

In the Matter of:

CECIL HICKS, DISTRICT ATTORNEY FOR
COUNTY OF ORANGE, CALIFORNIA,
ACTING ON BEHALF OF ALTA SUE FEIOCK,

Petitioners,

V.

PHILLIP WILLIAM FEIOCK.

No. 86-787

Pages: 1 through 49

Place: Washington, D.C.

Date: December 1, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 CECIL HICKS, DISTRICT ATTORNEY
4 FOR COUNTY OF ORANGE, CALIFORNIA, :
5 ACTING ON BEHALF OF ALTA SUE :
6 FEIOCK, :
7
8 Petitioners, :
9
10 v. : No. 86-787
11
12 PHILLIP WILLIAM FEIOCK :
13 -----x

14 Washington, D.C.

15 Tuesday, December 1, 1987

16 The above-entitled matter came on for oral argument
17 before the Supreme Court of the United States at 11:09 a.m.

18 APPEARANCES:

19 MICHAEL R. CAPIZZI, ESQ., Chief Assistant District
20 Attorney for Orange County, Santa Ana, California:
21 on behalf of the petitioner.

22 RICHARD LYNN SCHWARTZBERG, ESQ., Santa Ana, California:
23 on behalf of the respondent.
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
MICHAEL R. CAPIZZI, ESQ.	
on behalf of Petitioners	3
RICHARD LYNN SCHWARTZBERG, ESQ.	
on behalf of Respondents	20
MICHAEL R. CAPIZZI, ESQ.	
on behalf of Petitioners - Rebuttal	45

1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We will hear arguments next
3 in Cecil Hicks, District Attorney for Orange County,
4 California, acting on behalf of Alta Sue Feiock versus Phillip
5 William Feiock.

6 Mr. Capizzi, you may proceed whenever you are ready.

7 ORAL ARGUMENT OF MICHAEL R. CAPIZZI, ESQ.

8 ON BEHALF OF THE PETITIONER

9 MR. CAPIZZI: Thank you. Mr. Chief Justice,
10 honorable associate Justices, if it may please the Court, this
11 is a case that will determine whether Mr. Feiock and the
12 Feiocks of this country may sit on their hands and defy with
13 impunity valid court orders to provide support for their minor
14 children.

15 This case originated in the State of Ohio when Alta
16 Sue Feiock, the mother of respondent's three children,
17 petitioned the Ohio courts for support under the Uniform
18 Reciprocal Enforcement of Support Act, URESA.

19 The petition was forwarded to California, where the
20 Orange County District Attorney's office in turn filed a
21 petition with the California Superior Court seeking an order
22 for support. Following a hearing an order for support was
23 entered directing payment of \$50 per month per child, and that
24 was in fact a reduction from the original \$75 per month per
25 child which had been ordered at the time of the divorce some

1 eight years earlier.

2 The Orange County District Attorney's office was
3 acting in this case not as the public prosecutor, but as the
4 attorney for Alta Sue Feiock for the sole purpose of gaining
5 the support due her and her children. This was not a welfare
6 case. There was not an effort to recoup welfare moneys. There
7 was, however, an interest in assuming that Mrs. Feiock would
8 not be a welfare recipient, but more importantly, this case
9 represents a strong and fundamental interest that the state has
10 in assuming minor children that they shall have the support
11 that is due them.

12 The children have always had a special place in our
13 system, and there is no reason why they should not in matters
14 of child support. After the order was entered, over the next
15 12 months Mr. Feiock the respondent, paid three months, but for
16 the other nine months he sent not one thin dime. He was cited
17 for contempt, and in the contempt hearing the petitioner herein
18 relied on California Code of Civil Procedure 1209.5.

19 With somewhere in the neighborhood of 35,000 family
20 support matters in the active cases of the Orange County
21 District Attorney's office, it is essential that reliance can
22 be made on a statute such as 1209.5.

23 QUESTION: What is the present population of Orange
24 count? Do you know, Mr. Capizzi?

25 MR. CAPIZZI: Something in excess of two million.

1 QUESTION: Two million.

2 MR. CAPIZZI: Yes. Of course, that is the 35,000
3 cases are all types, the litigation, the enforcing reciprocal
4 cases from other states, those that have enforcement orders,
5 and the criminal cases that are filed in that connection.
6 There just aren't sufficient resources for even a public agency
7 to pursue cases such as this without reliance on the statute
8 involved in this case, and certainly if a public agency doesn't
9 have the resources, the private individual who often times
10 seeks to assert their own support, enforcement of their own
11 support orders individually couldn't even begin to pursue those
12 on their own.

13 QUESTION: Well, Mr. Capizzi, the California Court of
14 Appeals held that the California statutes make this contempt
15 proceeding criminal in nature.

16 MR. CAPIZZI: Yes, Justice O'Connor.

17 QUESTION: Now, I guess California is entitled to
18 determine that for itself as a matter of state law, isn't it?

19 MR. CAPIZZI: Well, it can place whatever label it
20 chooses on a case, and this case the court below did term the
21 case criminal. I would submit that the --

22 QUESTION: So is it a matter, is it a question of
23 federal law for purposes of answering whether the federal
24 constitution is violated?

25 MR. CAPIZZI: I think that unquestionably it is and

1 be that as it may I would submit that the court below was wrong
2 in terming this case criminal even under California law.

3 QUESTION: Well, but you don't really want us to get
4 in there, do you, and say that the California Court of Appeals
5 was wrong as a matter of California law? Are we likely to do
6 that, and can you give me examples of where we have done that?

7 MR. CAPIZZI: Well, I think the Court has always
8 looked to the highest court -- this Court has looked to the
9 highest court of the state in determining what the state law

10 is. QUESTION: Well, why would we want to do that if it
11 is a question of federal law for purposes of the federal
12 constitutional question? You spent a lot of time in your brief
13 arguing this, and I had a hard time understanding whether you
14 seriously thought we were going to overturn the California
15 court on a question of what the California law is.

16 MR. CAPIZZI: No, we merely meant to set the record
17 straight, and point out that the California Supreme Court as
18 held repeatedly that there are still two types of contempt in
19 California, civil and criminal, but that is absolutely correct.
20 As far as the constitutional analysis is concerned, it doesn't
21 matter what label California puts on it. Otherwise a state
22 could deprive this Court of determining in what instances the
23 constitutional provisions of the Fourteenth Amendment will or
24 will not apply.

25 Now, I suppose we could decide that as a matter of

1 federal law for federal purposes this has the characteristics
2 of a civil proceeding, but that wouldn't mean that California
3 when it went back couldn't treat it as something else for its
4 purposes and under the California constitution.

5 MR. CAPIZZI: That's true. California could do that.
6 But they haven't done that in this case. The courts have
7 repeatedly said that there's a distinction between civil and
8 criminal contempt, and the California Supreme Court repeatedly
9 over three years has said that civil is to protect the rights
10 of litigants and criminal is to vindicate the dignity or
11 authority of the court, and --

12 QUESTION: But it is up to California to decide what
13 it is coming with a -- I mean, that is a purposive test, and it
14 is California's purpose. If California says that it is
15 criminal, who are we to say that it isn't?

16 MR. CAPIZZI: California has not said that it is
17 criminal, Justice Scalia.

18 QUESTION: You are arguing that it doesn't matter
19 what California said. You are arguing that it doesn't matter,
20 and I am saying if it is a purposive test you are urging upon
21 us, it does matter. What is California's purpose? If
22 California's purpose is criminal, then that is the end of the
23 matter as far as that issue is concerned.

24 QUESTION: I agree with you. I think that California
25 has not said that.

1 MR. CAPIZZI: That's correct.

2 QUESTION: It has applied certain protections that
3 are normally applicable in a criminal context. But they can
4 also do that if they want.

5 MR. CAPIZZI: Yes, Justice Blackmun, that is correct.
6 They have continued to draw the distinction between civil and
7 criminal contempt. One is punitive, coercive, is civil. They
8 have extended the procedural safeguards otherwise applicable in
9 a criminal case to the civil contempt proceeding.

10 QUESTION: That is a different issue. You are arguing what
11 California has done. I am asking why it should be true, the
12 other point that you say, that it doesn't matter what
13 California has done, that even if California has called it
14 criminal, you urge upon us that we are not bound to accept
15 that, and I don't see how that follows at all. It seems to me
16 we are bound to accept it.

17 MR. CAPIZZI: If California should suggest, Justice
18 Scalia, that in a civil case where there are punitive damages
19 those are penal in nature, as they have said in contempt
20 proceedings, the potential of a jail sentence is penal, and
21 because punitive damages are potentially penal, we are going to
22 extend the procedural safeguards of a criminal case, not
23 because they are constitutionally required, but because as a
24 state we are going to extend those rights in the civil case.
25 Thus we would have as we have in the contempt setting, have a

1 description of these civil cases as quasicriminal or criminal
2 in nature because we have extended procedural safeguards
3 otherwise available in criminal cases, and then respondent
4 would come before you and say, because these are criminal in
5 nature we have extended the safeguards of a criminal case, the
6 libel case in which we are seeking punitive damages, that, too,
7 is criminal.

8 The tort case where we are seeking punitive damages,
9 that, too, is criminal. The bad faith insurance case where we
10 are seeking punitive damages, that, too, is criminal, and that
11 would deprive this Court of determining when and in what
12 setting the constitutional provisions of the due process clause
13 are to apply, and I would submit that the appropriate test is
14 to analyze what the hearing is substantively.

15 QUESTION: Mr. Capizzi, I am looking at page A6 of
16 the petition for writ of certiorari where you have the opinion
17 of the Court of Appeal, and I am looking at the second full
18 paragraph on the page, the second sentence, where its says,
19 "Our Supreme Court recently discussed the problem raised by the
20 use of presumptions in criminal cases in people against Roder."

21 Now, does the Court of Appeal opinion have any more
22 discussion than tat of why it considered this a criminal
23 proceeding rather than civil proceeding?

24 MR. CAPIZZI: No. I would submit that it is lacking
25 in analysis as to why it considered it a criminal proceeding.

1 QUESTION: Have there been other cases from the
2 Supreme Court of California that have said this kind of
3 proceeding is a criminal rather than a civil proceeding?

4 MR. CAPIZZI: No. In fact, the Roder case did not
5 say a contempt proceeding is a criminal proceeding.

6 QUESTION: Roder wasn't a contempt case, was it?

7 MR. CAPIZZI: No, it was not a contempt. It involved
8 the constitutionality of a state statute involving a
9 presumption and prima facie case.

10 QUESTION: What significance do you give to the
11 sentence on page A8, contempt is quasi-criminal and requires
12 proof beyond a reasonable doubt?

13 MR. CAPIZZI: That is what the California courts have
14 required for in excess of 100 years.

15 QUESTION: In civil contempt proceedings as well as
16 criminal?

17 MR. CAPIZZI: In civil as well as criminal, and that
18 is why civil contempt proceedings because they have the
19 potential for a jail sentence if the coercive order is
20 violated, they have been given in civil contempt proceedings
21 many of the procedural safeguards that would otherwise be
22 available to a criminal defendant, and as a result, over the
23 100 years or so, the civil contempt proceedings have been
24 referred to as quasi-criminal and criminal in nature, but that
25 doesn't make them criminal substantively, and as this Court has

1 said in Shilitani versus United States, that we are going to
2 look at the substance, not the procedure by which the order for
3 contempt came about.

4 Shillitani was a case under Rule 42, the Rules of
5 Criminal Procedure. As Justice Harland pointed out in footnote
6 3 in a dissenting opinion, but it called attention to the
7 record below, the judgment and commitment was for guilty of
8 criminal contempt but this Court went beyond the procedural
9 aspects of it and looked at the matter substantively, and
10 because the order of two years in jail or until purging oneself
11 of contempt by testifying before the grand Jury was the order,
12 it was concluded that it was coercive and not subject to the
13 procedural aspects of a true criminal case.

14 QUESTION: What was the procedure that was involved
15 there that we said was not necessary?

16 MR. CAPIZZI: In Shillitani?

17 QUESTION: Yes.

18 MR. CAPIZZI: It was the jury trial.

19 QUESTION: Now, you are urging here that what is not
20 necessary is not only -- not only the burden of persuasion --
21 not only the burden of initiation of the evidence, production
22 being placed on the plaintiff, but also the burden of
23 persuasion. So if I understand your case correctly, it is that
24 although this individual should not be liable for the payments
25 unless he can afford them, although that is part of these, if

1 the court can't make up its mind, if it is unclear, I don't --
2 if the court finally concludes on the basis of all the
3 evidence, I can't really tell whether he can afford these
4 payments or not, the court will then send him to jail.

5 That is what you are urging.

6 MR. CAPIZZI: No, we are not, Justice Scalia. We are
7 urging that since this is a civil case, the determination of
8 whether the statute meets the due process clause of the
9 Fourteenth Amendment should be analyzed in terms of a civil
10 rule, and in a civil context.

11 QUESTION: The Court of Appeals certainly ruled
12 clearly enough that the burden of proving the ability to pay is
13 on the prosecution.

14 MR. CAPIZZI: The Court expressed that, and again --

15 QUESTION: As a matter of California law.

16 MR. CAPIZZI: But it misstated California law,
17 Justice White.

18 QUESTION: Well, I don't know how you can convince us
19 of that, but I thought that -- I didn't read your brief and
20 disagree especially with that. I just thought that you thought
21 that an inference of the ability to pay could be drawn from
22 that.

23 MR. CAPIZZI: The statute points out that if there is
24 an order --

25 QUESTION: Right.

1 MR. CAPIZZI: -- there is knowledge of the order --

2 QUESTION: Yes.

3 MR. CAPIZZI: -- and there is a violation, it hasn't
4 been paid, that that is prima facie evidence of contempt, and
5 even if we are to --

6 QUESTION: You are just saying that the statute says
7 that the prosecution's burden is satisfied when you prove the
8 things that you just mentioned.

9 MR. CAPIZZI: That is correct, and that is consistent
10 with an early California Supreme Court case, In re McCarty,
11 which likewise said those are the three elements of contempt.
12 In that case it was an alimony case, but there should be no
13 difference for that analysis between the alimony case and the
14 child support case, and that was the rule in California for a
15 number of years.

16 QUESTION: Did your brief argue that this statute
17 shifted the burden of persuasion on ability? I thought you
18 just said it shifted the burden of production.

19 MR. CAPIZZI: The court below --

20 QUESTION: What about your brief?

21 MR. CAPIZZI: Our brief expresses that it shifts to
22 the respondent the burden of production.

23 QUESTION: But the burden of proving ability rests on
24 the -- remains on the prosecution.

25 MR. CAPIZZI: No, the -- again --

1 QUESTION: Well, you can't do it both ways.

2 MR. CAPIZZI: -- the California Supreme Court has

3 repeatedly said that inability to pay is an affirmative

4 defense.

5 QUESTION: Yes.

6 MR. CAPIZZI: And as an affirmative defense the

7 respondent has the burden of producing evidence.

8 QUESTION: Well, we have got --

9 QUESTION: You are talking about proving, not

10 producing evidence. You keep -- do you say that the burden of

11 proving it is also on the defendant? You do say that in your

12 brief, don't you? You say, as an affirmative defense he not

13 only has to go forward, but he has to prove that he can't pay.

14 Yes or no?

15 MR. CAPIZZI: No.

16 QUESTION: It seems to me that could take --

17 MR. CAPIZZI: No. No.

18 QUESTION: You don't say that.

19 MR. CAPIZZI: Justice Scalia, what we --

20 QUESTION: But that is what the Court of Appeals

21 said, isn't it?

22 MR. CAPIZZI: The Court of Appeals said --

23 QUESTION: The Court of Appeals said that California

24 law puts the burden of persuasion on the respondent. I

25 understood your brief to say that is wrong as a matter of

1 California law.

2 MR. CAPIZZI: That's correct, Justice O'Connor.

3 QUESTION: Again, you don't want us to decide that,
4 do you?

5 MR. CAPIZZI: I don't think it is necessary. It is a
6 civil case, and as a civil case either a burden of production
7 or a burden of proof is appropriate, and the statute places
8 this case in much the same position if not identical position
9 as the circumstances this Court addressed in Rylander versus
10 United States. The statute --

11 QUESTION: Well, Rylander involved a situation where
12 only the burden of production shifted.

13 MR. CAPIZZI: That's correct, Justice O'Connor.

14 QUESTION: Well, do you lose this case if the burden
15 of persuasion is also involved and placed on the defendant?

16 MR. CAPIZZI: No, I don't believe we do.

17 QUESTION: I don't think you do, either.

18 MR. CAPIZZI: It is a civil case, and regardless of
19 whether it is the burden of persuasion or the burden of
20 production, there is a rational connection between the proven
21 fact and the presumed fact. I would submit, however, assuming
22 just for the sake of argument that this were a criminal case,
23 that the statute would meet the heavier beyond a reasonable
24 doubt standard that is required in the criminal case. It is --
25 if we have an individual who is ordered to pay support, I think

1 it is -- a reasonable person would seek to modify that order if
2 he could no longer make the support payments.

3 His failure to seek modification causes the missed
4 payments to accrue and build in arrearage, which some day he is
5 going to have to pay, as he was ordered to pay even in this
6 case, because even though he was found not guilty on some of
7 the months of contempt, at the time of the hearing he was still
8 found able to pay in installments and was ordered to make
9 payments even for those months for which he could not have been
10 held in contempt because of the coercive nature of it and the
11 fact that the missed support payments accrue.

12 Now, a reasonable person would seek to modify that
13 order if he truly had no ability to pay. And his failure to
14 seek modification is a tacit admission that the order remains
15 valid and reliable. And that is especially true in California,
16 having enacted a code section, Civil Code 4700.1, that makes it
17 extremely easy for an individual to modify a support order. It
18 is almost as though it is a small claims action, and attorneys
19 are not required, and its express purpose is to make it easy to
20 modify a support order.

21 So given those factors, it seems to me a reasonable
22 person would modify and an unmodified order supports the
23 presumed fact beyond a reasonable doubt that the original order
24 is still valid.

25 QUESTION: Mr. Capizzi, whether California decides to

1 or not, and whether you argue it here or not, I had the
2 impression -- I don't know which of the briefs I got it from,
3 that most states do place the burden on the defendant, not just
4 for production but of persuasion. Is that --

5 MR. CAPIZZI: That's correct.

6 QUESTION: That is correct.

7 MR. CAPIZZI: It is a burden of producing -- or
8 burden of proof in most states.

9 I would submit that with respect to whether in this
10 case it was a burden of production or a burden of proof, we
11 should look to the cases in California which have said that it
12 was a burden of production. We should look to the treatises in
13 California which say it is a burden of production, 1209.5. We
14 should look to Penal Code section 270, the criminal nonsupport
15 section, and the California Supreme Court, People versus
16 Sorenson, interpreting a presumption in that criminal section
17 very comparable to the presumption here as being one involving
18 the burden of producing evidence.

19 Now, I submit that we should examine those even
20 though they were ignored by the Court of Appeal below, and the
21 reason we should examine those is because even though the court
22 below ignored them, the trial judge didn't. And just as in
23 Ulster versus Allen, in Footnote 16, this Court said we should
24 look to the jury instructions and how it was treated at the
25 trial level.

1 The presumption in this case was treated at the trial
2 level by the trial judge as one affecting the burden of proof.
3 All of the other cases, the treatises were available to him.
4 He expressed an awareness of the long-standing law. And he
5 expressly stated on the record that he was treating it as
6 affecting the burden of going forwards, which is another way of
7 saying the burden of producing evidence.

8 And it was based on the way it was treated by the
9 trial court and the laws in California which treats a
10 presumption affecting the burden of producing evidence almost
11 the same way as this Court analyzed a permissive inference in
12 Allen -- in Ulster County versus Allen.

13 The Evidence Code Section 604, which sets forth how
14 that presumption affecting the burden of producing evidence is
15 to be used is almost identical to the definition of a
16 permissive inference in Ulster County versus Allen, and
17 therefore even if we were to assume that it was a criminal
18 case, I submit that it was treated by the trial court as a
19 burden, as a presumption affecting the burden of producing
20 evidence, and as such meets the due process requirements of the
21 Fourteenth Amendment.

22 We would submit that the order of the court below
23 finding the statute unconstitutional was in error and --

24 QUESTION: Let me ask you one final question. As I
25 remember, and I may have this incorrectly in mind, but the

1 trial judge here did conduct a hearing on the question of
2 ability to pay.

3 MR. CAPIZZI: Yes.

4 QUESTION: And concluded that there was ability to
5 pay with respect to at least a portion of the disputed period.
6 Does his -- do his remarks -- it is not clear from the part
7 that is quoted in your brief. Do his remarks indicate where he
8 thought the burden of proof was, which way the preponderance of
9 the evidence went?

10 In other words, if he said in so many words, I find
11 the evidence to convince me and it is not equally balanced, I
12 am not relying on any presumptions, I find on the facts here
13 that this man had an ability to pay, and I therefore hold him
14 in contempt, it seems a little strange to be arguing about all
15 this argument about presumptions. I mean, isn't that the end
16 of the case?

17 MR. CAPIZZI: He did, Justice Stevens, make a finding
18 that there was ability to pay. After first relying on the
19 presumption which the trial judge treated as one affecting the
20 burden of producing evidence, and once the respondent then
21 produced evidence under California law that showed the
22 nonexistence of the presumed fact, then the court was required
23 to treat the evidence without reference to the presumption, and
24 based upon his analysis then of the evidence, including the
25 testimony of the respondent, he found him guilty of the five

1 counts of contempt and dismissed four of the counts.

2 QUESTION: Right.

3 MR. CAPIZZI: And then made the findings that he had
4 the ability to pay and entered the coercive order.

5 QUESTION: What I am really asking is whether in the
6 actual decision of this case did the allocation of the burden
7 of proof actually have any impact on the outcome.

8 MR. CAPIZZI: Not the ultimate result, no. It
9 assisted in travelling the path to reach that, but ultimately
10 it was based upon the testimony of the defendant. We would
11 submit the court below erred and the order finding the statute
12 unconstitutional should be reversed, and with the Court's
13 permission we would like to reserve the remainder of our time
14 for rebuttal.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Capizzi.

16 We will now hear from you, Mr. Schwartzberg.

17 ORAL ARGUMENT OF RICHARD LYNN SCHWARTZBERG, ESQ.

18 ON BEHALF OF THE RESPONDENT

19 MR. SCHWARTZBERG: Mr. Chief Justice, and may it
20 please the Court, the issue, contrary to a number of the amicus
21 briefs that were filed in this case, I would suggest, is rather
22 narrow, and I would suggest it has almost no national
23 importance. What we are here to decide is the interpretation
24 of a very specific California statute which affects a civil
25 contempt in the criminal venue for only California makes that

1 definition. What I would suggest, however, is that the
2 significance of this debate concerns almost a century of
3 California jurisprudence concerning civil contempt.

4 What I would suggest to the Court is that there are a
5 number of rigs which this Court in Boykin versus Alabama has
6 applied to criminal cases, which, if this Court adopts the
7 position of the petitioner, will eviscerate, will essentially
8 vacate.

9 Those rights are self-incrimination, both the right
10 not to have to testify and the right not to be called as
11 witnesses, the right to counsel in California, and I would
12 suggest a right which is perhaps more fundamental than those
13 rights in Boykin versus Alabama, that is the right to have
14 proof beyond a reasonable doubt as to each and every element of
15 the charge as contained in the case, this Court's case of In re
16 Winship.

17 I would suggest that whether 1209.5 violated the
18 Fifth Amendment involves three questions. The first question
19 is, does 1209, which is the general scheme for contempts in
20 California, define a crime with the element of the ability to
21 pay. Second, if it does, may this Court redefine that
22 definition of a crime to suit the Court's federal
23 interpretation of what a civil contempt is. And finally, does
24 it offend the Fifth Amendment if it is a crime?

25 I think that the answer to whether 1209 defines a

1 crime in California is an unequivocal yes. In fact, all the
2 Court needs to do is to turn to a case which was decided in the
3 1940s called Bennet versus Superior Court, and I would merely
4 quote the first line of the third paragraph on Page 210, where
5 the Court says, "Contempt of court is a specific criminal
6 offense."

7 Now, they get that from McClatchie versus Superior
8 Court, which is at 119 Cal. They get that from In Ex Parte
9 Gould, which is at 99 Cal., both 1800s California Supreme Court
10 cases. Now, one of the questions that the Court asked Mr.
11 Capizzi was, why is it that the Court of Appeal dealt in sense
12 with such short shrift with the question of whether it was
13 criminal or not, and the answer is simple. They knew what it
14 was. And there wasn't any need to have any particular extended
15 analysis of that issue because every Court of Appeal knows what
16 it is.

17 QUESTION: Mr. Schwartzberg, it seems to me that what
18 the California Court of Appeals did ultimately was to say that
19 the California statute as applied here was invalid as a matter
20 of federal constitutional law.

21 MR. SCHWARTZBERG: I would concede that, yes.

22 QUESTION: So is it not also a question of federal
23 law whether this statute is indeed civil in nature or criminal
24 for purposes of answering the federal constitutional question?

25 MR. SCHWARTZBERG: No, Justice O'Connor, no more

1 than --

2 QUESTION: No? I would have thought perhaps it was,
3 that if we are going to say the federal Constitution strikes it
4 down because it is criminal in nature, that it is a matter of
5 federal law whether this thing is criminal in nature for
6 federal purposes.

7 MR. SCHWARTZBERG: Well, I think the answer to that
8 is this. If, for whatever reason, the federal government had
9 no murder statute, and then, in fact, let us assume that murder
10 on the federal level was never a crime, but California chose to
11 treat murder as a crime, a felony, and they had a statute that
12 was similar to that in Martin versus Ohio, I don't think this
13 Court would have any trouble striking that statute down, as
14 violating the Fifth Amendment.

15 QUESTION: Well, Mr. Schwartzberg, what about a case
16 like Shillitani v. The United States which at least indicates
17 that we are free to examine the purpose of the contempt
18 proceeding and characterize it as civil in this instance
19 because it was for the purpose of coercing the payment of the
20 money.

21 MR. SCHWARTZBERT: I don't know how to reconcile that
22 with California, and I think California would have trouble
23 reconciling it with Shillitani. It is the same reason, I
24 think, that the Supreme Court in Culver City tried to make it
25 clear that California was not -- I think the problem here is

1 that the legislature used the label "civil."

2 The fact is that the courts have been calling it a
3 "crime." Not criminal in nature, not a criminal action, but a
4 crime in California.

5 QUESTION: Well, I think that is perfectly all right
6 if California wants to do that. The problem is that we have a
7 California court that has rested its holding on the Federal
8 Constitution. Now, we can decide that issue, I suppose, and
9 leave California free to call it whatever it wants and impose
10 whatever requirements it wants as a matter of California law.

11 MR. SCHWARTZBERG: I think the difficulty with that
12 is that we are putting the cart before the horse. I think that
13 what the Court of Appeal said was that what we have here is a
14 crime. A crime no different than any misdemeanor or felony in
15 the State of California. And their conclusion was that once
16 you had it as a crime, then the decision such as this Court's
17 decision in Rylander do not have any effect. And then that, in
18 essence, once you determine this is a criminal act, a crime
19 punishable as a crime in California, that this Court's opinions
20 then presuppose that various rights inure. And one of those
21 rights is the Fifth Amendment.

22 And what I would suggest to the Court --

23 QUESTION: I assume that to some extent, the answer
24 to Justice O'Connor's question must depend upon what the
25 Federal test for criminality is. If the Federal test for

1 criminality is purpose, if whether the purpose of the penalty
2 is to coerce or to punish and if the State says: Our purpose
3 in applying these penalties is to punish, it would be very hard
4 for us to say, "No, you are wrong, California. Your purpose is
5 not to punish." California is certainly dispositive as to what
6 its purpose is. So, it would depend on what test we are
7 applying; wouldn't it?

8 MR. SCHWARTZBERG: Not only that, but I would go one
9 step further. And what I would suggest to the Court and I tried
10 to present it in my brief, which is that California has a very
11 unusual legislative scheme which is that we have 166, which is
12 a specific penal statute governing contempt of court and it
13 covers the same act, the same exact act that is prosecuted
14 here.

15 The difference between "civil contempt" under 1209
16 and criminal intent in 166 is that only the people in the State
17 of California can bring a 166 action, but a civil litigant, in
18 other words, a custodial parent, typically, the mother, can
19 hire counsel and bring a civil contempt which is a criminal
20 action.

21 And for that reason, what I am suggesting is that the
22 California Supreme Court in Culver City and going all the way
23 back to Gould said there are -- all these contempts are
24 contained in different places in our legislative scheme, but
25 they are all the same crime. They just carry different kinds

1 of right.

2 QUESTION: May I pursue Justice O'Connor's inquiry
3 with a hypothetical? Supposing a state differently from all
4 other states passed a statute saying that the negligent
5 operation of a motor vehicle shall be a crime. And it said,
6 (1) you can go to jail, and all the rest of it, but also have a
7 separate proceeding that the person thereby injured by proof,
8 just by a preponderance of the evidence that he was hurt by the
9 negligent operation, after he proves a crime by a preponderance
10 of the evidence, he can get damages. Would that comport with
11 the Fifth Amendment?

12 They call it a crime and they say the private
13 litigant gets a remedy on the basis of it by a preponderance of
14 the evidence. Does the fact they call it a crime mean that
15 Winship applies?

16 MR. SCHWARTZBERG: Well, I am having a little bit of
17 trouble with the analogy because I am not entirely certain as
18 to whether the courts are determining that the civil cause of
19 action is itself a crime.

20 QUESTION: Yes, the statute says: Negligent
21 operation of the vehicle is a crime. And it may be proved.
22 The crime may be proved in a civil proceeding by a
23 preponderance of the evidence. And, if you get a jury, you
24 instruct them that having done this is a crime and the
25 consequence of the crime is you have got to pay damages to the

1 plaintiff. The fact that they call it a crime, in your view, I
2 take it, would require all these other protections.

3 MR. SCHWARTZBERG: I would be less than frank if I
4 told the Court I really can answer that question. I can't
5 because I -- in essence, what you are saying is that a private
6 prosecutor can come in and obtain damages for a crime.

7 QUESTION: No. What I am saying is what a state
8 calls the proceeding may not be binding on us in interpreting
9 the Federal Constitution. That's what I am saying.

10 MR. SCHWARTZBERG: I hope that this does not devolve
11 into a semantics debate because I don't think that when we say
12 we are calling it a crime that that is all we are doing and
13 that it is not a crime in fact.

14 QUESTION: But do you say, though, that the
15 California rules applicable to this kind of proceeding should
16 be judged by the same standards that apply to similar rules
17 that produce similar consequences in other states except they
18 don't call it a crime.

19 MR. SCHWARTZBERG: I don't think that they have
20 anything to do with each other. I just don't.

21 QUESTION: So, our case pertains only to California?

22 MR. SCHWARTZBERG: Yes. And that's why I say I think
23 that contrary to some of the amicus who are concerned about the
24 national ramifications of this, I don't think they have any.

25 QUESTION: Well, what if California that has a

1 statute that says, for negligently driving while drunk, you can
2 have your license revoked, your motor vehicle operator's permit
3 revoked, and the California courts say, "Well, gee, this is
4 pretty tough on the motorist. We think it is a criminal
5 proceeding." And then we talk about presumptions and what the
6 burden of proof. Now, can this Court if a California court
7 says one of those procedural aspects is invalid under Federal
8 Constitution, can we not reexamine to see whether or not this
9 meets the definition of a "crime" for some of our cases?

10 MR. SCHWARTZBERG: Well, I think the answer to that
11 is that if the California court's interpretation is unambiguous
12 that notwithstanding the fact that this may only involve an
13 administrative penalty, whether it is loss of license, loss of
14 privilege, loss of money or jail, I think that if the
15 California court says that in California, that act is a crime,
16 then I think this court, not bound to accept that
17 determination, in effect, I think this Court must apply those
18 Federal constitutional guarantees which apply to a criminal act
19 within the context of this Court's decisions.

20 So, I would concede, for instance, that this Court
21 does not require counsel in every criminal proceeding, but that
22 does not mean that in those criminal proceedings where the
23 Court does require counsel. In other words, where the penalty
24 is not de minimis that counsel has to be applied in that
25 proceeding.

1 And what I would suggest, if we look at this case
2 backwards, if the Court notes that California courts have
3 traditionally, since 1893, applied and felt compelled to apply
4 Federal constitutional rights to civil contempts, the answer is
5 that they must know that it is a crime. And, in fact, there
6 are no cases --

7 QUESTION: But how does one "know" that it is a
8 crime?

9 MR. SCHWARTZBERG: Because the courts have, since
10 1893, defined it as a crime and have treated it as a crime.

11 QUESTION: And that's all it takes? You don't want
12 to get into a semantical debate?

13 MR. SCHWARTZBERG: Well, I am not suggesting --

14 QUESTION: Could you tell me, Mr. Schwartzberg, could
15 you tell me, because it makes a difference to my answer to the
16 question we are discussing why California has said it is a
17 crime? Have they said it is a crime because it is a
18 punishment?

19 MR. SCHWARTZBERG: Yes.

20 QUESTION: As opposed to a coercion? Is that the
21 reason they have said it is a crime?

22 MR. SCHWARTZBERG: I don't think there is any doubt
23 that the cases have always defined this as a crime because, as
24 the courts say, the ultimate result is punishment. And, in
25 fact, Petitioner likes to call this coercive. The truth of the

1 matter is that these proceedings result in substantial periods
2 of jail time. And whether that jail time comes up front or
3 whether it comes at the end of a probationary period where the
4 respondent still does not comply with the court's order, and in
5 fact the burden of proof becomes less in a probation situation
6 than it does in a normal criminal proceeding --

7 QUESTION: Well, Mr. Schwartzberg, isn't the
8 California procedure California's response to the uniform
9 reciprocal support law requirements?

10 MR. SCHWARTZBERG: Well, California's response as to
11 what, Justice O'Connor?

12 QUESTION: Well, there is a uniform act as you know
13 designed to enable parents with custody of a child to obtain
14 child support.

15 MR. SCHWARTZBERG: Yes.

16 QUESTION: And each state, including California, has
17 responded to that by having provisions such as this for
18 contempt proceedings, for non-payment of child support.

19 MR. SCHWARTZBERG: Yes.

20 QUESTION: And isn't this California's participation
21 in that scheme?

22 MR. SCHWARTZBERG: Well, the 1209.5 may be, Justice
23 O'Connor, but the original 1209 statute which presents a
24 contempt remedy is not --

25 QUESTION: Well, 1209.5 is what we are dealing with.

1 MR. SCHWARTZBERG: Yes.

2 QUESTION: And there is an indication, is there not,
3 in that uniform act that these proceedings are civil in nature
4 for purposes of the uniform act and are designed to coerce the
5 parent who is not making the payments to make the payments.
6 That is the idea of the uniform act; isn't it?

7 MR. SCHWARTZBERG: There is no question about that,
8 but that act does not supercede 1209. And 1209 is a crime.

9 QUESTION: Would it be more accurate to say they have
10 dealt with contempt proceedings as a matter of California law
11 as quasi-criminal? Would that be a little more accurate,
12 maybe?

13 MR. SCHWARTZBERG: I would say that the courts when
14 they get to the issue of what species this is, whether it is
15 criminal or civil, have used a number of different labels to
16 govern it. And that is why I suggested a moment to Justice
17 Scalia that one of the -- apart from looking at the direct
18 language of the courts to determine whether California
19 considers this a crime is to use deduction and work backwards.
20 And that is to look at what the courts have done and the only
21 way you can conclude that a defendant on a criminal action or a
22 contempt action in California has a right to counsel, which
23 most states don't provide, has a right to Fifth Amendment
24 privileges most states don't provide.

25 QUESTION: Well, don't you suppose, Mr. Schwartzberg,

1 that because one of the consequences of this coercive
2 proceeding may be imposition of a jail term that a state as a
3 matter of state law might want to build in extra protections,
4 such as a higher standard of proof.

5 MR. SCHWARTZBERG: But, Justice O'Connor, I would
6 agree with you if I could find in the cases -- and I have read
7 them over and over, again -- any reference either to
8 California's own constitutional provisions which govern the
9 Fifth Amendment which govern the right to counsel.

10 The truth is that they all relate back to the Fifth
11 Amendment. And, in fact, in In re: Witherspoon, which was
12 decided by the same Court of Appeal which decided In re:
13 Feiock, the Court of Appeal again noted that this was a
14 criminal proceeding and based upon Supreme Court language from
15 1893 concluded that a defendant in a criminal action or a
16 contempt action had a right not to be called as a witness and
17 that that was compelled not by California's Constitution, but
18 by the Fifth Amendment.

19 The leads me, obviously, to the next step which is
20 that --

21 QUESTION: Before you get there.

22 MR. SCHWARTZBERG: All right.

23 QUESTION: Do the California courts make any
24 difference between an order in a case like this which says, the
25 defendant's fault in the court and the court says, "Unless you

1 make these payments that are due, you will go to jail. And you
2 will sit there until you come up with the payments." That
3 seems to me coercive. Does it make any distinction between
4 that and a situation where the person who has failed in the
5 past who makes payments comes before the court and the court
6 says, "Because you have not made these payments in the past,
7 you are going to jail for three months." Is there any
8 distinction?

9 MR. SCHWARTZBERG: There is absolutely no distinction
10 in the procedural --

11 QUESTION: Both of them are called coercive.

12 MR. SCHWARTZBERG: Criminal.

13 QUESTION: Criminal.

14 MR. SCHWARTZBERG: Yes, in fact, when the Court looks
15 at City of Culver City v. Superior Court, essentially, the
16 petitioners in Culver City stand before the court asking them
17 to tell them what kind of contempt this is because they are
18 obviously looking at other jurisdictions and recognizing that
19 depending on what kind of a contempt it is, they get different
20 rights.

21 And the Supreme Court said, "We don't care what you
22 call it, because it is all the same." Now, that may sound like
23 Alice in Wonderland, but the courts have essentially
24 eviscerated any distinction between civil and criminal
25 contempt, the traditional forms. They discuss what they are.

1 There is no question about that. They are not blind to that.
2 But when we get down to the procedural niceties of what a
3 contempt is, there is no question that the courts in California
4 treat it as a crime. It is a misdemeanor because it is not
5 punishable by more than a year in county jail.

6 QUESTION: Yes, but in this very case, if this man
7 came up with the money that is in arreared and paid it in the
8 court or paid it for his children's support, would he not
9 immediately get out of jail?

10 MR. SCHWARTZBERG: Well, first of all, he is not in
11 jail and never was. He was placed on probation. And,
12 essentially, the probation grant ordered him to do two things.
13 It ordered him to make future payments on penalty of going to
14 jail and it ordered him to make past payments on penalty of
15 going to jail.

16 QUESTION: And what I am saying is if he makes the
17 past payments, he won't go to jail, if he complies with the
18 order.

19 MR. SCHWARTZBERG: It is clear that essentially
20 through the minority of his children's lives, if he never
21 misses a payment he will not go to jail.

22 QUESTION: So, it is clear that this order in other
23 jurisdictions would be treated as a coercive and a civil
24 contempt.

25 MR. SCHWARTZBERG: Correct. And I have conceded that

1 in my briefs. And that is why I say that I think that
2 California has chosen because of the threat of jail to call it
3 a crime.

4 QUESTION: See, you are suggesting, I think, in my
5 hypothetical example about a negligence case, if a state not
6 only called it a crime, but also said, "We will appoint counsel
7 and we will give the defendant the privilege of not getting on
8 the stand, but the only remedy is you pay damages." You would
9 say that having given some constitutional rights to a
10 proceeding that is labeled criminal means all other criminal
11 rights must go with it.

12 MR. SCHWARTZBERG: No, not based upon what you just
13 said. Depending upon where the genesis of those rights comes
14 from.

15 QUESTION: Well, it comes from California or my
16 hypothetical state's mistaken belief it was compelled to do so
17 by the Federal Constitution.

18 MR. SCHWARTZBERG: Well, if you assume it is
19 erroneous then, obviously, I lose. But I don't assume that
20 their decision was erroneous.

21 QUESTION: They say it was based on the Federal
22 Constitution and that's why they do it. It is the fact that,
23 (a) they call it criminal; and (b) they think as a matter of
24 Federal Constitutional law they had to do it. Does that mean
25 that we must agree with them that it is --

1 MR. SCHWARTZBERG: Well, I wouldn't put it that way.

2 QUESTION: What else do you have in this case? You

3 have California classifying this as criminal proceeding and

4 giving a lot of rights to the defendant.

5 MR. SCHWARTZBERG: Sure. Because it is a crime.

6 QUESTION: It is a crime because they call it a

7 crime.

8 MR. SCHWARTZBERG: But that is always the predicate.

9 Isn't that always true for any wrongful act?

10 QUESTION: No. The state also identifies certain

11 sanctions that require that then there are rights --

12 MR. SCHWARTZBERG: Well, then maybe we ought to make

13 it clear. This is a crime. The sanctions in this case are no

14 different than in any other crime.

15 QUESTION: Yes, they are because the defendant here

16 carries the key to the prison --

17 MR. SCHWARTZBERG: And so does every other criminal

18 defendant in California. If I go out and commit a robbery in

19 California, and I am convicted of that robbery, the penalty is

20 either probation or prison. A court could place me on

21 probation and could stay the imposition of that prison sentence

22 and if I am a good boy for three years on that probation grant,

23 I will never see a day of time.

24 QUESTION: Yes, but it could also say, "You are going

25 to jail for three years. I don't care whether you make

1 restitution or not."

2 MR. SCHWARTZBERG: And so can they under the civil
3 contempt statute. That's the analogy I want to break. Under
4 the civil contempt statute, there is no obligation that the
5 trial court place the contemtor on probation and give him
6 another chance. The court can simply say, "Off to the
7 hoosegow."

8 QUESTION: But if he does that, then I think everyone
9 would agree that is the equivalent of a criminal procedure.

10 MR. SCHWARTZBERG: But we don't define whether a
11 matter is criminal after we find out what the sentencing is
12 when the state has already said that it is criminal. And that
13 is the problem we are having.

14 QUESTION: Could I ask you, Mr. Schwartzberg, if we
15 disagree with you and say that California's notion about
16 whether this law is criminal or civil doesn't bind us and we
17 decide that we will treat it as civil, do you lose?

18 MR. SCHWARTZBERG: Yes.

19 QUESTION: Why?

20 MR. SCHWARTZBERG: I lose because I would concede
21 that under Rylander and Usury that the inferences, the burden
22 shifting that this statute accomplishes do not offend the Fifth
23 Amendment in civil matters. I would concede that, and I have
24 conceded that all along.

25 QUESTION: Yes. All right.

1 MR. SCHWARTZBERG: Let me go a little but further
2 here and indicate to the Court this. One of the things that I
3 think this case presents by the petitioner is essentially --
4 comes out of some for the same questions as the Court was
5 asking Mr. Capizzi, and that is do we essentially allow
6 petitioner to relitigate the definition of state law before
7 this Court when they have essentially lost that opportunity in
8 the Courts below? What I would suggest to the Court is that
9 these issues, if the Court looks through the original briefs
10 that were filed in this case, the Court will notice two things.
11 Petitioner never argued to the Court of Appeal that this was
12 not a crime. And Number Two, they never argued to the Court of
13 Appeal that as an element of that crime we add ability to pay.

14 Essentially they went to the Court of Appeal and they
15 argued that 1209.5, notwithstanding these two assumptions, did
16 not offend the Fifth Amendment, and perhaps that is why you
17 have the Court of Appeal providing short shrift to what we are
18 now arguing amongst ourselves.

19 The fact is that petitioner has also argued in their
20 brief, and I have had --

21 QUESTION: Well, yes, but the Court of Appeal didn't
22 give short shrift to the notion that this is the kind of a
23 proceeding in which shifting the burden of persuasion is
24 unconstitutional.

25 MR. SCHWARTZBERG: No, because they knew from the

1 outset that they were dealing with a crime in California, and
2 once they had that as a predicate, then the only other question
3 that they had to resolve was whether the wording of 1209.5
4 offended the Fifth Amendment, and they didn't have any trouble
5 reaching that conclusion either. And the reason we know that
6 they wouldn't have any trouble is because essentially this
7 shifts everything onto the defendant. We know that.

8 QUESTION: You seem to be arguing that we just aren't
9 entitled at all to ask whether or not this is close enough to a
10 crime to trigger these protections.

11 MR. SCHWARTZBERG: I would be fearful to use the word
12 entitled, but I would hope to argue to the Court --

13 QUESTION: Don't be fearful.

14 MR. SCHWARTZBERG: I would hope to argue to the Court
15 that, yes, the answer is is that this case is very similar in
16 some respects to Runi. I mean I just -- I see-- my view is
17 that what the Court is being asked to do is to rewrite the
18 opinion but I think that the answer has to remain the same.

19 My belief is, and I think that the cases support it,
20 and in fact in the reply brief that petitioner filed just last
21 week essentially petitioners -- I consider their central
22 argument to be on Page 9 that this Court must define the
23 subject matter of a statute solely in federal terms. If that
24 is true then what I would suggest is that if the federal
25 government in 49 states make a wrong a civil cause of action,

1 providing for injunctive relief, let's say pouring 1,000
2 gallons or sulfuric acid down a drain, they make it a civil
3 wrong, they allow for injunctive relief to stop it from
4 happening, and damages to punish the wilful or the wrongdoer
5 for what he did, and California thinks that it is more
6 important to protect its citizens on its water quality because
7 we don't have any water in California, and so they make it a
8 felony.

9 Essentially what I see petitioner arguing is that he
10 would come here and say it is not a crime, because nobody else
11 makes it a crime, and perhaps it wasn't a crime under common
12 law.

13 QUESTION: So the example would have to be they made
14 it a felony but they way the only remedy for committing this
15 felony is an injunction or a cease and desist order. If they
16 did that would your position be just as strong?

17 MR. SCHWARTZBERG: I don't know. I would suggest to
18 the Court that if California chooses to make something
19 criminal, and we are getting back to the semantic argument, I
20 don't know how to get out of t, and this is the problem I think
21 you have seen in our briefs, if they make something criminal,
22 does the definition of a crime only flow from the punishment,
23 and I don't know that the answer to that is true, because there
24 are many acts in society which may be labeled a crime which
25 perhaps don't even carry the punishment.

1 QUESTION: But I think you have agreed that
2 California could solve this problem. Instead of coming here
3 with their lawsuit, they could have gone to the Supreme Court
4 and said, we want a new rule defining this species of contempt
5 the same way every other state does.

6 MR. SCHWARTZBERG: Justice Stevens, they did, and
7 they got one vote. I mean, I think that is why we are here,
8 and I think the answer is that since 1893 the legislature has
9 not known what this is, they have seen various rights being
10 compelled by the Fifth Amendment. You don't have to be Phi
11 Beta Kappa to figure out that must mean it is a crime, and they
12 haven't amended the statute of 1209, and the reason for that is
13 because they are quite content with what it is.

14 QUESTION: If that is true and they want to keep this
15 burden of proof, they can, no matter what we decide, they can
16 say as a matter of California law we are still going to require
17 that the burden of proof on this issue be placed on the other
18 party.

19 MR. SCHWARTZBERG: I don't think they can do that as
20 long as the Fifth Amendment exists, but I think what they can't
21 do --

22 QUESTION: No, no, no, I mean they could take your
23 position, which you say they have now.

24 MR. SCHWARTZBERG: They don't need to. We have
25 already essentially eviscerated the law in California, but what

1 I would suggest is that --

2 QUESTION: What I am suggesting is, if you should
3 lose this case in this Court on the federal theory, they could
4 still, as you say as a matter of California policy this is the
5 result they want, they could easily --

6 MR. SCHWARTZBERG: No question, Your Honor. I hope
7 my client --

8 QUESTION: You have your own Fifth Amendment.

9 MR. SCHWARTZBERG: Well, we do, but I think that our
10 courts are going to be less inclined to utilize it in the near
11 future.

12 QUESTION: You can't apply it differently?

13 MR. SCHWARTZBERG: No, I don't think that. I think
14 that there is a movement of the court to utilize independent
15 test grounds in a far more judicious manner than have been used
16 in the past.

17 QUESTION: Mr. Schwartzberg, what about this as a way
18 of out of your semantical box. Anything that you go to jail
19 for is a crime. In fact, this is what I thought our law reads
20 like. If it is a proceeding that sends you to jail, it is a
21 criminal proceeding, unless the purpose of sending you to jail
22 is just to force you to do something.

23 Now, that means forcing you to do something after you
24 are in jail, so that I can send you to jail until you pay up
25 the money that is due or until you perform some act that you

1 are supposed to perform. That is civil.

2 MR. SCHWARTZBERG: And I would suggest that does not
3 happen in this case.

4 QUESTION: That is right.

5 MR. SCHWARTZBERG: Absolutely.

6 QUESTION: What is here is, you are going to jail for
7 not having paid previously.

8 MR. SCHWARTZBERG: Correct.

9 QUESTION: And that, if you call that coercive, then
10 every criminal penalty is coercive. That is to say, you are
11 coerced not to kill people by knowing that if you kill somebody
12 you will go to jail.

13 MR. SCHWARTZBERG: There is no question. The only
14 concern --

15 QUESTION: That couldn't be what we mean by coercive.

16 MR. SCHWARTZBERG: The only concern I have is that I
17 think that petitioner is going to argue to this Court two
18 minutes is that merely facing that jail sentence is going to
19 scare these people into paying their money, and that is what
20 makes it coercive, but the same argument is true that that is
21 supposed to stop crime, because if we know we might go to jail
22 if we are caught, somehow crime won't occur and we know that
23 that is baloney so it is not --

24 QUESTION: Why don't you make that argument to us?
25 That is not one that you made.

1 MR. SCHWARTZBERG: Well, I haven't made it because of
2 the difficulty in grappling with how the California courts go
3 back and forth between the definition of what is a civil versus
4 criminal contempt. It is always criminal.

5 QUESTION: Do most of these proceedings arise in the
6 fashion that this one is --

7 MR. SCHWARTZBERG: Yes.

8 QUESTION: -- that is, the defendant has said you
9 haven't made payments in the past and therefore go to jail? Or
10 do most of them come up, you know, we are going to send you to
11 jail until you make up past payments?

12 MR. SCHWARTZBERG: I would venture to say that most
13 judges attempt the rod before they put them in jail, and the
14 answer is, yes, most defendants are placed on probation just as
15 I would venture to say that most criminal defendants in the
16 traditional criminal sense are placed on probation for first
17 and second, maybe sometimes --

18 QUESTION: But if a judge says, you haven't paid,
19 therefore you got jail, and he goes to jail, if he then comes
20 up with his past payments, he gets out.

21 MR. SCHWARTZBERG: No, not in California. That is
22 it.

23 QUESTION: That is it.

24 MR. SCHWARTZBERG: You just do your time.

25 QUESTION: That's the difference.

1 MR. SCHWARTZBERG: You do your time. And when you
2 get out -- now you can always obviously as for a modification,
3 and you can hold up a certified cashier's check in front of the
4 judge and beg that he now comes back and modifies your
5 probation, but it is not a situation where the judge says the
6 Orange County jail is across the street, Mr. Defendant, why
7 don't you go over there, and when you get the money, give me a
8 call? It doesn't happen that way.

9 Obviously, I have just a few moments, but I would
10 like to emphasize this. Everybody is going to concede, just as
11 the argument made by Mr. Capizzi in the beginning, that these
12 are children involved, and obviously we have custodial parents
13 who need the money. Excuse me. I ask the Court to affirm the
14 decision below.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Schwartzberg.

17 Mr. Capizzi, you have three minutes left.

18 ORAL ARGUMENT OF MICHAEL R. CAPIZZI, ESQ.

19 ON BEHALF OF THE PETITIONER - REBUTTAL

20 MR. CAPIZZI: Mr. Chief Justice, if it may please the
21 Court, if there was such a defendant in jail and he did have
22 the money, we would be so willing and happy to take that money
23 for the children it is undoubtedly --

24 QUESTION: Yes, but how about the judge?

25 MR. CAPIZZI: I think the judge would --

1 QUESTION: If he puts him in jail for not having
2 paid for a term, he may not let him out just because he comes
3 up with the money.

4 MR. CAPIZZI: Where it is the coercive element that
5 is trying to be utilized, and the entire thrust of these
6 proceedings is to coerce payment, to get the payment for that
7 child, and it is only as a last resort that the jail --

8 QUESTION: Well, Mr. Capizzi, is it true as your
9 opponent says, that in California the jail is imposed only as
10 punishment, not as future coercion?

11 MR. CAPIZZI: No, that is absolutely incorrect,
12 and --

13 QUESTION: So he is wrong as a matter of California
14 law?

15 MR. CAPIZZI: He is wrong, and I think the judgment
16 of the Court in this case indicated that he is wrong. The jail
17 sentence was suspended on condition that he make the payments
18 and it is only if he failed to make the payments that the
19 coercive element would then come into play.

20 QUESTION: The sentence itself, before its
21 suspension, which is what we are arguing about, the sentence
22 itself was a sentence or having failed to make past payments.
23 Now, that is coercive, to be sure, just as much as life
24 imprisonment for murder is coercive. It induces you not to
25 commit a murder, and this would induce him to make the

1 payments. It is coercive in that sense, but that is not what
2 we mean by coercive. We mean you have the key to the jail in
3 your pocket, and that wasn't the case here, was it?

4 MR. CAPIZZI: Absolutely. It was suspended on the
5 condition that he make the --

6 QUESTION: I am talking about the original sentence.
7 It is the sentence that we are concerned about, not the
8 suspension of the sentence.

9 MR. CAPIZZI: But the sentence was suspended because
10 Mr. Feiock didn't have the wherewithal to pay the \$1,650 at the
11 time he was given a payment schedule and told to reduce the
12 arrearage at the rate of \$50 per month. And so it was
13 necessary to continue the course of nature of that 25-day jail
14 sentence. If he pays, he will never do the time. And there is
15 certainly a preference that he pay rather than that he do the
16 time. Counsel is also incorrect in categorizing this as
17 criminal. City of Culver City versus Superior Court, a
18 California Supreme Court case, at Page 549, says, "But in
19 California the proceedings leading to punishment for failure to
20 obey a decree, criminal contempt, and to imprisonment until the
21 omitted act is performed, civil contempt, are exactly the
22 same."

23 Although the sections which provide the procedure for
24 both kinds of contempt are provided for in 1209 of the Code of
25 Civil Procedure, contempt proceedings are said to be criminal

1 in nature, and those procedural right and safeguards which are
2 appropriate to criminal contempt proceedings are also afforded
3 in California in civil contempt proceedings. So we continue to
4 draw a distinction based upon the substantive aspect, but we
5 extend the procedural safeguards the same to both.

6 And as a result, both civil contempt and criminal
7 contempt are deemed to be criminal in nature. And the Court
8 below did not categorize this as criminal --

9 CHIEF JUSTICE REHNQUIST: Your time has expired, Mr.
10 Capizzi. The case is submitted.

11 (Whereupon, at 12:09 o'clock p.m., the case in the
12 above-entitled matter was concluded.)
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3 REPORTER'S CERTIFICATE

4 DOCKET NUMBER: 86-787
5 CASE TITLE: Cecil Hicks, District Attorney for
6 County of Orange California
7 HEARING DATE: Tuesday, December 1, 1987
8 LOCATION: Washington, D.C.

9 I hereby certify that the proceedings and evidence
10 are contained fully and accurately on the tapes and notes
11 reported by me at the hearing in the above case before the
12 United States Supreme Court,
13 and that this is a true and accurate transcript of the case.

14 Date: 12/1/87

15
16 Margaret Daely
17 Official Reporter

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