to appointed counsel at a purge hearing: *Schock v. Sheppard* (1982), 7 Ohio App.3d 45, 453 N.E.2d 1292; *Green v. Green*, Portage App. No. 2007-P-0092, 2008-Ohio-3064; *Everly v. Shuster* (Apr. 27, 1999), Noble App. No. 237, 1999 WL 260895; *Duffield v. Duffield* (Sept. 12, 2001), Wayne App. No. 01CA0002, 2001 WL 1044077.

{121} Therefore, to determine whether an indigent civil contemnor who had counsel at his contempt hearing has a per se right to appointed counsel at a purge hearing, we turn to the United States Supreme Court's decision in *Mathews v. Eldridge*

(1976), 424 U.S. 819, 96 S.Ct. 893, 47 L.Ed.2d 18. The *Mathews* Court identified three factors for courts to evaluate in determining what procedural due process requires: 1.) the private interests at stake; 2.) the government's interest; and 3.) the risk that the procedures used will lead to erroneous decisions. *Mathews* at 335. See *Lassiter*, supra, at 27 (in part balancing these factors to decide whether mother had due process right to counsel before parental rights could be terminated).

{122} As to the private interests at stake, civil contemnors such as Liming certainly face the loss of physical liberty at a purge hearing. However, as the Tenth District has recognized, this liberty interest is a "diminished one." *Segovia*, supra, at ¶43. In *Segovia* the trial court found Ricardo, the plaintiff in an action to establish parental rights and responsibilities concerning two minor children, in contempt for failing to comply with a court order regarding phone access to the children. *Id.* at ¶¶2-3, 7-8. The court sentenced Ricardo to 15 days in jail but suspended the sentence on the condition that Ricardo purge the contempt by giving the children's mother additional phone time with them during his next parenting weekend. *Id.* at ¶7. Subsequently, the mother filed a motion to enforce, claiming Ricardo did not comply with the purge condition. *Id.* at ¶11. At the purge hearing, Ricardo sought a continuance to obtain counsel, but the court denied his request. *Id.* at ¶12. The court enforced five days of the suspended sentence and continued to suspend the remaining ten days. *Id.* at ¶17. Ricardo appealed, arguing in part that the court should have determined whether he was indigent and eligible for court appointed counsel. *Id.* at ¶18.

{123} In evaluating the private interests at stake, the *Segovia* Court considered the fact that "a litigant's right to counsel diminishes as his personal liberty interest

diminishes." Id. at ¶42, citing *Lassiter* at 26. The Court cited parole revocation as an example, noting that "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." Id., quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484. While the Tenth District recognized that "Ricardo faced the risk of losing his freedom following the purge hearing," the Court also recognized that the "trial court had already conditioned Ricardo's freedom on his continued compliance with the court's order." Id. at ¶43. "Thus, like a parolee subject to having his parole revoked, Ricardo's liberty interest was a diminished one." Id. Likewise, we conclude that since the trial court already conditioned Liming's freedom on compliance with the purge conditions, he had a diminished liberty interest at the purge hearing.

{¶124} Regarding the risk that the procedures used will lead to erroneous decisions, the Tenth District considered the fact that Ricardo had a "full opportunity, with counsel, to defend against the contempt charge in the first instance" and "did not object to or otherwise appeal from that court's finding of contempt." Id. at ¶44. Therefore, the *Segovia* Court found that it could afford the finding of contempt "sufficient reliability to support a sentence." Id., citing *Alabama v. Shelton* (2002), 535 U.S. 654, 665, 667, 122 S.Ct. 1764, 152 L.Ed.2d 888. And the Court concluded that "the only question at issue in the purge hearing-whether Ricardo purged the contempt-was a limited one and presented a low risk of an erroneous decision by the trial court." Id.

{¶125} Like the contemnor in *Segovia*, Liming had counsel to defend the contempt charge in the first instance and did not appeal from the contempt finding. And

we agree with the *Segovia* Court that the only question at issue during a purge hearing, i.e., whether the contemnor purged the contempt, is a limited one and presents a low risk of an erroneous decision by the trial court. Moreover, in examining the government's interest, we recognize that requiring the state to provide indigent civil contemnors with appointed counsel at purge hearings would place additional fiscal and administrative burdens on the government. See *Mathews*, supra, at 335.

{126} Balancing the civil contemnor's diminished liberty interest at a purge hearing against the low risk of an erroneous decision at the hearing and the government's interest, we decline to create a categorical rule that civil contemnors represented by counsel at contempt hearings have a due process based right to appointed counsel at purge hearings. We overrule *Liming's* first and second assignments of error and affirm the trial court's judgment. This decision does not foreclose the possibility that fundamental fairness — "the touchstone of due process" — might require the appointment of counsel at a purge hearing under certain circumstances. See *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 787-790, 93 S.Ct. 1756, 36 L.Ed.2d 656. (declining to adopt categorical rule that government must provide counsel for indigents in all probation or parole revocation cases and instead adopting a case-by-case approach). However, *Liming* does not advocate a case-by-case approach to this issue, let alone argue that he was entitled to counsel at the purge hearing based on circumstances unique to his case. So we need not address those issues here.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY:


William H. Harsha, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

1 of 1 DOCUMENT

Page's Ohio Revised Code Annotated:
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Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through files 1-69 and 71.
*** Annotations current through January 9, 2012 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Go to the Ohio Code Archive Directory

Oh. Const. Art. I, § 15 (2012)

§ 15. No imprisonment for debt

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

ORIGINAL

IN THE SUPREME COURT OF OHIO

Michael Liming,

Plaintiff-Appellant,

v.

Denday Damos,

Defendant-Appellee.

:
:
:
:
:

Case No. 11-1170

On Appeal from the Athens
County Court of Appeals
Fourth Appellate District
Case No. 10CA0039

Notice of Appeal of Plaintiff-Appellant Michael Liming

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*Counsel for Plaintiff-Appellant
Michael Liming*

FILED
JUL 08 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Plaintiff-Appellant Michael Liming

Plaintiff-Appellant Michael Liming gives notice of appeal to the Supreme Court of Ohio from the judgment of the Athens County Court of Appeals, Fourth Appellate District, entered in *Michael Liming v. Denday Damos*, Court of Appeals Case No. 10CA39, on May 27, 2011. A motion to certify a conflict was filed in the Fourth Appellate District on June 6, 2011 and that motion remains pending. Mr. Liming will notify this Court when the court of appeals rules upon that motion.

This case raises a substantial constitutional question and is of public or great general interest.

Respectfully Submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

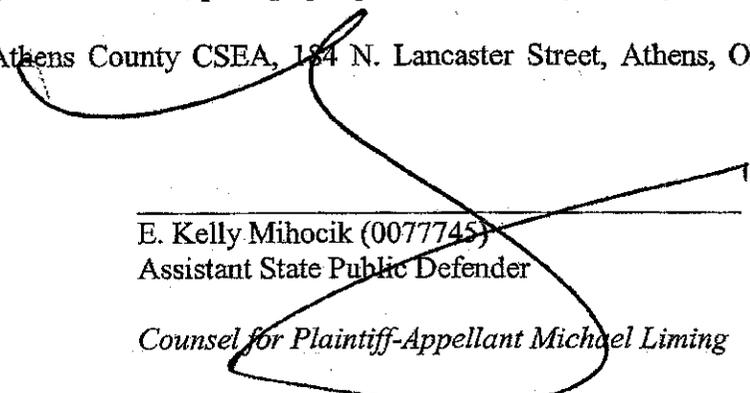
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Counsel for Plaintiff-Appellant Michael Liming

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Appeal of Plaintiff-Appellant Michael Liming* was sent by regular U.S. Mail, postage pre-paid, this 8th day of July 2011, to the office of Keith M. Wiens, Athens County CSEA, 184 N. Lancaster Street, Athens, Ohio 45701.



E. Kelly Mihocik (0077745)
Assistant State Public Defender

Counsel for Plaintiff-Appellant Michael Liming

#347199

ORIGINAL

IN THE OHIO SUPREME COURT

11-1985

Michael Liming, :
 : Case No. 2011-1170
Plaintiff-Appellant, :
 :
vs. : On appeal from the Athens
 : County Court of Appeals
Denday Damos, : Fourth Appellate District
 : Case No. 10 CA 39
Defendant-Appellee. :

NOTICE OF CERTIFIED CONFLICT

OFFICE OF THE OHIO PUBLIC DEFENDER

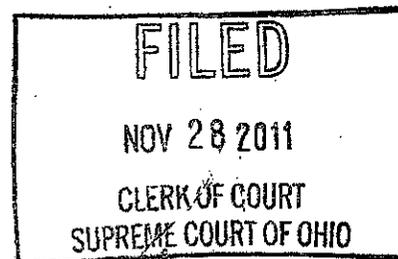
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*Counsel for Plaintiff-Appellant
Michael Liming*



IN THE OHIO SUPREME COURT

Michael Liming,	:	Case No. 2011-1170
Plaintiff-Appellant,	:	
vs.	:	On appeal from the Athens County Court of Appeals
Denday Damos,	:	Fourth Appellate District Case No. 10 CA 39
Defendant-Appellee.	:	

NOTICE OF CERTIFIED CONFLICT

In accordance with S.Ct. Prac.R. 4.1, Plaintiff-Appellant Michael Liming files notice that the Fourth Appellate District has certified a conflict in its decision in *Liming v. Damos*, 4th Dist. No. 10CA39, 2011-Ohio-2726, with *Samantha N. v. Lee A.R.*, 6th Dist. Nos. E-00-036, E-00-037, 2001 Ohio App. LEXIS 540. The Entry on Motion to Certify Conflict and the conflicting court of appeals' opinions are attached.

Mr. Liming filed a timely motion to certify a conflict in the Fourth Appellate District on June 6, 2011, in case number 10CA39. That motion was not ruled upon within the sixty days identified in App.R. 25(C). Consequently, on October 13, 2011, Mr. Liming filed a notice asking this Court to accept jurisdiction of Mr. Liming's discretionary appeal. On November 22, 2011, the Fourth Appellate District certified the following question to this Court:

Is a purge hearing to impose a suspended sentence for failing to pay child support a civil or criminal proceeding?

While the Fourth Appellate District's entry certifying a conflict is untimely, the certified conflict question should be considered by this Court in deciding whether to accept jurisdiction in Mr. Liming's discretionary appeal.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

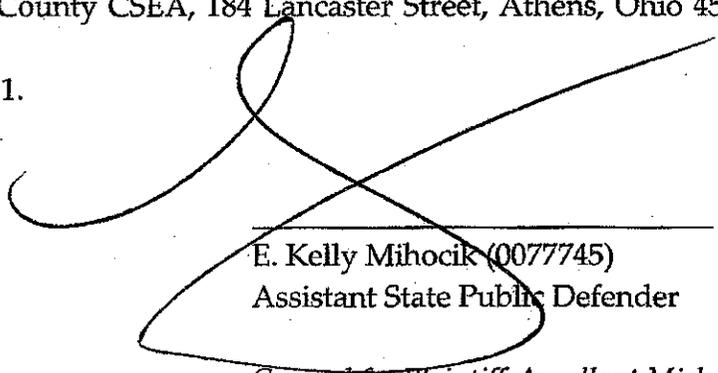
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kelly.mihocik@opd.ohio.gov

Counsel for Plaintiff-Appellant Michael Liming

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served, by regular U.S. Mail, upon
Keith Wiens, Athens County CSEA, 184 Lancaster Street, Athens, Ohio 45701 this 28th
day of November, 2011.



E. Kelly Mihocik (0077745)
Assistant State Public Defender

Counsel for Plaintiff-Appellant Michael Liming

#357129

NOV 22 2011

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

Autine, CLERK
COURT OF APPEALS

MICHAEL LIMING,

Case No. 10CA39

Plaintiffs-Appellant,

ENTRY ON MOTION TO
CERTIFY CONFLICT

v.

DENDAY DAMOS (fka LIMING),

Defendant-Appellee.

APPEARANCES:

Timothy Young, Ohio State Public Defender, and E. Kelly Mihocik, Assistant Ohio State Public Defender, Columbus, Ohio, for appellant.

Keith M. Wiens, Athens County Child Support Enforcement Agency, Athens, Ohio, for Athens County Child Support Enforcement Agency.

Harsha, P.J.

{11} This matter is before the Court on a motion to certify a conflict filed by Appellant Michael Liming. Appellee has not filed a motion in opposition. Liming contends that our May 27, 2011 decision in this case is in conflict with the Sixth District's decision in *Samantha N. v. Lee A.R.* (Feb. 16, 2001), Erie App. Nos. E-00-036 & E-00-037, 2001 WL 127343.

{12} Section 3(B)(4), Article IV of the Ohio Constitution provides: "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." "[A]t least three conditions must be met before and during the certification of a case to [the Supreme Court of Ohio] pursuant to Section

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3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be 'upon the same question.' Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 1993-Ohio-223, 613 N.E.2d 1032.

{13} Liming asks this Court to certify a conflict on the following questions:

Must a trial court appoint counsel to represent a contemnor at a purge hearing, if, at the conclusion of that hearing, the trial court imposes a period of imprisonment based upon a previously suspended sentence arising from the contemnor's alleged failure to pay his or her child support obligations?

Is a purge hearing to impose a suspended sentence for failing to pay child support a criminal contempt proceeding that entitles the contemnor to the full panoply of criminal due process rights?

{14} *Liming v. Damos*, Athens App. No. 10CA39, 2011-Ohio-2726, involved the imposition of a civil contempt order for failure to pay child support followed by a purge hearing. We held that the purge hearing constituted a civil proceeding, not a criminal proceeding. And we found that an indigent contemnor had no right to appointed counsel at such a purge hearing under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. See *id.* at ¶¶7-14. We also declined to create a categorical rule based on procedural due process, requiring the State to provide indigent civil contemnors, who were represented by counsel at their contempt hearing, with appointed counsel at purge hearings. *Id.* at ¶13.

{15} *Samantha N.* also involved a civil contempt order for failure to pay child

support followed by a purge hearing. The *Samantha N.* Court addressed whether a due process based right to counsel existed at such a purge hearing. However, the *Samantha N.* Court did not address the specific issue of whether an *indigent contemnor* had a right to *appointed* counsel at such a proceeding. The appellant in that case complained that “he did *hire* an attorney to represent him in the hearing and that when the court could not reach his counsel by telephone to learn why his counsel was not present for the hearing, the trial court forced him to proceed without representation.” *Samantha N.* at *2 (Emphasis added). Therefore, we disagree with Appellant’s contention that our judgment in *Liming* is in conflict with the decision in *Samantha N.* to the extent Appellant argues that the *Samantha N.* Court “held that before a jail sentence could be imposed at a purge hearing, an indigent contemnor must be appointed counsel.” (Motion to Certify Conflict at 2). Accordingly, we deny Appellant’s motion to certify a conflict on the first proposed question.

{16} However, the *Samantha N.* Court did address the issue of whether a purge hearing following a civil contempt proceeding was civil or criminal in nature. The *Samantha N.* Court found that such a hearing was criminal in nature and concluded that the appellant was entitled to “those rights and constitutional privileges afforded a defendant in a criminal action.” *Samantha N.* at *3, quoting *Winkler v. Winkler* (1991), 81 Ohio App.3d 199, 202, 610 N.E.2d 1022. We agree that our judgment in *Liming* conflicts with *Samantha N.* on the question of whether a purge hearing following a civil contempt proceeding for failure to pay child support is civil or criminal in nature. However, *Liming* did not address an indigent contemnor’s entitlement to the full panoply of criminal rights – it only addressed a right to appointed counsel. Therefore, we certify

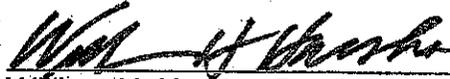
the following modified version of Liming's second proposed question to the Supreme Court of Ohio for resolution:

Is a purge hearing to impose a suspended sentence for failing to pay child support a civil or criminal proceeding?

{17} We grant Liming's motion in part, deny it in part, and certify the foregoing question to the Supreme Court of Ohio for resolution of the conflict pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. **MOTION GRANTED IN PART AND DENIED IN PART.**

Abele, J. & McFarland, J.: Concur.

FOR THE COURT



William H. Harsha, Presiding Judge



**MICHAEL LIMING, Plaintiff-Appellant, v. DENDAY DAMOS (fka
LIMING), Defendant-Appellee.**

Case No. 10CA39

**COURT OF APPEALS OF OHIO, FOURTH APPELLATE DIS-
TRICT, ATHENS COUNTY**

2011 Ohio 2726; 2011 Ohio App. LEXIS 2322

May 27, 2011, Released

SUBSEQUENT HISTORY: Later proceeding at *Liming v. Damos*, 129 Ohio St. 3d 1498, 2011 Ohio 5244, 954 N.E.2d 1210, 2011 Ohio LEXIS 2526 (Ohio, Oct. 13, 2011)

PRIOR HISTORY: *Liming v. Damos*, 2009 Ohio 6490, 2009 Ohio App. LEXIS 5448 (Ohio Ct. App., Athens County, Dec. 8, 2009)

DISPOSITION: **[**1]** JUDGMENT AFFIRMED.

COUNSEL: Timothy Young, Ohio State Public Defender, and E. Kelly Mihocik, Assistant Ohio State Public Defender, Columbus, Ohio, for appellant.

Keith M. Wiens, Athens County Child Support Enforcement Agency, Athens, Ohio, for Athens County Child Support Enforcement Agency.

JUDGES: William H. Harsha, Presiding Judge. Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

OPINION BY: William H. Harsha

OPINION

DECISION AND JUDGMENT ENTRY

Harsha, P.J.

[*P1] As a condition of his divorce, a court ordered Michael Liming to pay child support for his two minor children. After Liming missed payments, the Athens County Child Support Enforcement Agency (CSEA) asked the court to find him in contempt. At a hearing where Liming had counsel, the trial court found him in contempt and sentenced him to 30 days in jail. However, the court suspended the sentence and gave Liming an opportunity to purge the contempt if he met cer-

tain conditions. Later, CSEA alleged that Liming failed to comply with those conditions and asked the court to impose the previously suspended sentence. At the "purge hearing," the court denied Liming's request for court-appointed counsel, found that Liming failed to purge the contempt order, and ordered [**2] Liming to serve ten days of his 30 day suspended sentence. Liming now appeals the trial court's denial of his request for counsel.

[*P2] Liming contends that he had a right to counsel at the purge hearing under the *Sixth Amendment to the United States Constitution* and Section 10, Article I of the Ohio Constitution. However, the purge hearing constituted a civil proceeding, not a criminal proceeding, rendering these constitutional provisions inapplicable. Therefore, we reject this argument.

[*P3] Liming also contends that indigent civil contemnors who were represented by counsel at the time they were found in contempt have a procedural due process right to counsel at purge hearings under the *Fourteenth Amendment to the United States Constitution* and Section 16, Article I of the Ohio Constitution. However, a civil contemnor has a diminished liberty interest at a purge hearing because the trial court previously found him in contempt and imposed an appropriate sanction, which it simply deferred by conditioning his freedom on compliance with the court's order. Moreover, requiring the government to provide counsel at all purge hearings would impose fiscal and administrative burdens on the state while [**3] there is little risk of erroneous decisions when the only remaining issue is the limited question of whether the contemnor purged the contempt. Balancing these interests, we decline to create a categorical rule requiring the state to provide indigent civil contemnors, who were represented by counsel at their contempt hearing, with appointed counsel at purge hearings.

I. Facts

[*P4] Liming and Denday Damos married in 1993 and had two children. When the couple divorced in 2005, the court named Damos the legal custodian and residential parent of the children and ordered Liming to pay child support. In 2008, CSEA filed motions asking the court to find Liming in contempt for among other things, falling behind in his child support payments. Liming appeared at the contempt hearing represented by counsel. The magistrate recommended that the trial court hold him in contempt, sentence him to 30 days in jail, suspend the sentence, and give Liming an opportunity to purge the contempt by complying with certain conditions for one year, such as paying his monthly child support obligation on time and making payments towards the arrearage each month. Liming did not file objections to the magistrate's decision, [**4] and the trial court adopted the decision.

[*P5] In 2009, CSEA claimed that Liming failed to purge the contempt and asked the court to impose the previously suspended jail sentence. At the "purge hearing" on the motion, the court denied Liming's request for appointed counsel. The court found that Liming did not pay his current child support obligation or arrearage obligation in March, May, August, October, and December 2009. The court also found that he failed to pay his arrearage obligation from January to May 2010. The court ordered Liming to serve ten days of the suspended sentence and continued to suspend the remaining 20 days of the sentence so long as Liming complied with certain conditions. This appeal followed.

II. Assignments of Error

[*P6] Liming assigns two errors for our review:

The trial court violated Mr. Liming's right to counsel when it refused to appoint Mr. Liming an attorney to represent him at a hearing in which a jail sentence was imposed. *Sixth and Fourteenth Amendments to the United States Constitution*; Sections 10 and 16, Article I of the Ohio Constitution (July 28, 2010 Judgment Entry on Motion to Impose; Tr. 4.)

Because the June 2010 hearing to impose sentence was criminal [**5] in nature, Mr. Liming was entitled to counsel. The trial court erred when it refused to appoint Mr. Liming counsel for that hearing. *Sixth and Fourteenth Amendments to the United States Constitution*; Sections 10 and 16, Article I of the Ohio Constitution (July 28, 2010 Judgment Entry on Motion to Impose; Tr. 4.)

III. Constitutional Right to Appointed Counsel

[*P7] In his first and second assignments of error, Liming contends that he had a right under the federal and state constitutions to appointed counsel at the purge hearing. Liming cites the *Sixth Amendment to the United States Constitution* (made applicable to the states through the *Fourteenth Amendment*) and Section 10, Article I of the Ohio Constitution as a basis for this right. The *Sixth Amendment* guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." Section 10, Article I of the Ohio Constitution, which outlines the rights of criminal defendants, provides: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel[.]" Therefore, we must ini-

tially determine whether the purge hearing constituted a [**6] civil or criminal proceeding. We begin our analysis with an examination of the underlying finding of contempt.

[*P8] "Contempt is a disregard of, or disobedience to, the orders or commands of judicial authority." *McClead v. McClead*, *Washington App. No. 06CA67*, 2007 Ohio 4624, at ¶32 (per curiam), citing *Cassidy v. Cassidy*, *Pike App. No. 03CA721*, 2005 Ohio 3199, at ¶20. "Contempt proceedings are often classified as *sui generis*, neither civil nor criminal. However, most courts distinguish between civil and criminal contempt proceedings." *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001 Ohio 15, 740 N.E.2d 265 (internal citation omitted). The distinction largely depends upon the purpose of the sanction imposed. *Id.*

[*P9] Criminal contempt sanctions "are punitive in nature and are designed to vindicate the authority of the court." *Eastern Local School Dist. Bd. of Educ. v. Eastern Local Classroom Teachers' Assn.*, *Pike App. No. 03CA717*, 2004 Ohio 1499, at ¶8, citing *State ex rel. Johnson v. County Court of Perry Cty. (1986)*, 25 Ohio St.3d 53, 25 Ohio B. 77, 495 N.E.2d 16. They "are usually characterized by an unconditional prison term or fine." *Id.*, citing *Brown v. Executive 200, Inc. (1980)*, 64 Ohio St.2d 250, 254, 416 N.E.2d 610. [**7] "Civil contempt sanctions are remedial or coercive in nature and are for the benefit of the complainant." *Id.*, citing *Brown at 253*. "Prison sentences are conditional. The contemnor is said to carry the keys of his prison in his own pocket * * * since he will be freed if he agrees to do as ordered." *Brown at 253*.

[*P10] After making the contempt finding, the trial court sentenced Liming to 30 days in jail but suspended the sentence on the condition that he, among other things, timely pay his current child support obligation and make installment payments toward his arrearage. The court's sanction was coercive and benefited Liming, so we characterize the order as a civil contempt order.

[*P11] Nonetheless, Liming claims the purge hearing related to that order constituted a criminal proceeding. He cites *In re Earley v. Campbell* (Mar. 30, 2000), *Stark App. No. 99-CA-256*, 2000 Ohio App. LEXIS 1276, 2000 WL 329969 and *Samantha N. v. Lee A.R.* (Feb. 16, 2001), *Erie App. Nos. E-00-036 & E-00-037*, 2001 Ohio App. LEXIS 540, 2001 WL 127343, to support his argument. We find *Earley* inapplicable as it did not involve a purge hearing but instead involved a contempt finding followed by a deferred sentencing hearing. See *Earley* 2000 Ohio App. LEXIS 1276, [WL] at *2.

[*P12] In *Samantha N.*, the trial court [**8] found the appellant in contempt for failing to keep his child support obligations current, but the court suspended his jail sentences on the condition that he follow a particular payment schedule. *Samantha N.*, 2001 Ohio App. LEXIS 540, [WL] at *1. The child support enforcement agency alleged that the appellant failed to follow the court's order. *Id.* The appellant did not have counsel at the contempt hearing or purge hearing. *Id.* The appellant complained that he hired an attorney to represent him at the purge hearing, but when the court "could not reach his counsel by telephone to learn why his counsel was not present for the hearing, the trial court forced him to proceed without representation." 2001 Ohio App. LEXIS 540, [WL] at *2.

[*P13] The Sixth District concluded the trial court "was exercising its criminal contempt powers [at the purge hearing] because it was clearly no longer attempting to coerce appellant to pay his child support arrearages. Instead the trial court was punishing appellant for not complying with its previous orders." 2001 Ohio App. LEXIS 540, [WL] at *3 (footnote omitted). The *Samantha N.* Court noted that "[o]nce the contempt power is classified as criminal, the contemnor is entitled to those rights and constitutional privileges afforded a defendant [**9] in a criminal action. * * * The most important of these are the contemnor's right to due process and to have the complainant prove

the contempt beyond a reasonable doubt." *Id.*, quoting *Winkler v. Winkler (1991)*, 81 Ohio App.3d 199, 202, 610 N.E.2d 1022. And the court concluded that the trial court denied the appellant his due process rights. *Id.*

[*P14] The *Samantha N.* Court did not address the issue of whether indigent parties have a constitutional right to appointed counsel at purge hearings. Moreover, we disagree with the Sixth District's characterization of a purge hearing as an exercise of criminal contempt powers. The fact that Liming failed to meet the purge conditions to avoid enforcement of his sentence did not convert the purge hearing into a criminal contempt proceeding at which he faced a new risk of imprisonment. See *Segovia v. Likens*, 179 Ohio App.3d 256, 2008 Ohio 5896, 901 N.E.2d 310, at ¶39. The only issue before the court at the purge hearing was whether Liming met the purge conditions imposed following the civil contempt hearing, i.e., whether he paid his current child support obligations and his arrearage. See *id.* Finding that Liming had not purged the contempt, the trial court did not impose a new sentence. See *id.* "Rather, the court enforced the sentence it had already imposed." *Id.* Thus, we conclude that the purge hearing retained the civil character of the original contempt proceeding. And because the purge hearing did not constitute a criminal prosecution, the *Sixth Amendment to the United States Constitution* and Section 10, Article I of the Ohio Constitution did not apply to it.

[*P15] The characterization of the purge hearing as civil in nature does not foreclose the possibility that Liming had a procedural due process right to counsel predicated on the *Fourteenth Amendment to the United States Constitution* or Section 16, Article I of the Ohio Constitution. "When read in conjunction with Sections 1, 2, and 19 [of the *Ohio Constitution*], Section 16 is the equivalent to the *Fourteenth Amendment's due process clause*. As a consequence, decisions of the United States Supreme Court can be utilized to give meaning to the guarantees of Article I of the

Ohio Constitution." *State ex rel. Heller v. Miller (1980)*, 61 Ohio St.2d 6, 8, 399 N.E.2d 66 (internal citation omitted).

[*P16] The United States Supreme Court has explained:

For all its consequence, "due process" has [**11] never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy [(1961)]*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the *Due Process Clause* is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Dept. of Social Services (1981), 452 U.S. 18, 24-25, 101 S. Ct. 2153, 68 L. Ed. 2d 640.

[*P17] Liming claims that he had a due process right to counsel at the purge hearing because he faced the loss of his physical liberty at the hearing. He cites *Lassiter* for the proposition that "[r]egardless of whether the matter is civil or criminal, due process demands that whenever a party faces the deprivation of his or her liberty interest, the party is entitled to counsel." (Appellant's [**12] Br. 5). Contrary to Liming's assertion, *Lassiter* did not create a per se right to appointed counsel whenever loss of liberty is possible. *Lassiter* did not even establish a presumption in favor

of appointed counsel when incarceration is possible. In rejecting a mother's claimed right to counsel before her parental rights could be terminated, the Court simply found a "presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty[.]" *Lassiter* at 31. *Lassiter* did not involve a potential loss of physical liberty, so the Court had no occasion to hold -- and did not hold -- that when loss of liberty is at stake, there is a per se right to or presumption in favor of appointing counsel.

[*P18] Liming also cites *Argersinger v. Hamlin* (1972), 407 U.S. 25, 38, 92 S.Ct. 2006, 32 L.Ed.2d 530 for the proposition that "where imprisonment actually occurs[,] the indigent-defendant must have been appointed counsel." (Appellant's Reply Br. 2). However, the *Argersinger* Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented [*13] by counsel at his trial." *Argersinger* at 37. *Argersinger* involved the Sixth Amendment right to counsel in criminal proceedings, not a due process based right to counsel in a civil proceeding, thus we find it inapplicable here.

[*P19] Thus, we decline to create a per se right to counsel at purge hearings based solely on the possibility of imprisonment after such a hearing. We recognize that this conclusion appears at odds with our decision in *Matter of Estate of Straub* (Feb. 13, 1992), Ross App. No. 1728, 1992 Ohio App. LEXIS 863, 1992 WL 37781, at *8, where we broadly stated that "counsel must be appointed for those unable to afford counsel in any proceedings where incarceration is a possibility, including both civil and criminal contempt proceedings." However, *Straub* did not involve a purge hearing, so we did not have occasion to address the right to counsel in that context.

[*P20] Liming cites a number of Ohio cases for the proposition that a civil contemnor is entitled to counsel at a purge hearing. However, none of these cases address the specific issue of

whether a civil contemnor has a constitutional right to appointed counsel at a purge hearing: *Schock v. Sheppard* (1982), 7 Ohio App.3d 45, 7 Ohio B. 48, 453 N.E.2d 1292; *Green v. Green*, Portage App. No. 2007-P-0092, 2008 Ohio 3064 [**14]; *Everly v. Shuster* (Apr. 27, 1999), Noble App. No. 237, 1999 WL 260895, 1999 Ohio App. LEXIS 1973; *Duffield v. Duffield* (Sept. 12, 2001), Wayne App. No. 01CA0002, 2001 Ohio App. LEXIS 4012, 2001 WL 1044077.

[*P21] Therefore, to determine whether an indigent civil contemnor who had counsel at his contempt hearing has a per se right to appointed counsel at a purge hearing, we turn to the United States Supreme Court's decision in *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18. The *Mathews* Court identified three factors for courts to evaluate in determining what procedural due process requires: 1.) the private interests at stake; 2.) the government's interest; and 3.) the risk that the procedures used will lead to erroneous decisions. *Mathews* at 335. See *Lassiter, supra*, at 27 (in part balancing these factors to decide whether mother had due process right to counsel before parental rights could be terminated).

[*P22] As to the private interests at stake, civil contemnors such as Liming certainly face the loss of physical liberty at a purge hearing. However, as the Tenth District has recognized, this liberty interest is a "diminished one." *Segovia, supra*, at ¶43. In *Segovia* the trial [**15] court found Ricardo, the plaintiff in an action to establish parental rights and responsibilities concerning two minor children, in contempt for failing to comply with a court order regarding phone access to the children. *Id.* at ¶¶2 3, 7-8. The court sentenced Ricardo to 15 days in jail but suspended the sentence on the condition that Ricardo purge the contempt by giving the children's mother additional phone time with them during his next parenting weekend. *Id.* at ¶7. Subsequently, the mother filed a motion to enforce, claiming Ricardo did not comply with the purge condition. *Id.* at ¶11. At the purge hearing, Ricardo sought a continuance to obtain counsel, but the court denied his request. *Id.*

at ¶12. The court enforced five days of the suspended sentence and continued to suspend the remaining ten days. *Id.* at ¶17. Ricardo appealed, arguing in part that the court should have determined whether he was indigent and eligible for court appointed counsel. *Id.* at ¶18.

[*P23] In evaluating the private interests at stake, the *Segovia* Court considered the fact that "a litigant's right to counsel diminishes as his personal liberty interest diminishes." *Id.* at ¶42, citing *Lassiter* at 26. The Court [**16] cited parole revocation as an example, noting that "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Id.*, quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484. While the Tenth District recognized that "Ricardo faced the risk of losing his freedom following the purge hearing," the Court also recognized that the "trial court had already conditioned Ricardo's freedom on his continued compliance with the court's order." *Id.* at ¶43. "Thus, like a parolee subject to having his parole revoked, Ricardo's liberty interest was a diminished one." *Id.* Likewise, we conclude that since the trial court already conditioned Liming's freedom on compliance with the purge conditions, he had a diminished liberty interest at the purge hearing.

[*P24] Regarding the risk that the procedures used will lead to erroneous decisions, the Tenth District considered the fact that Ricardo had a "full opportunity, with counsel, to defend against the contempt charge in the first instance" and "did not object to or otherwise appeal from that [**17] court's finding of contempt." *Id.* at ¶44. Therefore, the *Segovia* Court found that it could afford the finding of contempt "sufficient reliability to support a sentence." *Id.*, citing *Alabama v. Shelton* (2002), 535 U.S. 654, 665, 667, 122 S.Ct. 1764, 152 L.Ed.2d 888. And the Court concluded that "the only question at issue in the purge hearing-whether Ricardo purged the contempt-was a limited one and presented a low risk of an erroneous decision by the trial court." *Id.*

[*P25] Like the contemnor in *Segovia*, Liming had counsel to defend the contempt charge in the first instance and did not appeal from the contempt finding. And we agree with the *Segovia* Court that the only question at issue during a purge hearing, i.e. whether the contemnor purged the contempt, is a limited one and presents a low risk of an erroneous decision by the trial court. Moreover, in examining the government's interest, we recognize that requiring the state to provide indigent civil contemnors with appointed counsel at purge hearings would place additional fiscal and administrative burdens on the government. See *Mathews, supra, at 335*.

[*P26] Balancing the civil contemnor's diminished liberty interest at a purge hearing against [**18] the low risk of an erroneous decision at the hearing and the government's interest, we decline to create a categorical rule that civil contemnors represented by counsel at contempt hearings have a due process based right to appointed counsel at purge hearings. We overrule Liming's first and second assignments of error and affirm the trial court's judgment. This decision does not foreclose the possibility that fundamental fairness -- "the touchstone of due process" -- might require the appointment of counsel at a purge hearing under certain circumstances. See *Gagnon v. Scarpelli (1973), 411 U.S. 778, 787-790, 93 S.Ct. 1756, 36 L.Ed.2d 656* (declining to adopt categorical rule that government must provide counsel for indigents in all probation or parole revocation cases and instead adopting a case-by-case approach). However, Liming does not advocate a case-by-case approach to this issue, let alone argue that he was entitled to counsel at the purge hearing based on circumstances unique to his case. So we need not address those issues here.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable [**19] grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. Exceptions.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

William H. Harsha, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.



Samantha N. and Sylvia P., Appellees v. Lee A. R., Appellant

Court of Appeals Nos. E-00-036, E-00-037

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT,

ERIE COUNTY

2001 Ohio App. LEXIS 540

February 16, 2001, Decided

PRIOR HISTORY: [*1] Trial Court No. 95-PA-87 97-SU-0176.

DISPOSITION: JUDGMENTS REVERSED.

COUNSEL: Dennis P. Levin, for appellant.

JUDGES: George M. Glasser, J., Richard W. Knepper, J., Mark L. Pietrykowski, P.J., CONCUR.
Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

OPINION BY: George M. Glasser

OPINION

DECISION AND JUDGMENT ENTRY

GLASSER, J. This is a consolidated appeal from two different judgments of the Erie County Court of Common Pleas, Juvenile Division, filed on May 10, 2000, in which the court ruled that appellant, Lee A. R., failed to purge two previous findings of contempt, and ordered him to consecutively serve two thirty day sentences in jail. Appellant has presented three assignments of error for consideration on appeal that are:

"FIRST ASSIGNMENT OF ERROR

The appellant was denied his right to procedural due process when the trial court failed to obtain a valid waiver of appellant's waiver of counsel at hearing.

"SECOND ASSIGNMENT OF ERROR

The trial judge abused his discretion in failing to continue the hearing until appellant's retained counsel could be located and be present for hearing.

"THIRD ASSIGNMENT OF ERROR

The failure of [*2] the court to even consider appellant's statements with regard to his inability to comply with the purge conditions which inability rises to the level of a complete defense, constitutes an abuse of discretion."

Appellant has fathered two children by two different mothers, and for each child, the Erie County Court of Common Pleas, Juvenile Division, entered separate orders in separate cases for appellant to pay child support. On March 19, 1999, the trial court filed form judgment entries in each case containing its rulings that appellant was in contempt of court for failing to keep his child support obligations current. The court ordered appellant to serve thirty days in jail for each contempt conviction, but stayed the imposition of the sentences on condition that appellant purge his contempt by making payments of \$ 275.08 a month in one case, and of \$ 64.04 per week in the other case. Appellant was also ordered to open a bank account for the purpose of making his child support payments, and was directed to provide the account number and routing number to the Erie County Child Support Enforcement Agency ("CSEA").

CSEA subsequently filed motions for the imposition of the contempt sentence [*3] in both cases, alleging that appellant failed to comply with the court orders to purge his contempt. On May 10, 2000, the trial court held a joint hearing on the motions for both cases. The transcript of the hearing begins with an opening statement from the court which includes the following statement: "The record will reflect that [appellant] is present without benefit of counsel, his having previously waived his [*sic*] rights to counsel under the contempt proceedings in both matters." Likewise, the form judgment entries filed by the trial court after the hearing in which the court ordered appellant to serve two thirty day sentences in jail consecutively, have check marks entered prior to the statement: "and waived his right to counsel."

The transcript shows that the trial court then held the hearing, in which an attorney for CSEA informed the trial court that its records showed that appellant had failed to make any payments at all on some occasions, and that he was still in arrears on his child support obligations for both cases. The attorney for CSEA said that because appellant is unemployed, the agency believed he was choosing when to make payments and when not to make [*4] payments, and that he was not being entirely forthright about his monetary circumstances.

Appellant attempted to contest the statements made by the CSEA attorney, and explained to the court that he had made at least partial payments to his bank account each month, but because he is self-employed as a car mechanic and is still working on building his business, he was unable to pay the full amount each and every month. He referred to documents he had to verify his statements, but they were never offered or admitted as exhibits.

Appellant explained that he brought his business records with him, and that the statements would show what his profits were and how hard it was for him to meet the obligations for child support. He said he was not hiding any of his income. Once again, the records were not offered or admitted as exhibits.

Appellant also tried to explain that he and the mother of one of his children were attempting to reach a new agreement on shared parenting that would lessen his monetary obligation for child support in regard to that son because he has the son in his care and custody for a much greater time than is reflected in the original orders in the case. The trial court [*5] interrupted him, however, saying that matter was not before the court.

The trial court then ruled that appellant had failed to purge his contempt, and ordered the imposition of both thirty day sentences, to be served consecutively. In response to protestations from appellant that he had sincerely tried to meet his obligations, the trial court said that when

self-employed persons could not meet their obligations, it was time for them to get a "regular job through a regular employer." When appellant pleaded that he would lose his business if forced to serve sixty days in jail, the trial court replied that appellant knew that before he arrived for the hearing, and he should have purged his contempt.

The record shows that after the trial court filed its judgments ordering appellant to serve a total of sixty days in jail, appellant filed a motion for reconsideration. On May 25, 2000, the trial court denied appellant's motions for reconsideration. The trial court also denied subsequent requests from appellant for a stay of his sentences. Appellant then filed his notices of appeal, and this court consolidated them. This court also granted appellant's request for a stay of his sentences [*6] so that his appeal would not be rendered moot.

1 Appellant presented several documents to support his motion for reconsideration to show that he had hired an attorney for the hearing, why the attorney did not arrive, and that he had some evidence to support the assertions he made at the hearing that he had made some payment for which CSEA did not credit him. This court cannot rely upon that information, however, because a motion for reconsideration in a trial court is a nullity. See *Pitts v. Ohio Dept. Of Transportation* (1981), 67 Ohio St. 2d 378, 380, 423 N.E.2d 1105.

In support of his first assignment of error, appellant argues that he was denied due process at the hearing on CSEA's motion to impose the sentences for contempt because he did not knowingly, voluntarily or intelligently waive his right to counsel in this case. He stated that he did hire an attorney to represent him in the hearing and that when the court could not reach his counsel by telephone to learn why his counsel was not [*7] present for the hearing, the trial court forced him to proceed without representation.

We note that appellee, CSEA, did not file a brief in this case. Therefore, applying *App.R. 18(C)* we find that the record presented supports this court accepting as correct appellant's statement that he did not knowingly, voluntarily or willingly waive his right to representation at the hearing. The record does not include a written waiver of counsel from appellant and does not contain any discussion in the hearing transcript between the trial judge and appellant to show that appellant was knowingly, voluntarily and intelligently waiving his right to counsel. See *State v. Grimes (1984)*, 17 Ohio App. 3d 71, 72-73, 477 N.E.2d 1219; *Moran v. Colaner*, 1999 Ohio App. LEXIS 3351 (July 19, 1999), Tuscarawas App. No. 1998 AP 090105, unreported; and *State v. Donahoe*, 1991 Ohio App. LEXIS 1153 (March 21, 1991), Greene App. No. 90CA55, unreported.

We next consider the nature of the contempt powers that were exercised by the trial court in this case. As the Ninth District Court of Appeals discussed in an analogous case:

"It has been stated that 'sentences for criminal contempt are punitive in nature and are designed to vindicate [*8] the authority of the court.' *** Criminal contempt 'is usually characterized by an unconditional prison sentence.' *** By contrast, 'civil contempt is to coerce the contemnor in order to obtain compliance with the lawful orders of the court.' *** In civil contempt the 'contemnor is said to carry the keys of his prison in his own pocket *** since he will be freed if he agrees to do as ordered.' *Winkler v. Winkler (1991)*, 81 Ohio App. 3d 199, 201, 610 N.E.2d 1022. (Citations omitted.)

After reviewing the transcript from these consolidated cases, we conclude that the trial court was exercising its criminal contempt powers because it was clearly no longer attempting to coerce appellant to pay his child support arrearages. ² Instead the trial court was punishing appellant for not complying with its previous orders. See *Winkler v. Winkler (1991)*, 81 Ohio App. 3d 199, 201, 610 N.E.2d 1022. As the Ninth District Court of Appeals explained:

2 The record shows that after the trial court said it was going to impose the sentences, appellant repeatedly asked the trial court what he could do to avoid being jailed, and the trial court told appellant it was "too late" that he had been given time to purge his contempt and that the trial court had "no choice" but to jail appellant. These statements show that the trial court was more interested in punishment, than in coercing payment from the contemnor.

[*9] "Once the contempt power is classified as criminal, the contemnor is entitled to those rights and constitutional privileges afforded a defendant in a criminal action. *** The most important of these are the contemnor's right to due process and to have the complainant prove the contempt beyond a reasonable doubt." *Id. at 202.*

In this case, appellant was not afforded his full due process rights. CSEA was permitted to prove its case against appellant by having its attorney make representations to the court. The record shows that appellant would have benefited from having counsel to challenge the statements and assumptions voiced by the CSEA attorney regarding appellant's failure to pay and CSEA's belief that appellant was not being forthright about his ability to pay. Appellant's counsel could have introduced evidence to show that appellant did engage in a good faith effort to purge his contempt and was not underemployed or hiding his income. This information was relevant, because the issue under consideration was whether appellant had attempted in good faith to comply with the court orders for purging his contempt for child support owed. See, *id. at 203.* [*10] The information should have been considered by the trial court before it decided beyond a reasonable doubt that appellant had not made a good faith effort to comply with its orders and was in willful violation of its contempt orders. Appellant's first assignment of error is well-taken.

In support of his second assignment of error, appellant says that if this court is not persuaded by his arguments in his first assignment of error that he was constitutionally entitled to counsel or that he did not make a knowing, intelligent and voluntary waiver of counsel, he asserts an alternative argument that the trial court abused its discretion when it went forward with the hearing knowing that appellant had hired an attorney, who failed to appear for unknown reasons. As our discussion of the first assignment of error shows, this court has already found that appellant was entitled to counsel at the hearing. We have further ruled that the record does not show that appellant made a knowing, intelligent and voluntary waiver of his right to counsel. Accordingly, appellant's alternative argument is rendered moot and the second assignment of error is not well-taken.

In support of his third assignment [*11] of error, appellant argues that the trial court abused its discretion when it failed to consider the information he tried to present to show that he had made a good faith effort to purge the court's contempt orders, and that he had an inability to pay the full amounts owed. In our discussion of the first assignment of error, this court noted that the trial court should have considered the information appellant was attempting to present to show that he had made at least partial payments, that he was unable to pay the full amounts owed but was making a good faith effort to comply, and that he was not hiding income and was not underemployed. Accordingly, appellant's third assignment of error is well-taken.

The judgments of the Erie County Court of Common Pleas, Juvenile Division, are reversed. This case is remanded for further proceedings consistent with this decision. Appellee CSEA is ordered to pay the court costs of this appeal.

JUDGMENTS REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*, amended 1/1/98.

George M. Glasser, J.

Richard W. Knepper, J.

Mark L. Pietrykowski, P.J.

[*12] CONCUR.

Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.
