

**IN THE SUPREME COURT OF  
THE STATE OF NEVADA**

MICHAEL FOLEY

*Appellants,*

vs.

PATRICIA FOLEY,

*Respondent,.*

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District Court No.:  
R-11-162425-R

**AMICUS AMERICAN CIVIL LIBERTIES UNION OF NEVADA**  
**JOINDER IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING**

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## RELIEF SOUGHT AND ARGUMENT

American Civil Liberties Union of Nevada (ACLUNV) files this joinder to Appellant Michael Foley's Petition for Limited Rehearing.<sup>1</sup> ACLUNV's joinder speaks only to one issue: the right to counsel.

In the Dec 21, 2018 Order, the Court commented that Appellant "offers no compelling reason as to why this court should depart from established precedent and find a categorical right to counsel in every civil contempt proceeding where the contemnor is indigent," and cited to *Turner v. Rogers*, 564 U.S. 431, 448 (2011). However, ACLUNV's understanding is that Appellant's Opening Brief did not seek a categorical right to counsel for every civil contempt proceeding, but rather only those civil contempt proceedings where "the government has its own counsel advocating for collection." App. Op. Br.55-56. Appellant's subsequently-filed Reply Brief similarly argued that "even if the inquiry had properly focused on ability to pay, Michael was procedurally disadvantaged in a lopsided system against DAFS's experienced, entrenched attorneys pursuing collection." App. Rp. Br. 15. Thus, Appellant's right to counsel argument was limited solely to cases, such as that of Mr. Foley, where the government is pursuing the contempt action, and was not seeking a right to counsel for all civil contempt cases.

Rather than asking to exceed the U.S. Supreme Court's holding in *Turner*, Appellant's sought-after right to counsel is supported by *Turner*. In *Turner*, the

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<sup>1</sup>As a brief note regarding timing, although the Nevada Rules of Appellate Procedure do not address timing for a joinder, this joinder was filed within nine (9) days of the motion it supports. Counsel, however, is prepared to file a motion extending time if the Court prefers it do so.

U.S. Supreme Court was careful to note that the facts of the case before it did not involve a government plaintiff or “some other competent representative”, and therefore the Court was not addressing such situations. *Id* at 449. Reflecting on the significance of this difference, the Court cited to *Johnson v. Zerbst*, 304 U.S. 458 (1938), which established a right to counsel for federal felony cases based in part on a concern over the prosecution being represented by “experienced and learned counsel” while the defendant went unrepresented. *Id*.

Based on this concern about the asymmetry of representation, courts around the country prior to and since *Turner* have recognized a limited right to counsel for those facing incarceration in state-initiated contempt proceedings. See e.g. *State v. Stone*, 268 P.3d 226, 235 (Wash. App. 2012) (recognizing right to counsel for litigant facing incarceration for failure to pay legal financial obligation in part because “Stone's lack of counsel during these proceedings created an ‘asymmetry of representation’ because a prosecuting attorney represented the State in this adversarial proceeding”); *Commonwealth v. Diaz*, 191 A.3d 850, 861-62 (Pa. Super. 2018) (noting in case involving incarceration for failure to pay fees/fines that “unlike *Turner* ... the fines and costs are owed to the Commonwealth and not a private party ... Thus, the *Turner* Court's reluctance to impose an automatic right to court-appointed counsel for an indigent defendant must be viewed against the backdrop of that case's unique facts”); *Sheppard v. Sheppard*, 2017 Wisc. App. LEXIS 541, \*17 (Wisc. App. 2017) (noting that past case law “established a ‘bright-line rule’ that a defendant has a right to appointed counsel when his or her liberty ‘is threatened by a remedial contempt action brought by the government’”);

*JEFM v. Holder*, 107 F. Supp. 3d 1119, 1139 (W.D. Wash. 2015) (noting that *Turner* left open right to counsel question when government is plaintiff, and that “The right-to-counsel claim asserted by plaintiffs in this case falls squarely within the intersection of the questions unanswered in *Turner*. The removal proceedings at issue in this case pit juveniles against the full force of the federal government ...”); *Black v. Div. of Child Support Enf’t*, 686 A.2d 164, 166 (Del. 1996) (limiting right to counsel in child support proceedings to those initiated by State).

For these reasons, Appellant’s right to counsel claim does not depart from established precedent and in fact is consonant with holdings from the U.S. Supreme Court and other jurisdictions.

### **CONCLUSION**

ACLUNV supports Appellant’s Petition for Rehearing and urges the Court to reconsider its position on question of the right to counsel for Appellant and others similarly situated in State-initiated civil contempt proceedings.

Dated on this 5th day of April, 2019.

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## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this JOINDER IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING was filed electronically with the Nevada Supreme Court April 5, 2019 and electronically served on the following parties:

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font, Times New Roman style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 754 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: April 5, 2019.

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