Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TURNER *v.* ROGERS ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 10–10. Argued March 23, 2011—Decided June 20, 2011

After a South Carolina family court ordered petitioner Turner to pay $51.73 per week to respondent Rogers to help support their child, Turner repeatedly failed to pay the amount due and was held in contempt five times. For the first four, he was sentenced to 90 days' imprisonment, but he ultimately paid what he owed (twice without being jailed, twice after spending a few days in custody). The fifth time he did not pay but completed a 6-month sentence. After his release, the family court clerk issued a new "show cause" order against Turner because he was $5728.76 in arrears. Both he and Rogers were unrepresented by counsel at his brief civil contempt hearing. The judge found Turner in willful contempt and sentenced him to 12 months in prison without making any finding as to his ability to pay or indicating on the contempt order form whether he was able to make support payments. After Turner completed his sentence, the South Carolina Supreme Court rejected his claim that the Federal Constitution entitled him to counsel at his contempt hearing, declaring that civil contempt does not require all the constitutional safeguards applicable in criminal contempt proceedings.

Held:

1. Even though Turner has completed his 12-month sentence, and there are not alleged to be collateral consequences of the contempt determination that might keep the dispute alive, this case is not moot, because it is "capable of repetition" while "evading review," *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 498, 515. A case remains live if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149. Here, the "challenged ac-

tion," Turner's imprisonment for up to 12 months, is "in its duration too short to be fully litigated" through the state courts (and arrive here) prior to its "expiration." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U. S. 765, 774. And there is a more than "reasonable" likelihood that Turner will again be "subjected to the same action" because he has frequently failed to make his support payments, has been the subject of several civil contempt proceedings, has been imprisoned several times, and is, once again, the subject of civil contempt proceedings for failure to pay. *DeFunis* v. *Odegaard*, 416 U. S. 312, and *St. Pierre* v. *United States*, 319 U. S. 41, distinguished. Pp. 5–7.

2. The Fourteenth Amendment's Due Process Clause does not *automatically* require the State to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. In particular, that Clause does not require that counsel be provided where the opposing parent or other custodian is not represented by counsel and the State provides alternative procedural safeguards equivalent to adequate notice of the importance of the ability to pay, a fair opportunity to present, and to dispute, relevant information, and express court findings as to the supporting parent's ability to comply with the support order. Pp. 7–16.

(a) This Court's precedents provide no definitive answer to the question whether counsel must be provided. The Sixth Amendment grants an indigent criminal defendant the right to counsel, see, *e.g., United States* v. *Dixon*, 509 U. S. 688, 696, but does not govern civil cases. Civil and criminal contempt differ. 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." *Hicks* v. *Feiock*, 485 U. S. 624, 638, n. 9. And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Id.*, at 633. The Due Process Clause allows a State to provide fewer procedural protections in civil contempt proceedings than in a criminal case. *Id.*, at 637–641. Cases directly concerning a right to counsel in civil cases have found a presumption of such a right "*only*" in cases involving incarceration, but have not held that a right to counsel exists in *all* such cases. See *In re Gault*, 387 U. S. 1; *Vitek* v. *Jones,* 445 U. S. 480; and *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18. Pp. 7–10.

(b) Because a contempt proceeding to compel support payments is civil, the question whether the "specific dictates of due process" require appointed counsel is determined by examining the "distinct factors" this Court has used to decide what specific safeguards are needed to make a civil proceeding fundamentally fair. *Mathews* v. *Eldridge*, 424 U. S. 319, 335. As relevant here those factors include

(1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." *Ibid.*

The "private interest that will be affected" argues strongly for the right to counsel here. That interest consists of an indigent defendant's loss of personal liberty through imprisonment. Freedom "from bodily restraint" lies "at the core of the liberty protected by the Due Process Clause." *Foucha* v. *Louisiana*, 504 U. S. 71, 80. Thus, accurate decisionmaking as to the "ability to pay"—which marks a dividing line between civil and criminal contempt, *Hicks, supra*, at 635, n. 7—must be assured because an incorrect decision can result in a wrongful incarceration. And because ability to comply divides civil and criminal contempt proceedings, an erroneous determination would also deprive a defendant of the procedural protections a criminal proceeding would demand. Questions about ability to pay are likely to arise frequently in child custody cases. On the other hand, due process does not always require the provision of counsel in civil proceedings where incarceration is threatened. See *Gagnon* v. *Scarpelli,* 411 U. S. 778. To determine whether a right to counsel is required here, opposing interests and the probable value of "additional or substitute procedural safeguards" must be taken into account. *Mathews, supra*, at 335.

Doing so reveals three related considerations that, taken together, argue strongly against requiring counsel in every proceeding of the present kind. First, the likely critical question in these cases is the defendant's ability to pay, which is often closely related to his indigence and relatively straightforward. Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*represented by counsel. A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would "alter significantly the nature of the proceeding," *Gagnon, supra*, at 787, creating a degree of formality or delay that would unduly slow payment to those immediately in need and make the proceedings *less* fair overall. Third, as the Federal Government points out, an available set of "substitute procedural safeguards," *Mathews, supra*, at 335, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. These include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions

about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.

This decision does not address civil contempt proceedings where the underlying support payment is owed to the State, *e.g.,* for reimbursement of welfare funds paid to the custodial parent, or the question what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate," *Gagnon, supra*, at 788. Pp. 10–16.

3. Under the circumstances, Turner's incarceration violated due process because he received neither counsel nor the benefit of alternative procedures like those the Court describes. He did not have clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. And the trial court did not find that he was able to pay his arrearage, but nonetheless found him in civil contempt and ordered him incarcerated. P. 16.

387 S. C. 142, 691 S. E. 2d 470, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ROBERTS, C. J., and ALITO, JJ., joined as to Parts I–B and II.