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Supreme Court Argument in Civil Gideon/Civil Contempt Case – Sufficiency of SRL Procedures Addressed in SC for First Time

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This may become very important.

You can read the full transcript of today's (March 23, 2011) oral argument on whether there is a right to counsel for those facing contempt incarceration for nonpayment of child support.

It is fascinating, and very highly recommended reading for those of interested in how self-represented litigants are treated in the courts. As I explained in a prior post, the Solicitor General (SG) took the position that while there was no right to counsel in child support contempt cases, the failure of the trial court to provide assistance to the defendant by means of such tools or questioning by the judge as to the key issue of capacity to pay, violates due process and required reversal. SG brief here.

While the perhaps traditional civil Gideon topics of Lassiter, Mathews v. Eldridge, the relevance of the risk of incarceration and the need for a lawyer to explore the legal issues were addressed, what was surprising was the extent to which oral argument focused on ways that self-represented litigants might be helped by the courts. I suspect that this is the first time that these issues have been addressed even at oral argument by the Supreme Court. At a minimum it suggests that many, and perhaps all, the members of the court have no problem with, and see the benefits of, courts providing forms, and judges asking questions to get at the facts — this should be very helpful for access issues in the future. It will be interesting to see how the media report on the argument. (AP here. "*But the court sounded reluctant to extend the right to a taxpayer-provided lawyer that exists in criminal cases to civil proceedings where a person faces jail time. Justice Elena Kagan was among those who wondered whether there are procedures short of a court-appointed lawyer that would give a "person in this situation a fair shake at this.*"") NYT here.

Here are some of the highlights:

- Seth Waxman (for petitioners) offers a more limited rule — right to counsel when one threatened with incarceration has placed on him the burden of an affirmative defense (here incapacity to pay.) (Transcript at 9).
- Justice Sotamayor asks Waxman if the Solicitor General's suggestion that the due process would be satisfied if the defendant were told what he had to prove (the SG suggested that a form or judicial questioning would be ways of helping the defendant get the facts out). Waxman gives the good answer that incapacity to pay is both a legal and factual matter (Transcript at 9-11).
- Waxman says in rebuttal to SG argument that a form would have helped that there in fact was a form in which the defendant stated that he had no income and that his only asset was a $1,500 car. (Transcript at 11-12).
- Justice Alito seems to endorse the possibility of judicial questioning as being sufficient to meet due process needs: "*Why isn't something like what the solicitor general suggested adequate here? The State provides a very clear form for the noncustodial parent to fill out, and then in court the judge goes through it step*

by step, are you working? How much are you making? Do you have any other money? What expenses do you need for living?" (Transcript at 20).

- Alito then goes on to suggest that maybe counsel might need to be appointed in cases of **legal** complexity. I.e. a form of triage. (Transcript at 20).
- Justice Kagan, now questioning the SG attorney, Leondra Kruger, asserts that the proposed alternative procedures are " remarkably anemic" because they fail to provide a person to explain and help fill out the form, fail to require findings and "You don't require that the Court even ask any questions". (Transcrpt at 25.) Yes, a Justice is suggesting that a Court Self-Help Center might here be constitutionally mandated — as well as judicial questioning!
- Justices Scalia, on the one side, and Justices Ginsburg and Sotomayor on the other, appear to disagree as to whether the SG's position is properly before the court. (Transcript 41-44.)
- Justice Kagan points out to the mother's attorney that the judge did not in fact have any basis for making any implied finding of ~~lack of~~ capacity to pay: *"Well, we couldn't really tell, could we, Mr. Bibas? Because he* [the judge] *completely ignored the question. The entire transcript is less than two pages long. Mr. Turner talked about how he had no money and he was disabled. The court completely ignored him. The court also ignored the questions on the form for the order of contempt about whether he had any money."* (Transcript at 46.)
- Justice Kennedy asks mother's counsel whether the Court should lay out factors as to when counsel is required. Counsel says no, because *"we can't conceive of a legal issue here so complex that categorically a lawyer is necessary."* (Transcript at 55.)

I make no prediction as to how the case will come out. Given that even the more conservative justices had some interest in the issue (although there was questioning as to whether the issue was properly before the court), I would doubt that the approach would be used to undercut the right to counsel. But it has to be acknowledged as a potential risk (as there is in almost any practical argument in the real world.)

It may be appropriate to remind that the Self-Represented Litigation Network has developed an extensive curriculum on judicial engagement with the self-represented. Here is a link to an article in the Georgetown Journal of Legal Ethics, I have written that approaches the issue theoretically. Here is a more practical article on judicial techniques in Judge's Journal.

It will be fascinating to see if this set of issues makes its way into the opinion. If so, we may be quoting the opinion for a long time, and in many contexts.

About richardzorza
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