

No. **18-7591** ORIGINAL

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

Kofi Kyei — PETITIONER
(Your Name)

vs.

State of Oregon
and Tessica Swift — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Oregon Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kofi Kyei

(Your Name)

c/o Kyei Family, Post Office Box 25253

(Address)

Portland, Oregon, 97298-0253

(City, State, Zip Code)

503-422-0307

(Phone Number)

QUESTIONS PRESENTED

1.

Do state support statutes like the Oregon Statute (ORS) at Chapter 416.440 (3), which is essentially the same today as it was in 2009, contravene the 2011 United States Supreme Court rulings in *Turner v. Rogers*, 564 US 431 (2011)?

2.

Do state statutes like the Oregon Statute (ORS) at Chapter 416.440 (3) violate the United States Constitution, with respect to the Fifth and Fourteenth Amendments?

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
 SUPREME COURT OF THE UNITED STATES
 PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Commissioner - Stay Order in Appellate court appears at Appendix F to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 07/05/2018.
A copy of that decision appears at Appendix D.

A timely petition for rehearing was thereafter denied on the following date: 08/30/2018, and a copy of the order denying rehearing appears at Appendix E.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1.

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2.

United States Constitution, Fourteenth Amendment, Section One

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.

3.

Oregon Revised Statutes, Chapter 416.440 (3)

Upon entry in the register under subsection (2) of this section, the order shall have all the force, effect and attributes of a judgment of the circuit court, including but not limited to:

- (a) Creation of a judgment lien under ORS chapter 18; and
- (b) Ability to be enforced by contempt proceedings and pursuant to ORS 18.252 to 18.993.

4.

Oregon Revised Statutes, Chapter 416.427 (6)

Appeal of the order of the administrative law judge or any default or consent order entered by the administrator pursuant to ORS 416.400 to 416.465 may be taken to the circuit court of the county in which the order has been entered pursuant to ORS 416.440 for a hearing de novo. The appeal shall be by petition for review filed within 60 days after the order has been entered pursuant to ORS 416.440. Unless otherwise specifically provided by law, the appeal shall be conducted pursuant to the Oregon Rules of Civil Procedure.

STATEMENT OF THE CASE

The Clackamas county district attorney (DA), initiated this case on 06/26/2017 with the filing in Clackamas county, Oregon, of its own money award order against Petitioner Kofi Kyei (Petitioner) and in favor of county resident, Respondent Tessica Swift, based on the Oregon Statute (ORS) Chapter 417.440 (3). When acting as the Oregon child support administrator for the county under that statute, the DA filing of its own money order award with the local county court creates a judgment lien. Upon filing, the money award is fully enforced as a court judgment by the DA and the county court through multiple means that include contempt of court – which charge is accompanied by incarceration and the seizures and sales of the obligor's assets. The money award judgment immediately due from Petitioner in Clackamas county was a lump sum of \$29,850, plus an additional \$995 cash payment every month going forward for the one sole joint child [REDACTED] who lived with Respondent Swift. At the time of filing, Petitioner had been unemployed since July of 2016, and his spouse and other minor children were living with relatives.

Upon being alerted to the filing and enforcement of the money award judgment against him and the seizure of funds from his spouse and minor children, Petitioner filed a timely appeal with the Oregon Court of Appeals. The State of Oregon, Clackamas County and the DA (the state) challenged the supervisory role and jurisdiction of the appellate court based on ORS Chapter 416.427 (6). The

Oregon Court of Appeals agreed with the state that under the Oregon statutes, it was stripped of its supervisory role and lacked jurisdiction. An order was entered transferring the case back to the Clackamas county forum. The Oregon Court of Appeals granted Petitioner's timely petition for reconsideration, but adhered to its original order - that it was stripped of jurisdiction by the Oregon statute.

The Chief Judge for the Oregon Court of Appeals noted in his written appellate opinion that: "It appears, here, that the district attorney's authorized representative did not conduct a hearing leading to the administrative order. Therefore, there would be no record for this court to review on appeal." The lack of a record leading to the judgment that was already being enforced indicated a compromised Clackamas county forum, but the appellate court nevertheless was compelled to transfer the case back to that same forum. Per the appellate order, that forum was to supervise proceedings to rule on the validity of its own judgment that it was already enforcing against Petitioner.

Stripped of jurisdiction by statute, the Court of Appeals could not reach the merits of the case, or address the constitutional violations when Oregon's statutes allow local administrators and county courts to award money to their constituents against non-county residents, without a hearing. The appellate court also could not address the fact that the same parties (Kofi Kyei, Tessica Swift, State of Oregon, Clackamas county district attorney) had already appeared in court on the same child support issues and claims in Multnomah county, Oregon, along with the

Multnomah county district attorney, and that the final results there included one final judgment, one final child support order and a final support agreement between the parties under which regular child support was being paid. Nevertheless, ORS Chapter 416.440 did not bar the new judgment in the Clackamas county forum.

After the Oregon Court of Appeals ruling, Petitioner appealed to the Oregon Supreme Court by presenting his main argument that he was deprived of his constitutional rights when the DA filed its own order as a judgment in the local court, and then enforced it as a judgment against Petitioner to his detriment, but without a hearing or his involvement. Petitioner presented that even if he were to prevail after being granted discretionary review, the belated appellate court action would still be insufficient to cure the initial deprivation of his constitutional rights and the ongoing enforcement of the money award judgment against him. According to Petitioner, pursuing ORS Chapter 416.427 (6) in the compromised Clackamas county forum could not cure the deprivation of his constitutional rights.

Petitioner was denied a discretionary review by the Oregon Supreme Court. A timely-filed petition for reconsideration was denied on 08/30/2018. Petitioner then filed a motion for a stay of the appellate judgment based on the merits of his case, his constitutional arguments and the United States Supreme Court ruling in *Turner v. Rogers*, 564 US 431 (2011). Petitioner's stay motion was granted by the Appellate Commissioner on 09/25/2018.

REASONS FOR GRANTING THE PETITION

The Oregon Court of Appeals' ruling decided important questions in a way that conflicts with the United States Constitution and the relevant decisions of the United States Supreme Court in *Turner v. Rogers*, 564 US 431 (2011). The main Oregon statute involved at ORS Chapter 416.440 (3), does not provide safeguards to reduce the risk of erroneous deprivation of constitutional rights. Another statute involved is ORS Chapter 416.427 (6), which strips away the jurisdiction and supervisory role of the appellate courts in some support cases, and thereby cements the deprivation of due process and civil liberties. This is one of several statutes that has remained unchanged and, like other states' statutes that treat child support with deference, is the same today as it was in 2009 and 2010, before *Turner, supra*.

In Oregon, an ORS 417.440 (3) proceeding is supposed to be civil. The direct participation of the district attorney in initiating the case and representing the state, however, indicates that the proceeding was intended to be criminal in nature, with additional federal constitutional issues. See *Hicks v. Feiock*, 485 US 624 (1988). The unconditional, double-dip, money award was punitive, not remedial. The double-dip judgment contended against the double jeopardy clause of the Fifth Amendment. The judgment appeared to vindicate the authority of the Clackamas county court and the Clackamas district attorney, was entered without due process or procedural safeguards, was not proven beyond a reasonable doubt,

had no record of proceedings prior to the judgment, and no counsel was provided as per *United States v. Dixon*, 509 US 688, 696 (1993); *Gideon v. Wainwright*, 372 US 335 (1963).

Even if the proceeding is considered civil, the question whether the “specific dictates of due process” require safeguards or appointed counsel is determined by examining the “distinct factors” that the United States Supreme Court has used to decide what specific safeguards are needed to make civil proceedings fundamentally fair. See *Mathews v. Eldridge*, 424 US 319, 335 (considering fairness of an administrative proceeding). 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].” See *Turner v. Rogers*, 564 US 431 (2011). See also *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 US 18 (1981); specifically, 452 US, at 27–31 (applying the *Mathews* framework).

ORS Chapter 416.440 (3) does not include procedural safeguards, and states:

“Upon entry in the register under subsection (2) of this section, the order shall have all the force, effect and attributes of a judgment of the circuit court, including but not limited to:
(a) Creation of a judgment lien under ORS chapter 18; and
(b) Ability to be enforced by contempt proceedings and pursuant to ORS 18.252 to 18.993.”

The State of Oregon, Clackamas County and the county DA (the state) were represented by legal counsel in the form of the Clackamas county district attorney

(DA) for its ORS 416.440 (3) process that entered the administrative order as a judgment in Clackamas county court against Petitioner. The judgment exposed Petitioner to liens, seizures, contempt of court, loss of personal liberty, and other repercussions. Petitioner was not involved or represented at any time during the state's process. This created an asymmetry of representation that would "alter significantly the nature of the proceeding." See *Gagnon v. Scarpelli*, 411 US 778 (1973). Therefore, per *Turner*, ORS Chapter 416.440 (3) must require, and the state must provide, Petitioner with additional procedural protections, or alternative procedures. By failing to do so, the state's ORS 416.440 (3) process also failed to comply with mandatory requirements of the due process clause of the Fourteenth Amendment. *Turner* described such a child support process as "a highly complex system", thus triggering the consideration that Petitioner "can fairly be represented only by a trained advocate". See *Gagnon, supra*, at 788. Pp. 10–16. Also, cf. *Johnson v. Zerbst*, 304 US 458, 462–463 (1938).

A library online search indicated that Petitioner's situation was not unique in Clackamas county, or in Oregon. It was also repeated in several other states besides Oregon. The Clackamas county, Oregon, judgment mandated a \$29,850 lumpsum, plus \$995 monthly payments in addition to the support that Petitioner already provided via the final Multnomah county court order, and thereby double-dipped support in favor of Respondent Tess Swift, by using their one joint child to pad the Clackamas county support collection statistics and thus increase the

federal, state and local matching funds to the county and the state. According to

Turner:

“[S]ince 70% of child support arrears nationwide are owed by parents with either no reported income or income of \$10,000 per year or less, the issue of ability to pay may arise fairly often. See E. Sorensen, L. Sousa, & S. Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation* 22 (2007)”; and “[R]esearch suggests that many obligors who do not have reported quarterly wages have relatively limited resources”; Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 *Cornell J. L. & Pub. Pol’y* 95, 117 (2008).”

The DA judgment in Clackamas county contends against the presumption of ability to pay for Petitioner, who was unemployed during the prior year. For unemployed Petitioner who was balancing scarce resources to meet all his support obligations, the enforcement of the judgment took away from his parental support for his other children, spouse and family and further consumed public funds to resolve the new, artificially-created poverty issues. Like similar proceedings in other states, this ORS 416.440 (3) proceeding in Oregon also reduced the available funds that Petitioner needed to defend against the extensive, joint resources of the state, the DA, and Clackamas county.

Therefore to provide safeguards to the erroneous deprivation of property and assets, and to provide the minimum mandatory constitutional protections, Petitioner respectfully requests the United States Supreme Court to require that state laws such as ORS 416.440 (3): (1) must require proof that a child support case has not been tried or finalized in another jurisdiction, or show that child support is

not being paid under any pre-existing final support agreement, *before* the process is initiated; and/ or (2) must provide procedural protections or some other alternative procedures to balance the scales against the state's resources, district attorney and county counsel, due to the nature of the property and liberty interests at stake and the effect on uninvolved, innocent children, spouses and families who are adversely impacted by an ORS Chapter 416.440 (3) process that unfairly deprives them of the needed support of a parent; and/ or (3) must, before the money award order is entered and enforced as judgment, require the monthly support amount and arrears due to be independently reviewed, vetted and aligned with the ability to pay and/ or, the accuracy of the factors and monetary entries into the states' child support calculation must be independently reviewed and vetted to prevent large, arbitrary entries or inflated money awards.

Further, the United States Supreme Court is respectfully asked to address the issue of the states' appellate courts' lack of jurisdiction for the supervision of their own lower courts and administrators when due process, property, personal liberties and federal constitutional requirements are impacted, or when there is inherent bias that usually lead to unfair or arbitrary results being extended by a locality against non-local parents and their innocent children and families.

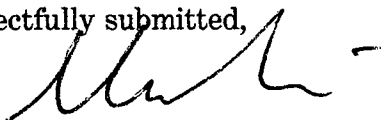
Of note, the Petitioner's research showed that Oregon's elected local public officials and judges tend to campaign as "progressives", and display propaganda on the amount of child support they have "championed", especially during the time

period preceding an election year. Oregon's local child support administrators compete for bragging rights about the total amount of child support under their purview, and the matching public funds that they secure are essential to county budgets. These motivations and profitable arrangements are unrelated to, and in conflict with, the welfare of other children, families, non-county residents, and the constitutional rights of their parental targets. Many of these targets appeared to be responsible, devoted parents who supported their children and families, but were procedurally shifted into the "deadbeat" parent ranks, deprived of constitutional safeguards and caught in the net of archaic state statutes to produce unreasonable results that ended up taxing public resources. While state agencies may permit local efforts to inflate support numbers and thereby secure more federal, state and local matching funds that are commensurate with the size of support being pursued, *Turner* on the other hand, should be re-visited to re-balance the scales against the states and to protect responsible parents and their other children and innocent families from the procedural issues, constitutional overreach and unfairness that are handed down by these state statutes, agencies and local administrators.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Kofi Kyei, Petitioner

Date: November 19, 2018