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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF COLUMBIA COUNTY SUPPORT COLLECTION,

Respondent,

-against-

RISLEY,

No. 82  
(Papers sealed)

Appellant.

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20 Eagle Street  
Albany, New York 12207  
April 28, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

THEODORE J. STEIN, ESQ.  
STEIN LEGAL SERVICES  
Attorneys for Appellant  
104 Cardinal Court  
Woodstock, NY 12498

DANIEL GARTENSTEIN, ESQ.  
ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES  
Attorneys for Respondent  
1061 Development Court  
Kingston, NY 12401

Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar  
2 is number 82, Matter of Columbia County Support  
3 Collection Unit v. Risley.

4 Good afternoon, counsel.

5 MR. STEIN: Good afternoon. May it please  
6 the court, my name is Theodore Stein; I represent  
7 Joshua Risley in this matter. I'd like to reserve  
8 two minutes, if I may, for - - -

9 CHIEF JUDGE DIFIORE: Yes, you may.

10 MR. STEIN: - - - for rebuttal. Joshua  
11 Risley was sentence - - -

12 JUDGE RIVERA: Counsel, is - - - is the  
13 issue that there's not a break between those six year  
14 - - - or, six months, excuse me - - - six months?

15 MR. STEIN: I'm sorry; could you repeat the  
16 question?

17 JUDGE RIVERA: Is - - - is it - - - is the  
18 issue that there's not a break between the six  
19 months? I mean you're not taking the position that  
20 the judge couldn't have given him six months, he  
21 comes out, he continues not to pay, gets another six  
22 months, comes out, continues not to pay. You're not  
23 saying that that would have been beyond the scope of  
24 the judge's authority, are you?

25 MR. STEIN: That's correct. I am not

1 saying that.

2 JUDGE RIVERA: Okay.

3 MR. STEIN: I'm not saying that.

4 JUDGE RIVERA: So the issue is the - - -  
5 the six - - -

6 MR. STEIN: The consecutive sentence.

7 JUDGE RIVERA: - - - six months three times  
8 consecutive, no break at all?

9 MR. STEIN: No break. That's correct.  
10 It's just - - -

11 CHIEF JUDGE DIFIORE: So then what are the  
12 specific distinctions that you can point out for us  
13 between Section, what is it, 454(3)(a) under Article  
14 4 and Section 846(a) under the Family Offense  
15 Proceedings Article?

16 MR. STEIN: Well - - - well, the - - -  
17 excuse me, the major distinctions are the public  
18 policy distinctions between Article 8 seeks to  
19 protect victims of domestic violence and to do so,  
20 excuse me, be removing from civil society the  
21 perpetrator or the alleged perpetrator.

22 CHIEF JUDGE DIFIORE: Beyond the policy  
23 considerations, going to the jurisdiction and the  
24 ability that - - - of the court to incarcerate Mr.  
25 Risley for those three consecutive but separate - - -

1 MR. STEIN: But my argument is that the  
2 court did not have the jurisdiction to sentence him  
3 to one eighteen month period of time which was, in  
4 effect, what - - - what the judge did. She sentenced  
5 him to six months and then lifted two suspended  
6 sentences, each of which was of six month's duration.  
7 So when he - - -

8 CHIEF JUDGE DIFIORE: Was that your  
9 argument, that it's one eighteen month - - -

10 MR. STEIN: It was - - -

11 CHIEF JUDGE DIFIORE: - - - sentence of  
12 incarceration?

13 MR. STEIN: It was three consecutive six-  
14 month periods that equaled eighteen months of  
15 incarceration. And that - - - excuse me, there's - -  
16 - well, for reasons that I don't know, the Appellate  
17 Division chose not to rule on the basic question of  
18 whether the court had the authority to sentence Mr.  
19 Risley to the eighteen months.

20 JUDGE ABDUS-SALAAM: Well, what - - -  
21 counsel, what are you proposing? That if it's not  
22 possible or the court doesn't have jurisdiction to  
23 con - - - to sentence someone consecutively for six  
24 months to the point of eighteen months or more, would  
25 you be satisfied by the court, after the first six

1 month sentence is over, then the next day putting the  
2 person back in jail because - - - for another six  
3 months and then, you know, coming back the - - -  
4 after that six months with a break of a day and then  
5 putting them back in jail?

6 MR. STEIN: No, I - - - I would not, Your  
7 Honor. The way the statute is current written, it's  
8 an - - - excuse me, six months is the maximum period  
9 of confinement, and he would have to have been  
10 released from jail at the end of that six month  
11 period of time, given the option, if you will, of  
12 finding employment and making his payments - - -

13 JUDGE FAHEY: But the - - - the way I  
14 understand your argument is - - - is basically you're  
15 saying that after six months, he has to be given a -  
16 - - it - - - it has to be a willful violation for the  
17 next one and that you can't establish willfulness if  
18 they're consecutive.

19 MR. STEIN: No, the fir - - - under the  
20 Family Court Act willfulness is presumed. The Family  
21 Court Act 4 - - - Article 4 makes two presumptions.  
22 The first one of which is that you have the ability  
23 to pay, and the second one of which is that if you  
24 didn't pay it was willful.

25 JUDGE FAHEY: I see.

1 MR. STEIN: So the six month - - - the  
2 first six - - - any six-month period of time is based  
3 on a willful violation of the order.

4 JUDGE GARCIA: And, counsel, going to that  
5 ability to pay, as you described it, a question then.  
6 If he comes before this judge and cannot pay, what's  
7 the procedure then? I mean he - - - does he raise  
8 that then as an affirmative defense - - -

9 MR. STEIN: Well, he should - - -

10 JUDGE GARCIA: - - - to the willfulness  
11 finding?

12 MR. STEIN: If - - - excuse me. When it  
13 moves on a willfulness - - - into a willfulness  
14 hearing, at which point it's gone up to family court  
15 from support court - - -

16 JUDGE GARCIA: Um-hum.

17 MR. STEIN: - - - and that basically the  
18 person should argue - - - he should be able to  
19 present evidence that he's made affirmative eff - - -  
20 efforts to find employment, what his effort - - - you  
21 know, the - - - the outcome of his efforts to find  
22 employment. And in the - - - the important - - -

23 JUDGE GARCIA: That's a defense to a  
24 willfulness presumption?

25 MR. STEIN: Well, no. The - - - I mean the

1 willfulness is presumed. So you can't - - -

2 JUDGE GARCIA: Right. But if you say - - -  
3 if you make a case that I am looking for work or I'm  
4 only making X amount of money, then you rebut the  
5 willfulness presumption; is that how it works?

6 MR. STEIN: Well, if you're saying that I'm  
7 only making a certain amount of money, what you're  
8 saying, what you should have done is - - - is move  
9 the court to modify the order of support so that  
10 you're - - - if - - - if, in fact, you're not making  
11 enough money to meet your obligation. Most - - - a  
12 lot of these cases, by the time - - - there's no  
13 attorney assigned at support court level.

14 JUDGE GARCIA: Um-hum.

15 MR. STEIN: So the - - - the kind of  
16 defense that a person would have to prepare is to a  
17 willfulness, which is to basically show efforts made  
18 to find employment or reduced income, you would have  
19 moved the court to modify the existing order and - -  
20 -

21 JUDGE GARCIA: So I guess another way to  
22 ask my question is is there anything in this record  
23 showing he tried to do that?

24 MR. STEIN: I'm sorry, sir, could you - - -

25 JUDGE GARCIA: Is there anything in this

1 record showing your client tried to do that?

2 MR. STEIN: Yeah, there's nothing in this  
3 record that basically shows what he tried to do in -  
4 - - in order to basically - - - excuse me - - - make  
5 his current support obligation and to in some way  
6 reduce the arrears that he had. And this - - - this  
7 - - -

8 JUDGE GARCIA: There is evidence that he  
9 was joining bowling leagues and - - - and that kind  
10 of thing, right?

11 MR. STEIN: The - - - the - - - luckily,  
12 you know, we don't make public policy based on single  
13 cases because this is a particular case where most  
14 people would agree that the eighteen-month sentence  
15 was not, I'll say, disproportionate to the offense.

16 JUDGE GARCIA: No, I agree with that. But  
17 - - - so I guess that the point is in - - - in the  
18 willfulness findings it's not based, in anything on  
19 the record, on an inability to pay. You know, there  
20 was no - - - there was no evidence he had an  
21 inability to pay or he had ability to pay less and  
22 the judge - - - so I think one of the concerns would  
23 be you put somebody in jail for eighteen months,  
24 they're unable to pay, and it's like a debtors'  
25 prison, and you've got - - -



1 MR. STEIN: That's exactly right.

2 JUDGE GARCIA: - - - an eighteen-month  
3 sentence. But this was somebody who was willfully  
4 violating orders to pay before on a regular basis,  
5 was getting suspended sentences. There was never any  
6 evidence in the record that he couldn't pay or he was  
7 trying to get employment. So I don't see that  
8 argument - - - again, I'm not saying you make policy  
9 on each case, but I don't really see that argument  
10 under the scheme where you can rebut the willfulness  
11 presumption based on those efforts, and he didn't.

12 MR. STEIN: No, he - - - no, I - - - I  
13 certainly agree. He didn't. My point is that the  
14 court - - -

15 JUDGE RIVERA: You're not challenging that  
16 anyway.

17 MR. STEIN: I'm sorry?

18 JUDGE RIVERA: You're not challenging that  
19 the - - - the opportunity to show that it wasn't  
20 willfully - - - your - - - yours is a very clear,  
21 narrow challenge, right, on this case which is you  
22 just can't do this consecutively.

23 MR. STEIN: That's right. That's exactly  
24 what it is.

25 JUDGE RIVERA: Then to follow up on - - -

1 on - - -

2 MR. STEIN: It's just a very simple - - -

3 JUDGE RIVERA: - - - the initial - - - my  
4 initial question, Judge Abdus-Salaam's, even if we  
5 held for you, right, he served six months, comes out  
6 for one day, he'll come right back and serve another  
7 six. If the court decided to - - - to sentence him  
8 in that way, the court could, even under your  
9 argument, correct?

10 MR. STEIN: Well, I - - - I would argue  
11 that basically the court would be violating due  
12 process if he were out for one day. There was not a  
13 new finding of willfulness. He's just out for one  
14 day. Nobody - - -

15 JUDGE ABDUS-SALAAM: But these were - - -

16 JUDGE RIVERA: Yeah.

17 JUDGE ABDUS-SALAAM: - - - suspended  
18 sentences from previous willful findings - - -  
19 willfulness findings. So in a situation like that  
20 where a parent has consistently shown that they're  
21 going to defy the orders of the court, what would you  
22 do?

23 MR. STEIN: Right.

24 JUDGE ABDUS-SALAAM: Help us say we should  
25 do - - - the family court should do.

1 MR. STEIN: If the legislature wants to  
2 sentence people for eighteen-month periods of time or  
3 twelve month periods of time, I think the statute has  
4 to be modified. I think that basically there are a  
5 variety of, I'll say, alternative methods that the  
6 court can use in order to try to get somebody to pay.  
7 I'm not going to argue that this man would have paid.  
8 That would be - - - I think the evidence is that he's  
9 - - - he had the opportunity and - - - and he  
10 basically didn't pay. But I think that the way the  
11 statute is currently written, once he gets out of  
12 jail at the end of six months, he has to again - - -  
13 the court has to again - - - papers have to be filed,  
14 establish willfulness and send him back for another  
15 six months.

16 JUDGE GARCIA: But I think that goes back  
17 somewhat to what the Chief Judge was asking  
18 originally on Walker. The language is the same and  
19 we read an ability to - - - there was no - - -  
20 nothing in that statute that said you could impose  
21 consecutive sentences. I understand your point. The  
22 policy was different there - - -

23 MR. STEIN: Right.

24 JUDGE GARCIA: - - - in terms of orders or  
25 protection but of willful violations. And I think

1 here, if you're looking at the policy on willful  
2 violations for the reasons that are in this record,  
3 why would we then read in a limitation on imposing  
4 consecutive sentences on the same language that we  
5 found in Walker? You could - - -

6 MR. STEIN: Well - - - well, it's important  
7 to note that in Walker, he violated the order of  
8 protection while he was in jail. He communicated  
9 with the protected party, so his violation - - - you  
10 could argue that he - - - he was sentenced on a  
11 series of violations that he committed, the initial  
12 one and the subsequent ones while he was in jail.  
13 And you - - - with an Article 8 proceeding, you're  
14 basically dealing with - - - it's a - - - flip of the  
15 coin. The party can go to criminal court and get an  
16 order of protection, and it's dealt with as a  
17 criminal act. Or you go into civil court and you get  
18 an order of protection. But there's - - - there's no  
19 similarity, I don't think, between the objective of  
20 an Article 8 proceeding - - - and particularly in the  
21 Walker case because he violated Walk - - - there's no  
22 way, in the Risley case, that he could violate while  
23 he was incarcerated. The only way you can violate is  
24 to get out and proceed in basically the same manner.

25 JUDGE RIVERA: So what - - - what happens

1 to the outstanding suspended? If he - - - if he can  
2 only do six months, what happens to those other two?

3 MR. STEIN: They remain suspended. Right  
4 now, the statute doesn't allow any particular way of,  
5 I'll say, imposing those additional sentences without  
6 his coming out, somebody moving again to find that  
7 his - - - you know, he's - - - he's in contempt of  
8 court because he failed to pay his obligation, and  
9 then he goes back for whatever period of time the  
10 judge determines.

11 CHIEF JUDGE DIFIORE: Thank you, sir.

12 MR. STEIN: Thank you.

13 CHIEF JUDGE DIFIORE: Counsel. Counsel,  
14 how many willfulness findings were there?

15 MR. GARTENSTEIN: Three.

16 JUDGE PIGOTT: Three sep - - -

17 MR. GARTENSTEIN: Actually, there was one  
18 initial willfulness finding and then there were two  
19 subsequent findings that he violated the terms of the  
20 suspended judgment. There were three separate  
21 periods of violations, and Mr. Risley was committed  
22 for three separate periods of six months. Mr.  
23 Stein's argument is based upon the misstatement that  
24 this was actually one long eighteen-month sentence.  
25 It was three sentences that were served consecutively

1           because allowing them to be served concurrently would  
2           have been giving Mr. Risley a free pass with regard -  
3           - -

4                         JUDGE PIGOTT: Well, that - - - that's true  
5           because of the suspensions. But when - - - when I  
6           read the orders, it - - - it just says you're  
7           willful, you're going to jail for six months, but  
8           we're going to suspend that. And then the next  
9           petition says it's willful again and he had to go to  
10          jail. If he's already been - - - if he's already  
11          been sentenced for - - - for willfulness, all right,  
12          but we said we're going to suspend it, then the  
13          petition comes saying he - - - he's being willful, I  
14          mean, what happened to the first six? I mean why - -  
15          - why do we say well, we're going to reinstate that  
16          six based upon this finding, the second finding? And  
17          it seems to me okay, do that, but don't say we're  
18          going to find that - - - we're going to put that six  
19          in because the suspension's now lifted because he was  
20          willful and we're going to add another six for  
21          exactly the same reason.

22                        MR. GARTENSTEIN: Well, it's not exactly  
23          the same reason because it's a second period of  
24          willful violation. He failed to pay support for an  
25          initial period that led to the finding of a willful

1 violation. He was brought before the court. He  
2 consented to a suspended judgment. He then, once  
3 again, failed to pay his support from the date of the  
4 suspended judgment forward until - - -

5 JUDGE PIGOTT: But wasn't - - - wasn't the  
6 finding and the ultimate suspension because he was  
7 not paying? Because - - - because he was willfully  
8 not paying?

9 MR. GARTENSTEIN: He was willfully not  
10 paying every charging period that came up. They are  
11 separate offenses. The fact that it is the same  
12 offense doesn't change the fact that it is a repeat  
13 offense of the same conduct that led to the  
14 incarceration in the first place.

15 JUDGE PIGOTT: But isn't it - - - isn't it  
16 like double jeopardy? I mean you're - - - you're  
17 saying, you know, we made a finding of willfulness to  
18 this - - - to this amount and - - - but we've  
19 suspended it and we said, you know, you - - - you get  
20 back in our good graces and - - - and that  
21 suspension, I assume, will go away. He doesn't. So  
22 he gets - - - he gets sus - - - another judgment of  
23 six for the reason that he was found in the first  
24 place and it was suspended. And because of that, the  
25 suspension is lifted and he gets - - - he gets hit

1 with that original six. But at the same time, he  
2 gets hit with the second six and - - - and you say  
3 because now there's more money due. But it's the  
4 same willfulness and it's only a question about - - -  
5 pardon me.

6 MR. GARTENSTEIN: It's a sub - - - Judge,  
7 it's a subsequent willfulness, the same as if we were  
8 talking about a criminal matter with a robbery and  
9 somebody commits three successive robberies, okay.  
10 Him being charged with - - -

11 JUDGE PIGOTT: If it's a second - - - if  
12 it's a second willfulness, then it shouldn't have any  
13 effect on the first suspension, should it?

14 MR. GARTENSTEIN: Well, but under that  
15 theory - - -

16 JUDGE PIGOTT: I mean he - - - he's a risk  
17 - - -

18 MR. GARTENSTEIN: - - - the suspended  
19 judgment is meaningless and it should just be removed  
20 from the Family Court Act.

21 JUDGE PIGOTT: Exactly.

22 MR. GARTENSTEIN: The language of this - -  
23 - the language allowing the suspended judgment was  
24 put into the Family Court Act by the legislature in  
25 an attempt to give the judge a tool to - - -



1                   JUDGE PIGOTT: No, in an - - - in an  
2 attempt to allow the - - - allow the miscreant,  
3 usually the - - - the husband or the father, to - - -  
4 to get better. He doesn't get better and we say  
5 okay, so the suspension's lifted, you're going to  
6 jail for six months. But because you didn't get  
7 better, you're going to jail for another six months.

8                   MR. GARTENSTEIN: Well, then I would ask  
9 what the difference would be between an adjournment  
10 contemplating dismissal, which the court clearly had  
11 the authority to do without imposing a sentence, and  
12 a suspended - - - and a suspended term of commitment  
13 of six months.

14                   JUDGE PIGOTT: Because in an ACD, if you  
15 screw up, you're going to jail for six months.

16                   MR. GARTENSTEIN: Well, or an - - - you  
17 know, the judge would have the authority just to  
18 issue an ACD without any specific term of - - -

19                   JUDGE PIGOTT: But my point is if you're  
20 going to jail for six months, it's not you're going  
21 to jail for six months on - - - on that and because  
22 you violated the ACD we're going to give you another  
23 six months.

24                   MR. GARTENSTEIN: Judges have to be given  
25 the discretion and the ability in child support cases

1 to - - -

2 JUDGE PIGOTT: I understand that. I - - -  
3 I think put them in jail for six months. But don't  
4 put them in jail for six months and say and by the  
5 way, because you violated and we - - - and we lifted  
6 a suspension, we're also giving you another six  
7 months.

8 MR. GARTENSTEIN: And I believe that the  
9 unintended consequences of a decision that supports  
10 Mr. Stein's argument would be that we will no longer  
11 have suspended judgments.

12 JUDGE PIGOTT: Well, don't, but - - - if  
13 you don't want to. But you can also say we told - -  
14 - we gave you a break, you violated it, six months.  
15 Not - - - not six plus six.

16 JUDGE ABDUS-SALAAM: Were there three  
17 separate petitions here?

18 MR. GARTENSTEIN: Yes.

19 JUDGE ABDUS-SALAAM: Yeah, so it's - - -  
20 it's a six month - - - willfulness was decided three  
21 different times on different petitions is what you're  
22 saying.

23 MR. GARTENSTEIN: Willfulness was actually  
24 consented to, I believe, the first two times and then  
25 found the third time. And in reference to Your

1 Honor's question, Mr. Risley was given a full and  
2 fair opportunity to present evidence regarding his  
3 ability to pay, and not only was there evidence of  
4 him participating in bowling leagues and doing other  
5 things that demonstrated that he had the resources to  
6 pay, there was also evidence that he actually was  
7 working and that even during the period he was  
8 working, he was not paying.

9 JUDGE PIGOTT: How many - - - how many  
10 times can you do this?

11 MR. GARTENSTEIN: As many times as a judge  
12 believes it will be persuasive to a litigant in front  
13 of them, and the judge has to have the discretion to  
14 look at the litigant and decide when they lose  
15 patience. I don't believe there's - - -

16 JUDGE PIGOTT: I don't mean to be facetious  
17 about it, but that - - - you're - - - what you're  
18 saying is that you can give them ten suspended  
19 sentences and when you - - - when you finally get  
20 mad, you can put them in jail for five years.

21 MR. GARTENSTEIN: Well, certainly, I  
22 believe three is appropriate. If we were talking  
23 about then, we may have a different issue here. The  
24 gentleman consented to the - - - the second suspended  
25 judgment.

1 JUDGE PIGOTT: No, I understand.

2 MR. GARTENSTEIN: When he consented to the  
3 second suspended judgment, he was represented by  
4 counsel. He was specifically told on the record that  
5 - - -

6 JUDGE PIGOTT: I understand all that. I'm  
7 just - - - I'm just looking at the arithmetic. It -  
8 - - it just seems to me that you can - - - you can  
9 say, you know what, I'm going to keep suspending  
10 because I - - - you know, I think you're useless, and  
11 - - - and in about ten years I'm going to put you in  
12 jail for five, and then we know that - - - that  
13 you've got - - - it seems to me the reason you've got  
14 it is to help - - - is - - - is to try to give the  
15 guy, usually the guy, a break. All right, and - - -  
16 and I get that. I mean that - - - that kind of makes  
17 sense, but at some point, you can't just keep  
18 stacking them up, can you?

19 JUDGE RIVERA: Well, there's another goal,  
20 right. You're trying to get support. The point is -  
21 - - is to get support at the end of the day, and so a  
22 judge may very well decide that delaying ten times  
23 may not be in the interest of that particular  
24 legislative goal and policy. But let me ask you  
25 perhaps a different question, and maybe it's obvious,

1 but not to me, what - - - how long do these suspended  
2 judgments - - - how long could they be validly  
3 suspended?

4 MR. GARTENSTEIN: There's no specific  
5 restriction in the statute.

6 JUDGE RIVERA: I see.

7 MR. GARTENSTEIN: And again, the judge is  
8 given the discretion and the ability to mold a  
9 sentence to address the issues that Your Honor is  
10 specifically speaking about. A litigant comes in  
11 front of a judge. The judge has to evaluate the  
12 circumstances, listen to the litigant, and decide how  
13 much rope to give this person. This particular  
14 gentleman, at the time of the second - - -

15 JUDGE RIVERA: So let me ask so pursuant to  
16 Judge Pigott's hypothetical then, so let's say it's  
17 been ten years but there was one suspended sentence  
18 in the first year. So ten years later, suspended  
19 sentence could be now applied to him and he's going  
20 to go to jail even if he's been paying for nine years  
21 and lapsed one month?

22 MR. GARTENSTEIN: That's not the facts  
23 before Your Honor and - - -

24 JUDGE RIVERA: No, I understand that. I'm  
25 just trying to - - -

1 MR. GARTENSTEIN: - - - it's kind of  
2 difficult - - -

3 JUDGE RIVERA: - - - figure out how the  
4 suspended sentences work.

5 MR. GARTENSTEIN: Well, it would all depend  
6 if, ten years later, the children are still minors,  
7 the children are still receiving support.

8 JUDGE RIVERA: Let's assume so, of course.  
9 Yes.

10 MR. GARTENSTEIN: There is still a need to  
11 secure that support on behalf of the custodial  
12 parent, and every case in family court, particularly,  
13 with regard to child support is different. If the  
14 gentleman comes back in front of the court ten years  
15 later and his children are now emancipated, then  
16 there's no support order anymore and there's no need  
17 to - - - for the court to balance the need to ensure  
18 support payments with the need for punishment. It's  
19 one which it would be different - - -

20 JUDGE FAHEY: But - - - but you see the  
21 problem is that the amount of discretion that you're  
22 arguing for, in essence, could create a debtors'  
23 prison. That's really the - - - that's - - - that's  
24 the logical consequence of what you're saying.

25 MR. GARTENSTEIN: Well, and one could argue

1 that about the entire statutory scheme with willful  
2 violation.

3 JUDGE FAHEY: I - - - I would like to but -  
4 - -

5 MR. GARTENSTEIN: Yeah.

6 JUDGE FAHEY: - - - it's kind of beyond the  
7 scope of this case. But I think you're right about  
8 that. You could say well, why don't we put people in  
9 jail for student loans.

10 MR. GARTENSTEIN: Okay.

11 JUDGE FAHEY: Why aren't we putting people  
12 - - - people in jail for every form of tax violation  
13 the first time out. Exac - - - exactly. And those  
14 would also be subject to that argument, but this is  
15 legitimately subject to that argument because the  
16 reality is these debts are not going to get paid.  
17 The State is going to support these kids. That's the  
18 real reality, and that they're not going to get blood  
19 from a stone, and we're going to just - - - and  
20 create a recidivist criminal where we didn't have one  
21 before, and we're making the situation worse. Those  
22 are policy concerns that are kind of beyond our  
23 scope, but the creation of a debtors' prison six  
24 months at a time really isn't. That's within our  
25 scope.

1                   MR. GARTENSTEIN:  And I would ask that you  
2                   return to the question that started this discussion  
3                   with Mr. Stein, which is that there is no difference  
4                   between the statutory language under the Family  
5                   Offense Statute and the statutory language under the  
6                   Support Statute.

7                   JUDGE PIGOTT:  But if - - -

8                   MR. GARTENSTEIN:  And - - -

9                   JUDGE PIGOTT:  I'm sorry, finish.  I - - -  
10                  I apologize.

11                  MR. GARTENSTEIN:  And when Mr. Stein  
12                  indicates that the Appellate Division did not set  
13                  forth its reasoning, it set forth its reasoning  
14                  abundantly clear.  It said Walker is controlling.  It  
15                  said this is the same statutory language, and we  
16                  cannot deviate from a previous Court of Appeals  
17                  decision that said consecutive sentences under these  
18                  circumstances are permissible.  They also drew an  
19                  analogy to rules with regard to imposition of  
20                  consecutive versus concurrent sentences in criminal  
21                  proceedings and specifically addressed the fact that  
22                  when you're talking about a number of incidents that  
23                  rise out of the same transaction, there is basically  
24                  a presumption that sentences can run concurrently.  
25                  Here, we are not talking about a single - - - a



1 single transact - - - transaction. We are talking  
2 about an extended period of time of multiple  
3 violations. In point of fact, there is a violation  
4 every pay period, every two weeks - - -

5 JUDGE PIGOTT: Of course there is, and  
6 that's - - - that's kind of the point that I'm  
7 struggling with here. You're - - - you're un-lifting  
8 the suspension, you're imposing the six months,  
9 because he did it willfully over here. And at the  
10 same time, while he's standing here, he said this six  
11 and now we're giving you another six for the same  
12 charge that's - - - that we're unsuspending. And it  
13 seems to me if it's ameliorative you would have said  
14 you didn't get it, so you're going to jail for six  
15 months. When you get out, we'll see what happens.

16 MR. GARTENSTEIN: And if the issue before  
17 Your Honor was whether or not the granting of the  
18 suspended judgment was appropriate, I believe the  
19 issues that you're raising would be a lot more  
20 relevant.

21 JUDGE PIGOTT: No, I think that's fine. I  
22 don't - - - I don't mind suspending them. I'm - - -  
23 I'm just saying stacking them up seems rather rotten  
24 rather.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.

1 MR. GARTENSTEIN: Thank you.

2 CHIEF JUDGE DIFIORE: Counsel.

3 MR. STEIN: I would just like to make a  
4 couple of points about Walk - - - Walker, if I may.

5 CHIEF JUDGE DIFIORE: Certainly.

6 MR. STEIN: The - - - when this court  
7 decided Walker, it drew an analogy between - - -  
8 excuse me, the consecutive sentences that are  
9 permissible in a criminal case, excuse me, and what  
10 was going on in the Walker case. And this court said  
11 that the consecutive sentences in Walker were  
12 harmonious with the legislative intent. And I - - -  
13 I think that is clearly the point. The legislative  
14 intent in Article 4 is to get people back out of jail  
15 working and supporting their children. The  
16 legislative intent with Article 8 is to protect  
17 victims and if it requires sentencing people to long  
18 periods of time, then so be it. That is harmonious -  
19 - -

20 JUDGE GARCIA: But I think you can say - -  
21 -

22 MR. STEIN: - - - with the intent.

23 JUDGE GARCIA: - - - the legislative intent  
24 here is to - - -

25 MR. STEIN: I'm - - - I'm sorry?

1                   JUDGE GARCIA: Legislative intent here is  
2                   to enforce support orders, and one of the ways to do  
3                   that is this result, right, to put people in jail.  
4                   So where you're not having a person here say - - -  
5                   you don't have a person here saying I can't pay, so  
6                   we're getting to Charles Dickens and debtors' prison.  
7                   You have a person here saying I'm not paying. So the  
8                   first six months go by, he's not paying, he doesn't  
9                   say I can't, he gets a suspended sentence. Another  
10                  six months go by, he's not paying again, he gets  
11                  another suspended sentence, another more than six  
12                  months go by, he's not paying again. So isn't it at  
13                  that point part of the legislative intent to say to  
14                  somebody who hasn't been paying over two years this  
15                  is the penalty here, and isn't that going towards the  
16                  legislative intent of getting you to pay when you get  
17                  out?

18                  MR. STEIN: I think Walker - - - I'm sorry,  
19                  the Risley case falls in between the cracks. I think  
20                  there's no question but that if the legislature  
21                  wanted to punish people with consecutive sentences,  
22                  it would have made the statutory language perm - - -  
23                  it would have permitted that - - -

24                  JUDGE GARCIA: That's the same as - - -  
25                  that's the same argument as Walker. So you're trying

1 to distinguish Walker from this case and this  
2 language on a policy basis. You're saying, you know,  
3 on the other case it's more aligned to a criminal  
4 statute and there's the - - - the violence aspect of  
5 it. But in this case, I think you can make a similar  
6 argument on the same language that the goal of the  
7 legislature here, in an incredibly difficult problem,  
8 was to get people who are, not because they can't pay  
9 because they won't pay, to pay.

10 MR. STEIN: Yeah. I think that if the  
11 legislature wanted the punishment for people who will  
12 not pay to be consecutive sentences, it could have  
13 said so in the statute, and it could have given the  
14 judge sentencing discretion, and there is no  
15 sentencing discretion.

16 JUDGE GARCIA: That's the same as Walker.

17 MR. STEIN: It's the same as Walker but  
18 this court distinguished Walker by saying - - - by  
19 making reference to the criminal provisions for  
20 consecutive sentencing and by - - - again, Walker  
21 violated, twice at least, while he was in jail. So  
22 the extended periods of time in Walker could arguably  
23 have been made in relation to each of the violations,  
24 the ones that he made while in jail. And you can't  
25 do that in a - - - in a support case. You cannot

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violate once you're in jail.

CHIEF JUDGE DIFIORE: Thank you, sir.

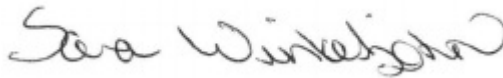
MR. STEIN: Thank you.

(Court is adjourned)

C E R T I F I C A T I O N

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I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Columbia County Support Collection v. Risley, No. 82 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: May 3, 2016