State of New Hampshire
Supreme Court

NO. 2005-0059

2005 TERM

APRIL SESSION

JAMES & VICTORIA KNIGHT,

BRENDA FULLER & CLAIRE DONAHUE

v.

CHARLES & MARY TERYEK,

& TOWN OF WOLFEBORO NEW HAMPSHIRE

RULE 7 APPEAL FROM FINAL DECISION OF
CARROLL COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT, CHARLES TERYEK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEW HAMPSHIRE CASES

OTHER STATES' CASES

NEW HAMPSHIRE STATUTES AND CONSTITUTION

SECONDARY SOURCES

QUESTIONS PRESENTED

1. Does a citizen who is incarcerated under a superior court order which sets out conditions of release which are on their face beyond the ability of the incarcerated person to comply with, have the right to court appointed counsel, when that person has requested appointed counsel and he cannot afford to hire an attorney?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Charles Teryek's intermittent incarceration during the past year is the culmination of a lengthy battle instigated by his neighbors.

When Charles and Mary Teryek bought their home in Wolfeboro in 1968 it was surrounded by forest, and most neighbors were not within sight. After an injury 15 years ago cut short Mr. Teryek's career as a trucker, the Teryeks and their family of five children have lived close to the land – they kept chicken for eggs, goats and cows for milk, and turkeys for meat. Mr. Teryek works odd-jobs for the Town and at the town dump; Ms. Teryek had a part-time job at a local motel in the summer, and has sold milk, eggs, and baked goods to local retailers.

Charles has compulsively amassed cast-away objects for use in maintaining their house, barn, and working vehicles. Consequently their ½-acre lot is an organized accumulation of parts for projects-in-process; an open-air basement of Yankee frugality. The items are not in a pile like dumped junk; they are arranged in aisles with tarps for protection from the weather. *See* PHOTOGRAPH, ***Appx. to Br.*** at 24 (taken April 20, 2005, photo ***not*** part of record below).

When they moved in, the Teryeks were surrounded by other families who also kept animals and lived from the land. As the area has lately become suburbanized, the trees cut, and the abutters within view, what was once an accepted rural subsistence lifestyle is now considered an eyesore.

After one of the Teryek's neighbors began complaining, the Town of Wolfeboro got involved. A cease-and-desist order was issued, and attempts were made to enforce it. The

District Court for Southern Carroll County found that the Teryeks' lot was a junkyard,[1] and ordered it cleaned. ORDER (July 9, 1998). Finding it insufficiently unsullied, the court allowed the Town to enter and remove things, ORDER (May 5, 2000). A dispute then arose about what was taken – Mr. Teryek alleged the town took 140 tons of topsoil and 30 cords of firewood – how well it was done, and the cost of the service. The New Hampshire Department of Environmental Services inspected the property, but declined to take action. *See* LETTER, *Appx. to Br.* at 25.

Ultimately the neighbors sued the Town and the Teryeks, alleging nuisance, trespass, negligence, and violation of statutes and ordinances. PETITION FOR INJUNCTIVE RELIEF, DAMAGES AND ATTORNEYS' FEES (May 19, 2003). Since then the Carroll County Superior Court has held numerous review hearings and issued just as many orders. Although the orders differ in details, generally they re-order Mr. Teryek to clean up, specify how many truckloads of things must be removed by a certain date, demand receipts from the Town Dump to prove it, prohibit more items being brought to the property, award attorneys fees, note Mr. Teryek's *pro se* status, find him in wilful contempt of the previous order, and either threaten to or send him to jail. *See ,* ORDERS (Sept. 18, 2003; Oct. 27, 2003; Jan. 2, 2004; Mar. 12, 2004; May 11, 2004; June 2, 2004; June 24, 2004; Sep. 3, 2004; Sep. 23, 2004; Dec. 1, 2004; Jan. 14, 2005).

As a result, Mr. Teryek has suffered four periods of incarceration, totaling 191 days as of

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[1]One of the orders says Mr. Teryek "agreed that his property is being operated as a junkyard within the meaning of RSA 236." ORDER (July 9, 1998). Because it was never his intent or practice to sell any of his collected possessions, and Mr. Teryek understood the junkyard statute then existing to apply only to the conduct of business, he denies having made such an admission. It is believed that the order may have been appealed, but declined by this Court. As there is no record, the matter remains.

the date of this brief, and he currently resides in the Carroll County House of Correction. In addition, the Teryeks, who own little except their house valued at about $75,000, owe a total of more than $70,000 to the town, the plaintiffs, and their attorneys. Moreover, because the court has demanded receipts from the Town Dump, Ms. Teryek is constrained from selling any of the items complained of, and has no other source of income other than fulfilling Mr. Teryek's contract with Wolfeboro to clean its municipal trash barrels. MOTION TO APPOINT (SEPT. 20, 2004), *Appx. to Br.* at 26.

Beginning in September 2004 Mr. Teryek began to request the appointment of free counsel. *Id.* The request was denied because the court "is not aware of any statutory authority to do so in that this involves an Equity matter dealing with 'civil' contempt." ORDER (Sept. 23, 2004), *Appx. to Br.* at 45. In January Mr. Teryek was again found in civil contempt and again sent to jail, where he remains, "until such time as forty (40) truckloads of material (junk) are removed from the subject site." ORDER (Jan. 14, 2005), *Appx. to Br.* at 48.

Mr. Teryek filed a Petition for Writ of habeas Corpus in this Court, which was reformatted into a Notice of Appeal at the direction of this Court, to settle the question of whether Mr. Teryek has a right to a free attorney. Appellate counsel was conditionally appointed.

SUMMARY OF ARGUMENT

After explaining some of the lengthy procedural history leading to Mr Teryek's incarceration for civil contempt for having a junkyard, Mr. Teryek demonstrates that he does not hold the keys to his jail cell because there is nothing in his power he can do that will get him out.

Mr. Teryek then attempts to fill the word "offense" in the New Hampshire Constitution, Article 15, with some content. He then argues that as applied to him, civil contempt is an "offense" requiring the appointment of a free attorney.

Existing law provides that civil contemnors enjoy the right to a free attorney if they can demonstrate that they cannot get a fair trial without one. Mr. Teryek lists the several reasons for his not having been fairly treated – that he has been subjected to a well-funded and sustained campaign to rid his now-suburban neighborhood of its agricultural subsistence roots, the difficulty of developing and presenting evidence to explain that to a court, the fact that property rights and grandfathering were not presented below, the unpursued possibility of a variance, his inability to comply with court orders and how an adequate explanation is beyond his education and ways of articulation, the need for litigation of what constitutes junk under the statute, the problem of an alleged early admission and the need to collaterally attack it, the possibility that Mr. Teryek suffers from an undiagnosed psychological disorder in need of further exploration and presentation to the court, and the problem of having been subject to a moving target regarding how clean is clean. Thus he shows that he has not been treated fairly and the services of an attorney would mitigate the problem.

Mr. Teryek then argues that he is deserving of a free attorney pursuant to the Six Amendment and the Due Process clauses of the State and Federal Constitutions.

Finally, he advocates a standard of imminence employed by many jurisdictions; there is a right to a free lawyer when it appears to a trial court that a civil contemnor faces imminent incarceration.

ARGUMENT

I. Mr. Teryek Does Not Hold the Keys to the Jail

There is civil contempt and criminal contempt:

> The difference between civil and criminal contempt is the character of the punishment. In civil contempt, the punishment is remedial, coercive, and for the benefit of the complainant. Civil contempt proceedings may result in money fines payable to the complainant or in an indeterminate jail sentence until the contemnor complies with the court order. The purpose of prosecution for criminal contempt is to protect the authority and vindicate the dignity of the court. The criminal contempt defendant, unlike the civil contempt defendant, may be imprisoned for a determinate amount of time without the ability to purge the sentence.

In re Kosek, __ N.H. __ (Feb 22, 2005) (citations omitted). In addition there is both direct and indirect contempt:

> Direct contempts may be punished summarily. The word summarily as used in this context does not refer to the timing of the action, but to the procedure. Summary procedure dispenses with the *issuance of process, service of complaint and answer, holding of hearings, taking of evidence, listening to arguments, filing of legal memoranda, submission of findings and all that goes with a conventional court trial*. The summary contempt power should be used only when the contemnor's conduct in the presence of the court is openly threatening the orderly procedure of the court or publicly defying its authority. The contemptuous behavior must constitute a threat that immediately imperils the administration of justice.

Town of Nottingham v. Cedar Waters, Inc., 118 N.H. 282, 285-286 (1978) (citations omitted) (emphasis added). This case concerns indirect civil contempt, and thus cannot dispense with the procedural protections listed in *Cedar Waters.* The Superior Court here wrote:

> Consistent with the request of the Plaintiffs, the Court finds that the said Defendant-Charles Teryek is in <u>willful</u> contempt of the Court Orders (dated 9/18/03, 2/1/04 and 12/1/04) in that he has failed to remove ten (10) truckloads of junk (as defined by RSA 236:112(1)) each week for five (5) weeks since the last Court Order (12/1/04). Consistent with the request of the Petitioners, a *capias* for the arrest of the Defendant-Charles Teryek shall issue <u>forthwith</u>. Said Defendant

> shall remain incarcerated at the Carroll County House of Correction until such time as forth (40) truckloads of material (junk) are removed from the subject site. Said removal shall be verified by an executed document from the Wolfeboro Waste Facility consistent with the past practice.

ORDER (Jan. 14, 2005) (emphases in original), *Appx. to Br.* at 48.

Because the purpose of incarceration is to force compliance, a civil contemnor is regarded as having the "keys to the jail." *Cedar Waters, Inc.*, 118 N.H. at 285. But when the contemnor cannot comply, whether due to indigence, disability or disease, or some other reason, he has no keys. *Cook v. Navarro*, 611 So.2d 47 (Fla.App.1992) (contempt purged on appeal because appellant had Alzheimer's disease, possibly making compliance impossible). A court, after all, cannot coerce that which is beyond a person's power to perform. Thus, inability to comply is an affirmative and complete defense to civil contempt. *State v. Wallace*, 136 N.H. 267 (1992); *United States v. Rylander*, 460 U.S. 752 (1983); *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948); *Fortin v. Commissioner of Massachusetts. Dept. of Public Welfare*, 692 F.2d 790, 796 (1st Cir. 1982).

The law of contempt contains a paradox concerning the burden of proof. In criminal contempt, "once the defendant introduces evidence regarding inability to comply in a criminal contempt proceeding, the burden then shifts to the State to prove beyond a reasonable doubt that the defendant intentionally did not comply." *State v. Wallace*, 136 N.H. at 271. In civil contempt, however, there is no such shift. The civil contempt defendant bears the entire burden of showing inability to comply. *State ex rel. Britton v. Workman*, 346 S.E.2d 562 (Va. 1986). Thus the burden for the defendant in civil contempt is greater than the burden in criminal contempt, while the outcome – incarceration – is the same.

Mr. Teryek is a poor man who does not have the resources to pay others to move his stuff.

He has long ago exhausted the will of his friends and family who have helped him in the past. His wife, Mary Teryek, is 62 years old and does not have the physical strength or agility, nor the resources, to move it. Mr. Teryek is in jail, unable to move it himself. He simply does not hold the keys to the jail.

> The 'keys to the prison' argument makes sense when the contemner may satisfy the court by revealing sources or producing subpoenaed evidence. When the contemner needs money to comply with the court order, however, it makes little sense to incarcerate him if he is truly unable to pay, for no amount of coercion will enable him to comply.

David L. Kern, *Due Process in the Civil Nonsupport Proceeding: The Right to Counsel and Alternatives to Incarceration*, 61 TEX. L. REV. 291, 300 (1982).

Being in jail is actually counterproductive to the plaintiff's goals – Mr. Teryek can neither earn money nor move the things. Moreover, although now the weather is cooperative, when he was most recently incarcerated on January 14, New Hampshire was covered in snow and nothing could be moved regardless of resources.

In *Ferris v. State ex rel. Maass*, 249 N.W.2d 789 (Wis. 1977), the Wisconsin Department of Natural Resources pursued a feeble man, appearing *pro se*, for keeping junk on his premises. "At the conclusion of the hearing the court told [Mr. Maass] he had thirty days to remove the salvage after which time he would be jailed if he did not." *Id.* at 790. He thus began serving an indeterminate sentence for civil contempt, and filed a *habeas corpus* action. The Wisconsin Supreme Court held that "where the state in the exercise of its police power brings its power to bear on an individual through the use of civil contempt as here and liberty is threatened, we hold that such a person is entitled to counsel." *Id.* at 791.

II. Mr. Teryek is Alleged to Have Committed an "Offense Punishable by Deprivation of Liberty" Requiring Appointment of an Attorney

The New Hampshire Constitution provides that "[e]very person held to answer in any crime or *offense* punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown." N.H. CONST., pt. I, art. 15 (emphasis added).

It is clear that those who are indigent and charged with a "crime" punishable by incarceration get a free attorney. *State v. Scarborough*, 124 N.H. 363 (1983) (*per se* right to appointed counsel). It is also clear that when there is no possibility of incarceration there is no right to counsel. *State v. Westover*, 140 N.H. 375 (1995) (no right to attorney for class B misdemeanor where maximum penalty is $1,200 fine). There is also no right to an attorney in civil proceedings where incarceration is not imminent. *Sheedy v. Merrimack County Super. Court.*, 128 N.H. 51, 56 (1986) (possibility of confinement remote).

The grey area is here where, although the proceeding is civil, there is not only the possibility of incarceration, but it is imminent. Article 15 is worded much differently than the sixth amendment, and has been held to be more protective. *State v. Scarborough*, 124 N.H. at 363 (article 15 "covers a broader range of defendants" than sixth amendment). Thus, whatever the content of the sixth amendment, there must be a separate article 15 analysis.

Article 15 uses two words – "crime" and "offense" – that might be "punishable by deprivation of liberty." Because the Constitution uses two separate words, "offense" must be given some content. *Ashuelot Railroad Co. v. Elliot*, 52 N.H. 387 (1873) (rejecting proposed reading of constitution because "construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense"); *see also, New Hampshire Dept. of*

Resources and Economic Development v. Dow, 148 N.H. 60, 64 (2002) (court "will not construe" statute "rendering its mandatory language meaningless").

What "offense" means in article 15 has heretofore not been made clear.

State v. Miller, 115 N.H. 662 (1975), held that for purposes of the criminal code a "violation" is an "offense" but not a "crime." This court said, however that outside the code no such distinction exists and the words are used interchangeably such that "crimes" are "offenses" and "offenses" are "crimes." While such conflation may be acceptable in statutory construction, because the word "offense" appears in the Constitution, it cannot easily escape interpretation.

Referring specifically to article 15, *Duval v. Duval*, 114 N.H. 422 (1974) held that term "offense" refers to public, not private wrongs. Public wrongs, although not necessarily crimes, are those "committed against the state." *See e.g., State v. Scott*, 585 S.E.2d 1, 5 (W.Va. 2003) (quoting Black's Law Dictionary). The common law sheds some light on the matter:

> In England and elsewhere . . . the kings increasingly extended their authority over public order. Even under Anglo Saxon law, before the Norman invasion, there developed a distinction between public offenses and private wrongs, as certain kinds of disruptive and injurious behavior came to be regarded as offenses against "the king's peace." A breach of the king's peace . . . "was an act of personal disobedience, and a much graver matter than an ordinary breach of the public order; it made the wrong-doer the king's enemy."

Grey v. Allstate Ins. Co., 769 A.2d 891, 896 (Md. 2001) (quoting 1 Pollock & Maitland, *The History of English Law* 45 (2d ed. 1899); *see Huntington v. Attrill*, 146 U.S. 657 (1892) ("The test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public, a breach in violation of public rights and duties which affects the community as a whole. A civil law . . . redresses a private wrong, an infringement of the private or civil rights belonging to an individual."). This suggests that the distinction made in *Duval* is correct – that "offense" in

article 15 applies to public wrongs and that when a person is charged with an "offense" they get a free attorney, regardless of whether they are charged with a "crime."

"Crime" and "offense" cannot be considered synonymous. If they were, one would be "absolutely nugatory" and "turn this part of the constitution into mere nonsense." *Ashuelot Railroad*, 52 N.H. at 387.

Of course only those offenses which are "punishable by deprivation of liberty" result in appointment of a lawyer. The universe of charges "punishable by deprivation of liberty" which are offenses but not crimes must be small, but a civil contempt stemming from a public wrong would have to be included.

Mr. Teryek is alleged to have violated RSA 236:112, which defines "junkyard." The statute proclaims that it:

> is adopted under the police power of the state to conserve and safeguard the public safety, health, morals, and welfare, and to further the economic growth and stability of the people of the state through encouragement to the development of the tourist industry within the state. A clean, wholesome, attractive environment is declared to be of importance to the health and safety of the inhabitants and the safeguarding of their material rights against unwarrantable invasion. In addition, such an environment is considered essential to the maintenance and continued development of the tourist and recreational industry which is hereby declared to be of significant and proven importance to the economy of the state and the general welfare of its citizens. At the same time, it is recognized that the maintenance of junk yards as defined in this subdivision, is a useful and necessary business and ought to be encouraged when not in conflict with the express purposes of this subdivision.

RSA 236:111. Based on this, there cannot be any doubt that the unlawful maintenance of a junkyard is a public wrong. Because public wrongs are offenses, violation of the junkyard statute is an "offense" pursuant to the Constitution's article 15.

Normally violation of the junkyard statute is not punishable by a deprivation of liberty.

See RSA 236:127 & RSA 236:128 (remedies include violation and injunction). But the circumstances of this case, where Mr. Teryek's incarceration for contempt was imminent when he requested an attorney, create the legal situation of him having committed an article 15 "offense" for which a free lawyer is a constitutional right. *See Ferris v. State ex rel. Maass*, 249 N.W.2d 789 (Wis. 1977) (right to attorney for civil contempt arising from violation of Wisconsin junkyard statute).

Accordingly, in the unique facts of his situation, Mr. Teryek is alleged to have committed what amounts to an "offense" pursuant to the New Hampshire Constitution, and he thus should enjoy the services of a state-appointed lawyer.

III. Mr. Teryek Cannot Get a Fair Trial Without a Lawyer

Due process stemming from both the State and Federal Constitutions requires trial courts in New Hampshire to appoint an attorney in civil contempt cases when "legal assistance [is] necessary for a fair presentation of the issues." *Duval v. Duval*, 114 N.H. 422, 425 (1974). Examples of this is when the "issues involved in the proceeding are complex or when the defendant is incapable of speaking for himself." *Sheedy v. Merrimack County Super. Court.*, 128 N.H. 51, 56 (1986).

The Teryeks have been treated unfairly. They have been subjected to a well-funded, sustained campaign to rid their now-suburban neighborhood in Wolfeboro of its rural roots in agricultural subsistence. *See e.g.*, Thorstein Veblen, *Absentee Ownership and Business Enterprise in Recent Times* (1923) (land values in American "country towns" artificially boosted by intolerance of non-homogeneous uses). The suburban trend in Wolfeboro is unmistakable. Where once they were surrounded by forest and agriculture, the Teryeks land is now in view of tourists and others. All of the plaintiffs moved into the area long after the Teryeks and were therefore aware of their neighbor's lifestyle. While the new residents may appreciate local fresh eggs, for instance, they apparently do not like the smell of chicken waste.

To explain that what he has is not a junkyard within the meaning of the statute would require Mr. Teryek to explain these trends, develop economic and sociologic data to describe them, and offer them to the court in a way that would be admissible as evidence. This is a complicated endeavor, not possibly tackled by a simple man who did not complete high school, and whose career has been as a truck-driver, garbage-collector, and subsistence farmer. Legal assistance is necessary.

The Teryek's farming and collecting may predate Wolfeboro's zoning ordinance and the relevant sections of the junkyard statute. Thus their uses may be grandfathered. Presenting legal arguments regarding their constitutional property rights is not a task lightly taken, nor easily accomplished. The services of an attorney would be invaluable.

The town and the parties are now at such loggerheads that compromise may no longer be possible. But at one time it may have been possible to obtain a variance from the town for the uses to which the Teryeks put their land. Depending upon the language of the Wolfeboro zoning ordinance, a variance may still be an option. It would take the knowledge and judgment of an attorney to evaluate these possibilities.

For whatever reason, Mr. Teryek has been unable to comply with the various orders requiring clean-up of his land. Inability to comply is a defense to contempt. If he had been able to articulate his inabilities, it is unlikely he would be now in jail. Yet due to either the complexity of his inabilities, or his lack of education and articulateness, they have not been presented. The help of someone trained to explain these things to a court might have prevented his predicament.

The Teryeks troubles are rooted in their ways of making a living, their view of what is valuable, and how these are at odds with prevailing social norms. Had Mr. Teryek been able to explain his livelihood, some better solution may have been possible. A lawyer would have helped.

What constitutes "junk" is a matter of dispute. There is nothing in the record showing Mr. Teryek adequately raised this matter. A lawyer would have immediately spotted the issue, would have made efforts to raise it, and would have presented evidence or testimony showing

what Mr. Teryek has is not "junk" but merely the products of a "pack rat lifestyle."

Early in his troubles with the Town the District Court made a ruling that Mr. Teryek admitted he was running a junkyard. Mr. Teryek denies making such an admission, as it would have been at odds with his understanding of the statute as it then existed. Even if a lawyer got involved late in the proceedings, that finding probably would have been collaterally attacked in some fashion.

Mr. Teryek may suffer from "compulsive hoarding syndrome," a condition that is just beginning to be understood and which has no known palliate. *See* Sanjaya Saxena, *et al.*, *Cerebral Glucose Metabolism in Obsessive-Compulsive Hoarding*, 161 AM. J. PSYCHIATRY 1038 (June 2004) (abstract available: <http://ajp.psychiatryonline.org/cgi/content/abstract/161/6/1038>; Mary Duenwald, *The Psychology of . . . Hoarding: What Lies Beneath the Pathological Desire to Stockpile Tons of Stuff?* DISCOVER (Oct. 2004), *see Appx. to Br.* at 50. If so, Mr. Teryek should be met with understanding and not scorn from his neighbors, the town, and the court. In addition, it might explain his inability to comply with the various orders. As with all psychiatric matters, realizing the relevance of the condition, getting an evaluation, and presenting medical evidence is a complex task, requiring at the least the assistance of an attorney and more likely that of a psychiatric expert.

Finally, even a casual reading of the many orders in this case reveals that Mr. Teryek has been subject to a moving target. It is not clear from the orders what exactly compliance entailed. The orders at times specify the number of truckloads to be removed; sometimes not. When the number is specified, it is different from both earlier and later orders. "How clean is clean?" is a question a lawyer would have asked and would have forced the court to define.

To summarize, Mr. Teryek cannot get a fair trial with regard to contempt.

- he has been subjected to a well-funded and sustained campaign to rid his now-suburban neighborhood of its agricultural subsistence roots,
- he does not have the wherewithal to develop and present evidence to explain that issue to the court,
- he has not raised constitutional property rights and grandfathering that seem obvious to an attorney,
- there may be the possibility of a variance,
- an adequate explanation of his inability to comply with court orders is beyond his education and ways of articulation,
- an adequate explanation of his subsistence livelihood is also beyond his education and ability to articulate,
- litigation of what constitutes junk under the statute is an outstanding issue,
- there appears to be a need to collaterally attack an alleged early admission that he keeps a junkyard,
- Mr. Teryek may suffer from an undiagnosed psychological disorder in need of further exploration and presentation to the court, and
- he has been subject to a moving target regarding how clean is clean.

These matters are complex and Mr. Teryek has been demonstrably unable to articulate them. He cannot be expected to evaluate and present them without the assistance of counsel. Accordingly, pursuant to *Duval*, and as exemplified in *Ferris*, 249 N.W.2d at 789, a lawyer should have been appointed as soon as it became apparent to the court that jail for Mr. Teryek was an imminent possibility.

IV. Mr. Teryek's Sixth Amendment and Federal and State Due Process Rights Provide For Appointment of an Attorney

The United States Supreme Court recognized in 1963 that the Sixth Amendment to the United States Constitution requires appointment of counsel to indigent defendants in state felony trials. *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Gideon* was expanded by *Argersinger v. Hamlin*, 407 U.S. 25 (1972), where the Supreme Court held that a defendant's sixth amendment rights attach as a matter of law in any criminal proceeding where a defendant may be imprisoned.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Court refused to extend to civil proceedings the "per se rule" it had enunciated in *Gideon* and *Argersinger*, which required appointed counsel as a matter of due process whenever the possibility of incarceration exists. *See e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *In re Gault*, 387 U.S. 1 (1967). Instead, the Court allowed a case-by-case approach dependent upon the facts of the case and type of proceeding. The Court reiterated this view in *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981) *reh'g denied*, 453 U.S. 927. In *Lassiter*, however the Court made clear that when there is the possibility of incarceration, the right to appointed counsel is a presumption:

> [T]he Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

Lassiter, 452 U.S. at 26-27.

The cases thus suggest that there are two varieties of the right to an attorney. *See* Robert Monk, *The Indigent Defendant's Right to Court Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support*, 50 U. CHI. L. REV. 326, 337-44 (1983). In some

proceedings, a person has a *per se* right to an appointed attorney. *See e.g., Argersinger v. Hamlin*, 407 U.S. 25 (1972) (criminal proceedings where possibility of incarceration exists); *In re Gault*, 387 U.S. 1 (1967) (juvenile proceedings even though technically labeled civil); *Vitek v. Jones*, 445 U.S. 480 (transfer of prisoner to mental institution). In other proceedings, courts may undertake a case-by-case evaluation to determine whether the right attaches with a presumption of counsel when there is a possibility of incarceration. *See e.g., Lassiter*, 452 U.S. 18.

The "elements in the due process decision" to which *Lassiter* refers, 452 U.S. at 27, and which must be evaluated to determine whether a right to an appointed attorney exists, are the three elements contained in *Mathews v. Eldridge*:

> First the private interest that will be affected by the official action; second, 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 finally, the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see Right to Counsel in Civil Contempt*, 50 U. Chi. L. Rev. at 337-44.

The New Hampshire Supreme Court has employed a similar analysis growing out of the New Hampshire Constitution. The right to an attorney is *per se* in some proceedings. *State v. Scarborough*, 124 N.H. 363, 368 (1983) (criminal case where defendant faces imprisonment); *State v. Clough*, 115 N.H. 7 (1975) (same); see also RSA 169-B:12, I ("court shall appoint counsel" in juvenile delinquency proceedings, deemed civil). In others, the court may make a case-by-case determination. *Sheedy v. Merrimack County Super. Court.*, 128 N.H. 51 (1986) (civil contempt for not paying private debt); *State v. Cook*, 125 N.H. 452 (1984) (habitual

offender proceeding); *Duval v. Duval*, 114 N.H. 422 (1974) (civil contempt for not paying child support). The determination uses the three due process elements.

The State has little interest in these proceedings. After inspection, the New Hampshire Department of Environmental Services determined that although the Teryeks' "property is a neighborhood eyesore," it was merely the result of a "pack rat life style," and not actionable. The State does have the interest always raised in attorney-appointment cases – the cost of the lawyer.

Mr. Teryek's interest, of course, is his physical liberty – "our most cherished value," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (*Brandeis*, J., dissenting). Because he cannot possibly meet the conditions of release, and his sentence is indeterminate, his liberty interests last for the rest of his life. He also has an interest in the stigmas that accompany a stay in jail – injury to reputation, honor, and integrity. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (statute allowing names of alcohol abusers to be posted in liquor store, without notice or hearing of those named, violated due process because "[w]here a person's good name, reputation, honor, or integrity is at state because of what the government is doing to him, [due process is] essential"); *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (injury to students' reputations, honor, and integrity stemming from in-school suspensions sufficient to trigger due process protection of liberty interests).

The value of an attorney to these proceedings would be an evaluation, and probably advocacy, of the plethora of complex issues noted above. Whether these efforts would be successful cannot be known, but without an attorney they are unlikely to be (and have not been) raised.

V. Mr. Teryek Should Have Had an Attorney When Incarceration was Imminent

This Court rejected a rule that there is a right to an attorney when there is the mere possibility of incarceration. *Duval*, 114 at 424. When jail is imminent – when a court has warned a defendant that if conditions are not met incarceration will follow, and it is plain that conditions have not been met – the balance between the defendant's rights and other considerations weighs more favorably toward the appointment of counsel. It is at this point that the defendant has failed to either do the thing that needs doing *or* to adequately explain why the condition cannot be met. It is at this point that loss of liberty is likely.

Imminence is a workable standard, and one that has been adopted by numerous jurisdictions in dozens of cases. *See e.g., Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984) (right to a lawyer in civil contempt limited to when "incarceration is a real possibility"). *See generally*, RIGHT TO APPOINTMENT OF COUNSEL IN CONTEMPT PROCEEDINGS, 32 A.L.R.5th 31 at §3. *See also, Wilson v. New Hampshire*, 18 F.3d 40 (1st Cir. 1994) (distinguishing on basis that incarceration was not imminent – "we note that actual (or imminent) incarceration was involved" in cases cited by defendant); *Sheedy v. Merrimack County Super. Court.*, 128 N.H. 51 (1986) (citing *Duval* standard and noting that imprisonment was merely an unripe possibility).

When it became apparent to the court in Mr. Teryek's case that he was likely to be taken to jail, it should have also become apparent that he might have reasons for non-compliance that had not been adequately explained. At that point an attorney should have been appointed.

CONCLUSION

In light of the forgoing, Mr. Teryek requests that this Court 1) order him immediately released from confinement, and 2) remand this case with the instruction that an attorney be appointed if imprisonment again appears imminent.

Respectfully submitted,

Charles Teryek
By his Attorney,

Law Office of Joshua L. Gordon

Dated: April 25, 2005

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REQUEST FOR ORAL ARGUMENT AND EXPEDITED TREATMENT

Counsel for Charles Teryek requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument. Mr. Teryek further requests that due to his unlawful confinement, this case be decided as expeditiously as possible.

CERTIFICATION OF SERVICE

I hereby certify that on April 25, 2005, copies of the foregoing will be forwarded to Mr. Charles Teryek; Ms. Mary Teryek; David W. Rayment, Esq.; Mark H. Puffer, Esq.; Maurice D. Geiger, Esq.; and the Office of the Attorney General.

Dated: April 25, 2005

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APPENDIX

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