Case No. 69997

In the Supreme Court of Nevada

MICHAEL FOLEY,

Appellant,

vs.

PATRICIA FOLEY,

Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable REBECCA L. BURTON, District Judge
District Court Case No. R-11-162425-R

APPELLANT'S REPLACEMENT OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. Appellant Michael A. Foley is an individual.

2. Daniel F. Polsenberg and Abraham G. Smith of Lewis Roca Rothgerber Christie LLP have appeared *pro bono* in this Court.

3. No publicly traded company has any interest in this appeal.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 21st day of June, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
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INTRODUCTION

When Walter Scott fled on foot after being pulled over for a broken taillight, he knew there was a warrant for his arrest.[1] It was dangerous, but so was the alternative—another jail term, another job loss, all inflating the reason he was in that position in the first place, his unpaid child support.[2] So he ran. And in the attempt, he was shot to death.

For a brief period after Mr. Scott's death, light was thrown on the broken system of jailing unemployed child-support debtors, whose unemployment is often linked to the repeated incarceration. Ironically, "those who have the ability to pay usually respond to other coercive means—seizing assets, revoking a driver's license—and it is only the poor who will end up in jail because at a hearing, the court simply doesn't believe they can't pay." Irin Carmon, *How Falling Behind on Child Support Can End in Jail*, MSNBC.COM, Apr. 9, 2015 (quoting Elizabeth Patterson), *available at* http://www.msnbc.com/msnbc/how-falling-behind-child-support-can-end-jail#56748. Mr. Scott had report-

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[1] *See* Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES, Apr. 19, 2015, *available at* https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html?_r=0%20.

[2] *Id.*

edly pleaded to a judged that he did not have enough money; when he asked, "How am I supposed to live?" the judge said, "That's your problem. You figure it out." Robles & Dewan, *supra*.

In 2016, the Justice Department wrote state and local courts, encouraging them to address the harmful, frequently unconstitutional practice of using incarceration as a means of debt collection. *See generally* Vanita Gupta, Dear Colleague Letter of Mar. 14, 2016, *available at* https://www.justice.gov/crt/file/832461/download. The letter included cautions and recommendations, including (1) not to jail before ensuring the defendant's ability to pay; (2) to consider alternatives for indigent defendants; (3) not to condition access to justice on the payment of fees; (4) to provide notice and, in appropriate cases, counsel; (5) not to use arrest warrants and license suspensions to coerce payment; (6) not to keep defendants in jail solely because they cannot pay for their release; and (7) to safeguard against unconstitutional practices by employees and adjuncts to the court system. *Id.* at 2.

The child-support system in Nevada falls short by every measure. Appellant Michael Foley's case illustrates most of them. His son has seen these deprivations and vowed never to have children. (Appellant's

Informal Brief, at 8.) An agent assigned the task of arresting Michael and others has similarly forsworn fatherhood. (*Id.*) Michael's case is but one of thousands, the injustices in which this Court may never see.

JURISDICTION

Michael Foley appeals from a final judgment and orders awarding custody to respondent Patricia Foley, modifying his obligations of child support, and holding Michael in contempt. NRAP 3A(b)(1), (2), (7).

A. The Judgments and Orders are Appealable

These determinations are appealable. A decree modifying child support is an appealable order. *See Jackson v. Jackson*, 111 Nev. 1551, 907 P.2d 990 (1995) (considering father's appeal from post-divorce decree modifying child support); *see also Rivero v. Rivero*, 125 Nev. 410, 431, 216 P.3d 213, 228 (2009) (considering mother's appeal from the denial of her motion to modify child support); *Ramacciotti v. Ramacciotti*, 106 Nev. 529, 795 P.2d 988 (1990) (same). In addition, "[w]hile a contempt order is not independently appealable . . . it may be challenged in the context of an otherwise substantively proper appeal." *Mack-Manley v. Manley*, 122 Nev. 849, 859 n.15, 138 P.3d 525, 532 n.15 (2006) (internal citations omitted); *cf. Lewis v. Lewis*, 132 Nev., Adv. Op. 46, 373

P.3d 878 (2016) (considering propriety of contempt orders in context of appeal from order modifying custody and enforcing prior child-support order).

B. The Appeal is Timely

The appeal, moreover, is timely because it was filed within 30 days of the first valid order entered in this action, the district court's February 22, 2016 order affirming the child-support master's recommendations from the previous November. *See* NRAP 4(a)(1).

Michael argued that the prior orders entered by the master without a district judge's signature were void. *See* NRCP 60(b)(4).[3] (1 App. 228:4–8; *see also* 1 App. 212:9–215:4.) In overruling Michael's objection in the February 22 order, the district court implicitly denied Michael's oral motion. The denial of that motion, too, is appealable and was timely appealed. *See Memory Gardens of Las Vegas, Inc. v. Bunker Bros. Mortuary, Inc.*, 91 Nev. 344, 345, 535 P.2d 1293, 1293 (1975); *Taylor v. Johnson*, 257 F.3d 470, 474 (5th Cir. 2001).

[3] Those master's recommendations bore no indicia of district-court approval.

C. As Necessary, the Appeal Can be Treated as a Writ Petition

If this Court finds that any aspect of this case is not appealable, Michael asks that this Court treat this appeal as a petition for a writ of mandamus or prohibition, as appropriate. *See Jarstad v. Nat'l Farmers Union Prop. & Cas. Co.*, 92 Nev. 380, 384, 552 P.2d 49, 51 (1976) (treating appeal as a petition for writ of mandamus).

ROUTING STATEMENT

Although family-law cases are presumptively assigned to the Court of Appeals (NRAP 17(b)(5)), the Supreme Court should retain this case as it raises several issues of first impression regarding the procedural safeguards required in child-support cases, questions that involve the U.S. and Nevada Constitutions and are matters of statewide public importance (NRAP 17(a)(10), (11)). These questions are raised at 1 App. 225–28, 1 App. 230, and 1 App. 233–35, and are resolved at 1 App. 228 and 1 ROA 206–11.

Appellant also seeks to overrule *Ex parte Phillips*, 43 Nev. 368, 187 P. 311 (1920) and its progeny as inconsistent with Article 1, Section 14 of the Nevada Constitution, which only the Supreme Court can do.

PRINCIPAL ISSUES PRESENTED

1. May a child-support master's recommendations be automatically entered as judicial decrees without notice to or approval by the district court?

2. The constitutional ban on imprisoning debtors excepts just cases of fraud, libel, and slander. Is it constitutional to imprison individuals unable to pay their child-support debts?

3. May a child-support debtor be imprisoned as punishment for willful underemployment when the debtor has no means to secure an immediate release?

4. Is an indigent respondent in a child-support matter entitled to appointed counsel when collection proceedings are driven by state attorneys?

STATEMENT OF THE CASE

This is an appeal from orders and judgments entered on the recommendations of the child-support masters. The assigned judge was the Honorable Rebecca L. Burton, District Judge of the Eighth Judicial District Court, Clark County.

This case arises from the Family Support Division's efforts to hold

appellant Michael Foley in contempt for nonpayment of child support owed to his ex-wife, respondent Patricia Foley. Over two years, Michael was incarcerated four times for contempt based on recommendations from the child-support masters that were not reviewed by the district court. In each case, Michael lacked the ability to purge the contempt with his own funds. The child-support masters increased his monthly support obligation despite overwhelming evidence that his earning capacity had actually diminished. The mounting arrearages and jail time drive Michael further into debt and cost Michael the job opportunities and driver's license he needed to earn a living.

After several unsuccessful attempts, Michael filed an objection to a contempt recommendation imposing a 10-day jail sentence with a release amount of $2,000, well beyond his ability to pay. Michael served the sentence before the district court ruled. The district court ultimately entered an order upholding the recommended sanction.

Michael appeals.

STATEMENT OF FACTS

A. Judge Teuton Awards Patricia Custody and Orders Michael to Pay Child Support

In 2008 and 2009, District Judge Robert Teuton presided over Pa-

tricia and Michael Foley's divorce. (*See* 2 App. 355.) John T. Kelleher represented Patricia. (*See* 2 App. 355.) Michael was unrepresented. (*See* 2 App. 355.)

A fraud on the district court leads to Michael's loss of custody

Michael's efforts retain custody of his children had been stymied by a fraud committed on the district court. Although the state had requested a psychological evaluation, the district court's minutes reflect that "no evaluation is needed." (1 App. 18.) Undeterred, the district attorney attempted to refer Mr. Foley for such an evaluation anyway, but the county fiscal department required "a copy of the court order or minutes"; "otherwise the doctor will not be paid." (1 App. 27.) Since the court minutes contradicted the district attorney's representation, the district attorney *ex parte* procured an "Order for Natural Father to Undergo a Psychological Evaluation," dated December 9, 2008 (1 App. 27), which bears no signatures, just the stamps of the clerk, a hearing master who *did not* preside over the hearing, and District Judge Cynthia Diane Steel. (*See also* 1 App. 154:3–23.) It appears that the judicial officers whose stamps appear on the "order" never actually authorized the order, but that one of the district attorneys had access to the file-stamp

machine. (1 App. 154:3–23.)

Although the fugitive order was never filed, it served its purpose: it distressed Michael, caused him understandable paranoia, and ultimately got the state's handpicked psychologist to conduct an unfavorable assessment of Michael, leading to the deprivation of custody. (1 App. 154:3–23; 1 App. 5:5–9.)

Michael is ordered to pay $700 a month in child support

Over Michael's objection, Judge Teuton awarded custody of the couple's three minor children to Patricia, granting Michael visitation every other Tuesday, Thursday, and weekend. (Decree, at 3:12–13, 3:23–26, at 1 ROA 6 (attached to Notice and Finding of Financial Responsibility, filed May 9, 2011); *see also* Ex. 1 to Decree, "Holiday Schedule," at 1 ROA 11.) Judge Teuton also ordered Michael to pay $700 a month as child support. (Decree, at 4:4–5, attached as Ex. A to June 30, 2015 Objection, at 1 ROA 136.)

The abuse allegations prove to be unfounded

Michael lost custody of his children in substantial part because of allegations by the Department of Family Services that he had abused his daughter. (1 App. 224:11–15.) Although DFS closed their own in-

vestigation after finding it unsubstantiated, neither Michael nor the district court was alerted to that finding until August 2012, three years after the court's misguided custody determination. (3 App. 435.) DFS maintains that they have no obligation to tell a target of their investigation when they find their allegations unsubstantiated. (1 App. 31.)

Michael pays while Patricia repeatedly violates the custody order

Although Michael paid his child support through wage withholding for more than two years, for much of this time Patricia has violated the terms of the custody arrangement, including hiding the children from Michael and leaving the children unsupervised on weeknights. (1 App. 82.) Patricia struggles with gambling addiction, and Michael fears that her addiction leaves her unable to adequately care for the children. (1 App. 225:6–9; 1 App. 235:22–23.) Michael has been unable to prevail in getting the district court or the sheriff even to enforce Patricia's existing obligations to allow visitation, however.

B. The Child-Support Master Enters Orders Holding Michael in Contempt

The district attorney brings action after Michael loses his job

In October 2011 he lost his job and was unable to continue making

payments. The district attorney brought this enforcement action and procured an order to show cause from the district court. (Order to Show Cause, filed Mar. 1, 2012, at 1 ROA 12–13.)

Child-support master Sylvia Teuton holds Michael in contempt

The matter was referred to child-support master Sylvia Teuton, wife of Judge Robert Teuton. At a hearing on April 12, 2012, Michael testified that he had lost his job and was had in the meantime secured temporary employment. (1 App. 3:20–4:4.) The unrebutted evidence showed that Michael was unable to pay, and the child-support master made no contrary finding. Nonetheless, the child-support master sentenced Michael to 25 days in jail to be imposed at the next hearing, should Michael come up short: "that will be hanging over your head in the event that you don't follow through with what I ask you to do between now and the next time I see you." (1 App. 9:4–7.)

The recommendations are entered as orders without a district judge's signature

Throughout this litigation, the child-support masters in their hearings do not talk about making "recommendations"; they purport to make orders. The so-called recommendations they file make clear why.

The "recommendation" arising from this hearing, like all the ones

that followed, was an unusual document. It recommended a calculation of arrearages, a total monthly payment, a finding of contempt, and a 25-day sentence. (Recommendation, filed May 12, 2012, 1 ROA 27–28.) The recommendation contained no "purge clause"—an amount that Michael could pay to secure his release from custody if he were arrested. (Recommendation, filed May 12, 2012, 1 ROA 28:17–23.) It contains a notice that "the Master's Recommendation is not an Order/Judgment unless signed and filed by a Judge." (Recommendation, filed May 12, 2012, 1 ROA 29:20–21; *see also, e.g.*, Rec. 9/19/12, at 1 ROA 38:6–7.) The signature line for "District Court Judge, Family Division" is blank, but the clerk entered the recommendation as a judgment anyway based on contradictory language in the recommendation that "the Master's Recommendation is hereby deemed approved by the District Court pursuant to NRS 425.3844." (*E.g.*, Rec. 9/19/12, at 1 ROA 38:27–28.)

The child-support master denies Michael's attempt to modify child support and orders his incarceration

In the district-court proceedings, Michael had been told that "there won't be any[ ]more orders from the case" and closed the case, precluding the possibility of modifying Michael's support obligation. (1 App. 4:5–10.)

Alerted to the possibility of modification 1 App. 5:3–4), Michael did so on grounds that he lost his previous job. (1 App. 65:14.) The district attorney acting "at the request of [Patricia]" asked the motion be denied. (1 App. 65:19–23.) Given the risk that, if Michael's motion were denied, Master Teuton would follow through on her promise incarcerate him, Michael did not dare attend the hearing.

Sure enough, at the August 28, 2012 hearing, the child-support master (Sylvia Teuton) denied the motion and ruled: "I'm going to issue a bench warrant for his arrest today . . . ." (1 App. 69:5–6.) The master conditioned his release on payment of $500. (1 App. 69:15.)

C. Michael is Repeatedly Jailed for his Inability to Pay

1. The October 2013 Incarceration

Michael is arrested after being attacked

Michael was arrested on October 27, 2013, his visitation day, after attempting to see his children. (1 App. 82.) Patricia's boyfriend had attacked Michael—grabbing his shirt, slamming his head into the curb, and attempting to strangle him—which had prompted Michael to call the police. (1 App. 821 App. 92.) When the police arrived, however, they arrested Michael, even though the arresting officer conceded that

the bench warrant for his arrest was not signed by any district judge. (1 App. 92. 93.)

The child-support master disregards Michael's inability to pay

At the "in custody hearing" on October 30, Michael said he had about $80 to his name, but could get another $120 if he could make a call. (1 App. 75:2, 76:1–2.) When the district attorney accused him of not making payments since his employment at a temp agency ended four to six weeks earlier, Michael explained that he had been making direct cash payments to Patricia. (1 App. 76:7–22.) The child-support master (James Davis) told Michael that "I don't care if you give $1000 to mom directly. . . . You don't get credit. And go to jail." (1 App. 77:1–4.) Without making any finding of Michael's ability to pay, Master Davis sentenced Michael to 25 days in jail for contempt, and imposed "five additional days" to be served through November 4, 2013. (1 App. 77:25–78:4.) The master set the release amount at $300 but rejected Michael's request to have his phone "to be able to contact somebody to produce that." (1 App. 78:4–9.)

Michael seeks emergency writ relief

Michael filed an emergency writ petition requesting this Court to

release him from custody. (1 App. 80.) Michael argued, among other things, that the unsigned master's recommendation and warrant were invalid. (1 App. 81.) This Court denied the petition under NRS 425.3844(3)(a) and (9). (1 App. 166.)

The child-support master grants the state's request to increase child support and issues another bench warrant

At a hearing on February 19, 2014, in Michael's absence Patricia and the deputy district attorney (Viveca Monet Woods) persuaded the child-support master to increase his monthly obligations from $700 to $804. (1 App. 107:14–108:12.) The child-support master issued a bench warrant with a release amount of $804. (Rec., filed 3/12/14, at 1 ROA 54:10–11.)

2. The August 2014 Incarceration

The child-support master blames Michael for fearing to appear—then imposes additional jail time when he does appear

On August 6, 2014 he was arrested again. (1 App. 178:10–11.) Although a hearing was set for August 8, 2015, Clark County Detention Center did not produce him for the hearing, so he was not heard until August 11, five days after his arrest. (1 App. 171.) At this hearing, the child-support master berated Michael for not showing up to contempt

hearings, explaining that "if you were struggling, we would have accepted that." (1 App. 179:9–10.) But when Michael gave unrebutted testimony that he *was* struggling—he had just $67 between cash in his pocket and his checking account—the master ignored it. (1 App. 177:25–178:5.) The master sentenced him to five additional days—a total of 10—"unless you can come up with $200." (1 App. 177:25–178:5; 182:7–9.)

Master Teuton prejudged the contempt proceedings

Master Teuton prejudged the evidence even when she acknowledged she had no authority to do so. For example, at a hearing on December 9, 2014, Master Teuton acknowledged that she had to continue Michael's request for a modification because he had to be in federal district court at the same time, which "supersedes this court." (1 App. 193:20–24; *see also* 1 App. 189.) But she commented that were it not for his hearing, she "absolutely" would have granted the district attorney's (Alec Jason Raphael's) request to hold Michael in contempt and issue a bench warrant, without hearing Michael's side. (1 App. 194:22–195:2.) In Michael's absence, the court reset the hearing for January 28, 2015. (1 App. 195:14–18.)

The child-support master issues another contempt order and bench warrant

On January 28, 2015, at a hearing for which Michael did not receive notice (1 App. 204:11–12), the child-support master modified Michael's child-support obligation to $729/month. (1 App. 200:1–2.) The master ignored Michael's written objection that he has difficulty finding employment due to malicious actions that led his name to be falsely placed on the Nevada child-abuse registry. (1 App. 185.) And the master ignored that because his driver's license had been suspended, Michael faces increased transportation expenses and cannot have a professional license. (1 App. 185.) The master sentenced him to 25 days in jail, with the release amount set at $1,000, to go into effect when Michael next came for a hearing. (1 App. 200:24–201:3.) The master also issued a no-bail bench warrant. (1 App. 200:24–201:3.)

Michael is precluded from filing an objection

Michael testified that he attempted to file an objection to the master's recommendation, but the clerk refused on the basis that Michael needed to pay a $240 filing fee. (1 App. 204:11:17.)

3. The April 2015 Incarceration

On April 9, 2015, Michael was arrested for child-support arrear-

ages. (1 App. 205:23–24.)

Master Teuton imposes the maximum sentence in retaliation for Michael's constitutional arguments

At the "in custody hearing" on April 15,[4] Michael argued that the U.S. Supreme Court's decision in *Tuner v. Rogers* required appointed counsel "because the opposing party is represented by counsel, the State is represented by counsel." (1 App. 206:14–15.) The child-support master (Sylvia Teuton) replied that "the law has already established that child support . . . is a civil proceeding. It is not criminal. Under our laws, you do not have a constitutional right for me to appoint a free lawyer to you." (1 App. 209:2–5.) And while the master and the deputy district attorney argued that the state only represents the state's interests, the master held that "if you've given money directly to . . . Patricia, that is going against the Court order; and you won't get credit for it. You have to pay through the court." (1 App. 210:22–24.) The child support master then sentenced Michael to 19 additional days, for the max-

[4] By arresting Michael on April 9, a Thursday, the county was able to detain him without hearing over the weekend and delay his court appearance for nearly a week. In addition, even though a bench warrant ought only to secure a civil-contemnor's appearance in court, Michael was confined in prison awaiting the hearing to purge his contempt. *See* NRS 22.140.

imum total of 25, conditioning an early release on the payment of $900. (1 App. 211:7–14.)

Michael, in jail, is barred from making his objection on the record

Michael attempted to lodge his objection under EDCR 1.40(e) on the record, but the child-support master barred him from doing so, saying "I'm not your personal lawyer," so "You need to figure out a way to [do] that." (1 App. 211:25, 212:7–8.) The child-support master asserted that a family-court judge had signed the previous order, although no signature appears on the entered order and the master refused to identify which judge had allegedly signed it. (1 App. 214:3–215:6.)

The child-support master issues another bench warrant

At a hearing on June 17, 2015, the child-support master (Lynn Conant) heard the deputy district attorney's (Patricia A. Ross's) characterization that Michael had been "belligerent, argumentative, . . . very, very difficult and rude to this Court" at the previous hearing and on that basis asked for a finding of contempt and a bench warrant with a release amount of $2,000. (1 App. 218:9–13.) The master obliged. (1 App. 218:14–18.) The hearing lasted less than two minutes. (1 App. 218:3, 218:20.)

***Michael fights to file an objection* in forma pauperis**

Michael attempted to object. On June 30, 2015, he applied to proceed *in forma pauperis*, attaching his objection. (1 ROA 122.) The objection argued that reference to a special child-support master was inappropriate in general, and it was particularly improper for Master Sylvia Teuton to entertain child-support issues in a case where her husband had initially ordered the support. (1 ROA 137–139.)

Michael's application is granted, but too late to prevent entry of the child-support master's recommendation

But although District Judge Burton recognized Michael's indigency on July 13, 2015 (*see* 1 ROA 151), by that time the clerk had already entered judgment on the child-support master's unsigned recommendation. (*See* 1 ROA 147.) Because of the masters' prevailing practice of entering orders without oversight or approval from the district judge, the district judge never saw that recommendation or Michael's timely objection.

4. November 2015 Incarceration

Michael is attacked with a stun gun for trying to see his children

On November 3, 2015, a Tuesday when Michael was entitled to visitation, Michael's sister attacked Michael with a stun gun to prevent

him from seeing his children. (1 App. 227:23–228:3.)

Michael is arrested

A week later, on November 12, 2015, Michael was again arrested, this time while trying to meet his 11-year-old daughter for lunch. (1 App. 221:5–6.)

The child-support master imposes further jail time, disregarding Michael's inability to pay to purge the contempt

On November 16, 2015, Michael participated in an "in custody hearing" via videoconference from jail. (1 App. 219.) Despite that Michael testified that he has only $119, and the deputy district attorney (Edward Ewert) did not offer any contradictory evidence, the child-support master (Merle K. Lok) recommended that that November 21, 2013 contempt order be imposed for 10 days, through November 22, 2015. (1 ROA 209:5; 1 App. 226:1, 228:12–5.) The master recommended that his release before then be conditioned on payment of $2,000 and that Michael pay $833 by December 2015 to avoid further contempt. (1 App. 228:16–21.) The master ignored Michael's argument that he was under a federal-court deadline—in his action to expunge his name from the child-abuser registry—to complete training for case management and electronic filing and to commence discovery by November 20, 2015.

(1 App. 224:11–19, 227:9–12.) The master also rejected Michael's suggestion that in lieu of further incarceration the Court take $100 of his $119 so he would have enough money to travel home. (1 App. 225:1–3.) And the master again ignored Michael's argument under *Hicks v. Feiock* and *Turner v. Rogers* that contempt was inappropriate for someone who did not have "the keys to his prison in his own pocket." (1 App. 227:3–8.) The master made no finding regarding Michael's ability to pay or underemployment.

Michael testified that he is self-employed earning about $275 a week because most employers will not accommodate his visitation schedule—Tuesdays and Thursday between noon and 7 p.m. (1 App. 224:4–11.) But even that amount is insufficient to pay his rent and other bills, making survival a constant struggle. (1 App. 223:16–22.)

Michael objects

Michael timely objected—twice—to the child-support master's recommendation. In his first objection, he pointed out that the district court had already found him indigent, unable to pay for court costs and expenses. (1 App. 230.) And he noted that the child-support master had never made a find that he had the ability to pay the ordered level of

support before depriving him of his liberty. (1 App. 230.) Although he submitted this objection on November 16, the day of the hearing, it was not filed by the clerk until November 24. (1 App. 230.) In the meantime, fearing that his objection would go unheard, Michael filed a second objection, noting that he was not given a copy of the master's recommendation at the conclusion of the hearing as EDCR 1.40(d) requires. (1 App. 233.) Michael also renewed his arguments that the Sixth and Fourteenth Amendments require appointed counsel under these circumstances. (1 App. 233.)

The district court schedules a hearing

In neither objection did Michael request a hearing on the objection, but the district court scheduled one anyway. (*See* 1 App. 234.)[5] Showing up would have risked additional jail time.

The district court affirms, despite conceding there is no evidence that Michael has the ability to purge his contempt

At the hearing, which Michael notified the court he would not at-

[5] Despite the timely objection to the district court, Master Teuton set the matter for hearing and tried to discuss whether Michael had complied with her recommendation. (1 App. 238:14–15.) Only after the district attorney acknowledged the impropriety of that course—"I don't want to get into the merits since he did file an objection"—did Master Teuton relent. (1 App. 238:16–19.)

tend, the district court conceded that the child-support master "did not make an express finding that he has the ability to pay." (1 App. 244:1–2.) The court excused that omission, however, because "[w]e also take into consideration willful unemployment or underemployment." (1 App. 244:3–4.) The court affirmed the master's recommendation. (1 ROA 205–06.) This was the first order signed and entered by the district court as opposed to just a child-support master.

Michael appealed. (1 ROA 220.)

D. The Child-Support Master Issues Additional Orders while this Appeal is Pending

Despite acknowledging the pending appeal, Master Teuton continued to enter recommendations, which the district order filed as orders in this case. (2 App. 309:4–5.) On May 17, 2016, the child-support master purported to enter "a judgment" that Michael owes nearly $60,000 in back support and increasing his support obligation to $833/month. (2 App. 310:11–12, 311:25, 312:8.) Though without jurisdiction, the child-support master issued a bench warrant on July 13, 2016, requiring $2,000 for Michael's release. (2 App. 317:8–12.)

Michael objected due to the pending appeal. (2 App. 318.) The hearing on that objection was taken off calendar, however. (2 App.

354.)

E. Michael Remains Impaired

Although Michael still objects to the custody arrangement which deprives him of his parental rights while imposing enormous expenses, the biggest problem right now is that Michael simply cannot pay. Michael faces several obstacles to steady employment, including Patricia's and the state's successful efforts to place him on the state child-abuse registry. That stigma prevents his return to the technology sector, like his previous job at Cox. He cannot get a driver's license, a real-estate license, or any other professional business license until he pays at least $2,000. But it is those very privileges, now suspended, that would enable him to earn the money to purge his contempt. As it stands, he has no legitimate means to earn the money to avoid further incarceration.

SUMMARY OF THE ARGUMENT

The proceedings below left Michael's constitutional rights, and his life, in shambles. The rulings that deprived Michael of his liberty and his family associations were issued by an irregular, extrajudicial tribunal. And without representation, Michael was helpless to defend the charge that he could earn, understand, and be accountable for more

than he really could.

Contrary to the Justice Department's directive, the Nevada family courts are structured to deny child-support debtors access to justice. *Cf.* Gupta Letter, *supra*, at 4–5. Child-support masters, rather than simply aiding the elected district court judges, are entering their own orders—including criminal and civil contempt sanctions—without any oversight by the district court. That practice violates local rules, and to the extent NRS 425.3844(3)(a) blesses this siphoning of judicial authority, it violates the constitutional separation of powers.

Similarly, the Justice Department warns against incarcerating a debtor without a diligent inquiry into indigency to guarantee that the debtor can afford the price of freedom. Gupta Letter, *supra*, at 3–4, 7–8. Yet that happens daily in Nevada family courts. This Court should shake off the poorly reasoned cases exempting child-support debts from Nevada's constitutional ban on debtor's prisons. And it should reaffirm limits on the civil contempt power to ban its use for punishing past underemployment when the debtor cannot secure his release.

Finally, adequate notice and appointed counsel are imperative when a defendant faces criminal sanctions or incarceration in a civil-

contempt proceeding pursued by the state. Gupta Letter, *supra*, at 5–6. That is not happening in Nevada's child-support hearings. Indigent, unrepresented respondents like Michael are being denied counsel even when combatting entrenched, experienced attorneys seeking to impose what amounts to criminal punishment. That violates the right to counsel under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment.

If the state is going to interfere with family relationships, it needs to enact appropriate constitutional safeguards. It is a travesty that poverty exposes a noncustodial parent to grosser deprivations of due process than would an accusation of criminal abuse or neglect.

ARGUMENT

I.

THIS IS A LIVE CONTROVERSY

Michael has a present, and pressing, stake in the outcome of this appeal.

A. Michael Challenges the Refusal to Modify his Obligation[6]

Michael's support obligation should have been *decreased* based on his poverty, not *increased*. At the hearing on November 16, 2015, Michael testified that he had just $119, but the child-support master refused to modify his support obligation from $833/month. (1 App. 226:1–6, 228:20–22.) This was already an increase from the $700/month ordered by the district court, which was nearly as unaffordable. The child-support master made no finding of willful underemployment. (*See* 1 ROA 173:14–17.) Neither did the district court. Its susurration that "there is an *indication* of *possible* underemployment" does not count. (*See* 1 ROA 191:3.)

The district court lacked substantial evidence for its finding that Michael could pay $833/month.

B. Michael Still Faces 91 Days in Pending Contempt Sentences

Michael's challenges to the child-support master's contempt sentences are also ongoing issues. Michael has been incarcerated for child-

[6] **Standard of review:** The calculation of child support is reviewed for abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). This Court can also address plain error *sua sponte*. *Id.* at 1021, 922 P.2d at 545.

support debts four times totaling more than 50 days, and the threat is far from over. The latest order shows 91 days of contempt sentences looming over Michael's head. (1 ROA 209:5–8.)

C. The Actions Michael Challenges will Happen Again

In any case, Michael's continued indigency makes it likely that he will again face contempt proceedings and imprisonment for failure to pay his child-support debts. *See Turner v. Rogers*, 564 U.S. 431, 440 (2011) (rejecting a mootness challenge under similar facts).

II.

CONTEMPT ORDERS ENTERED WITHOUT DISTRICT-COURT APPROVAL ARE VOID UNDER THE SEPARATION OF POWERS

Each of the contempt orders save the last was entered without a judge's signature. Those orders are void. *See* NRCP 60(b)(4).

A. *De Novo* Standard of Review

This Court reviews *de novo* the questions of statutory construction and separation of powers. *Tate v. Bd. of Med. Exam'rs*, 131 Nev., Adv. Op. 67, 356 P.3d 506, 508 (2015).

B. By Rule, the District Court is Supposed to Oversee the Child Support Masters

When the district court appoints a child-support master, the court must not relinquish oversight. By local rule, the presiding judge of the family division or the assigned family judge is to "[r]eview and sign off on recommendations of the child support masters with respect to disposition of all child support petitions." EDCR 1.31(b)(5)(iii) (family presiding judge).

According to the rule, this duty of supervision does not disappear simply because the parties do not contest the master's recommendations: "If no objection is filed, the report *will be referred to the presiding judge* and without further notice, judgment entered thereon." EDCR 1.40(e) (emphasis added). Although the parties in this situation are not entitled to further notice, the reference to the presiding judge is presumably not an empty exercise. In other words, the presiding judge needs to sign off on the master's recommendation and direct the clerk to enter judgment.

C. The Statute Purporting to Bypass District-Court Approval Violates the Separation of Powers

Were the child-support masters and district-court judges to follow

these rules, there would be at least some judicial oversight. But the masters read in NRS 425.3844(3)(a) a loophole, which they use to enter support and contempt orders and bench warrants, imprisoning respondents like Michael without any judicial act. So read, the statute violates the separation of powers and, in turn, Michael's due process rights. The entered-but-unreviewed orders of the masters are void.

1. A Hearing Master's Recommendations Cannot be Treated as Judgments

The separation of legislative, executive, and judicial functions is "fundamental to our system of government." *City of N. Las Vegas ex rel. Arndt v. Daines*, 92 Nev. 292, 294, 550 P.2d 399, 400 (1976) (citing NEV. CONST. art. 3 § 1(1)). Ensuring that each branch never exercises the power of the others is "to the end that it may be a government of laws and not of men." *Morrison v. Olson*, 487 U.S. 653, 697 (1988) (Scalia, J., dissenting) (quoting MASS. CONST. pt. 1, art. 30 (1780)).

a. MASTERS MAY ONLY RECOMMEND, NOT FINALLY DECIDE

Judicial power, unlike executive power, is not delegable. *Mistretta v. United States*, 488 U.S. 361, 424–25 (1989) (Scalia, J., dissenting). A master who is not a judicial officer may *recommend* action, but a judge

"may not leave the *decision* . . . to a master." *Id.* (citing *United States v. Raddatz*, 447 U.S. 667, 683 (1980); *Runkle v. United States*, 122 U.S. 543 (1887)) (emphasis added).

This Court has applied this limitation in custody and juvenile cases. In *Cosner v. Cosner*, this Court held that "the constitutional power of decision vested in a trial court in child custody cases can be exercised only by the duly constituted judge, and *that power may not be delegated to a master* or other subordinate official of the court." 78 Nev. 242, 245, 371 P.2d 278, 279 (1962) (emphasis added). A master's determination of the issue is "advisory only, and the trial judge has the right to disregard it." *Id.* at 246, 371 P.2d at 280. More recently, this Court rejected the Department of Family Services' argument that the juvenile court had to accept a dependency master's findings unless clearly erroneous. *In re A.B.*, 128 Nev., Adv. Op. 70, 291 P.3d 122, 127 (2012). This Court held that the court *may* accept those findings *only* if they are supported by the evidence and not clearly erroneous, but the advisory nature of those findings means the court need not accept them at all. *Id.* at ___, 291 P.3d at 127–29. This Court was emphatic that the Nevada Constitution precluded a master's decision from becoming a binding order:

> [A] master does not possess the same powers conferred to a . . . judge through Article 6, Section 6 of the Nevada Constitution. As a result, only the . . . judge makes the dispositional decision in a matter. The judge may not transfer his or her judicial decision-making power to a master.

Id. at ___, 291 P.3d at 127.

The prohibition against non-constitutional judges exercising the power to enter orders is longstanding. In *United States v. Raddatz*, the majority and dissent disagreed *whether* Congress had delegated judicial authority to a non-Article III officer, but they agreed that such a delegation would be unconstitutional. 447 U.S. 667 (1980). For the majority, the statute was saved by interpreting it so that "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge." *Id.* at 682 (quoting *Mathews v. Weber*, 423 U.S. 261, 271 (1976)). The dissent interpreted the statute more broadly and found it violated the precept that "due process" must be a "*judicial* process"; a deprivation of liberty must rest on "a judicial determination of the facts." *Id.* at 709 (Marshall, J., dissenting) (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring)) (emphasis added). It is "a distinction of controlling importance" that the proceedings of a master be advisory, "always subject

to the direction of the court." *Crowell v. Benson*, 285 U.S. 22, 61 (1932).[7]

b. EVEN AN UNOBJECTED-TO RECOMMENDATION CANNOT BECOME A JUDGMENT AUTOMATICALLY

The Legislature cannot transform the recommendations of a hearing master or referee into final judgments merely because no party petitions for review.

The Arkansas Supreme Court struck down a statute nearly identical to this one for violating the separation of powers. *Jansen v. Blissenbach*, 217 S.W.2d 849, 851 (Ark. 1949). There, the legislature attempted to make referees' orders in probate cases "final as if performed by the [probate judge]" unless objected to within 90 days. *Id.* at 850. Because it took away the probate court's duty to confirm or reject the order, it was unconstitutional:

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[7] This Court's 4–3 decision in *Harrison v. Harrison* addresses a different issue—the right of contracting parties to agree to a court-appointed parenting coordinator to resolve nonsubstantive disputes. 132 Nev., Adv. Op. 56, 376 P.3d 173, 178, 180 (2016). Like the disagreement in *Raddatz*, the majority and dissent split over *whether* the parties' agreement delegated judicial authority, but there was no question such a delegation would be impermissible. *Compare id.* at 179, 180 (majority opinion) (concluding that the coordinator's decisions were nonbinding and emphasizing the parties' agreement to the procedures in the first place), *with id.* at 183 (Hardesty, J., dissenting) (reading the agreement to impermissibly evade judicial review). That case did not present the question here: legislative intrusion on judicial oversight of masters.

> [W]e think it is clear that the Legislature is without power to provide that, if no petition for review is filed within 90 days, the action of the referee shall become a final judgment of the court without the intervention or approval of the court. To say the Legislature had such power would clothe that body with authority to create a second or deputy probate judge in the several counties and this it may not do under the Constitution. It follows that [the statute] is an unauthorized grant of legislative authority and, therefore, unconstitutional and void.

Id. at 851.

Likewise, the New Hampshire Supreme Court held that a bill to give masters in family-law cases "the power to decide, rather than merely to recommend" would be unconstitutional. *Opinion of the Justices*, 509 A.2d 746, 748 (N.H. 1986). The line between recommending and deciding marks the boundary of judicial authority, which must be exercised by one properly appointed and tenured. *Id.* The "orders and decrees" of such masters "would have no legal effect, without approval and adoption by" a judge. *Id.*[8]

[8] *See also id.* at 749 ("It follows that the legislature may not constitutionally empower any but a judicial officer to exercise marital jurisdiction, although the legislature has authority to determine which judicial officers should exercise that jurisdiction.").

2. The District Court has a Duty to Intervene to Protect Unrepresented Parties

Although in most matters the district court relies on the parties to raise contentions, in some cases the district court itself has a duty to act. The district court must satisfy itself that it has subject-matter jurisdiction, regardless of whether the parties contest jurisdiction. *Swan v. Swan*, 106 Nev. 464, 468, 469, 796 P.2d 221, 224 (1990). And where a criminal defendant is unrepresented, the district court must intervene unasked to police egregious prosecutorial misconduct:

> An accused, whether guilty or innocent, is entitled to a fair trial, and it is the duty of the court and prosecutor to see that he gets it.

Garner v. State, 78 Nev. 366, 372–73, 374 P.2d 525, 529 (1962).

3. NRS 425.3844 Gives Masters' Recommendations the Automatic Force of Judgments

a. CHILD-SUPPORT MASTERS ARE NOT JUDICIAL OFFICERS

Although the Legislature can provide for referees in district courts, "the judicial power of this State" remains vested in the courts created by Article 6. NEV. CONST. art. 6, §§ 1, 6(2)(a). *Compare Monroe v. Monroe*, 413 A.2d 819, 823–24 (Conn. 1979) (noting that Connecticut's constitution specifically authorized senior judges to serve as refer-

ees exercising the powers of the courts). Child-support masters are not elected judicial officers; they are appointed by the family judges. NRS 425.381(2)(b). Only Article 6 judges are elected by the people. *See* NEV. CONST. art. 6, § 5.

b. NRS 425.3844(3)(a) PURPOSELY ELIMINATES DISTRICT-COURT OVERSIGHT

NRS 425.3844(3)(a) nevertheless purports to strip from the district court the power to review unobjected-to recommendations of a child-support master by simply "deem[ing]" such a recommendation a judicial act. Indeed, subsection 6 makes clear that unless "the recommendation modifies or adjusts a previous order for support issued by any district court," the district court need not even be notified of the recommendation or its "deemed" approval. NRS 425.3844(6). Those unsupervised recommendations get "the force, effect and attributes of an order or decree of the district court." NRS 425.3844(9).

Cutting out the district court was no accident; it was the bill's purpose:

> Today the requirement is that once the master's recommendation is presented to the District Court ***it requires their action***. By having a provision where, if there are no objections within ten days, the recommendations are approved, will, we believe, help facili-

tate the program.

Minutes, Ass'y Comm. on Health & Human Servs., Feb. 23, 2009, at 11 (statement by Romaine Gilliland) (emphasis added); *see also* Minutes, Sen. Comm. on Health & Educ., May 1, 2009, at 14 (statement of Romaine Gilliland) ("Currently, the master's recommendations require a court signature with no time limit, so it is possible that a recommendation could sit for a lengthy period of time. This provision is designed to move the process forward in a timely manner."); Minutes, Sen. Comm. on Health & Educ., May 1, 2009, at 22.

c. NRS 425.3844(3)(a) IS UNCONSTITUTIONAL

As read to let the passage of time transform a master's recommendation into a judgment, the statute is unconstitutional. *Cf. Jansen v. Blissenbach*, 217 S.W.2d 849, 851 (Ark. 1949). It might seem as though requiring the district court's signature is a formal issue. It is not. It is the difference between recommending action to one who can take it and acting without authorization.

The lack of an objection does not remedy the constitutional problem. This case in fact illustrates why keeping the district court out of the loop is problematic. The child-support master entered judgment on

its June 17, 2015 recommendation on the assumption that no objection had been timely filed. (*See* 1 ROA 149:25.) But Michael *had* attempted to file an objection, by attaching it to his *in forma pauperis* application with the *district court*. So the *court* was aware of Michael's application—which it granted (ROA 151)—and his objection, but it never had the opportunity to entertain the objection.

In addition, many of the orders amounted to sentences of criminal contempt. *See infra* V.C. In that circumstance, the district court had an independent duty to supervise the state's actions to ensure Michael received a fair hearing—and to intervene if he did not. *Cf. Garner v. State*, 78 Nev. 366, 372–73, 374 P.2d 525, 529 (1962).

4. The Master has No Power to Imprison Child-Support Debtors via its Recommendations

An adjudicator that acts without judicial authority is not empowered "to stand between a citizen and his liberty." *In re Norton*, 68 P. 639, 641 (Kan. 1902); *accord In re Jafree*, 741 F.2d 133, 136 (7th Cir. 1984) (holding that an executive committee of the district court was "not a 'court' empowered to conduct criminal trials"). There is no court, and so no valid judgment. *In re Norton*, 68 P. at 641.

Here, the orders signed only by a child-support master were not

valid judicial decrees. Because "one may not be held in contempt of a void order," Michael's sentences of contempt must be vacated. *See State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) (brackets and internal quotation marks omitted).

III.

THE NEVADA CONSTITUTION PROHIBITS IMPRISONMENT FOR CHILD-SUPPORT ARREARAGES

The Nevada Constitution forbids jailing a debtor as punishment. That prohibition applies to child support just as any other debt. Earlier cases suggesting an exception should be disapproved.

A. Standard of Review

Although this Court usually reviews contempt orders for abuse of discretion, the Court reviews constitutional issues *de novo*. *Lewis v. Lewis*, 132 Nev., Adv. Op. 46, 373 P.3d 878, 880 (2016).

B. In the Past, this Court has Upheld Imprisonment for Child-Support Debts

Upon joining the Union in 1864, Nevada abolished debtor's prisons: "[t]here shall be no imprisonment for debt, except in cases of fraud, libel, or slander." NEV. CONST. art 1, § 14.

In *Ex parte Phillips*, this Court held that the constitutional protec-

tion against imprisonment for debts did not extend to alimony. 43 Nev. 368, 187 P. 311, 312 (1920). The Court reasoned that the constitutional definition of "debt" was limited to "an obligation growing out of a business transaction." *Id.* So alimony, a "mere allowance for support and maintenance," was not such a debt. *Id.*

This Court later extrapolated that child support must not be a debt, either. *In re McCabe*, 53 Nev. 463, 5 P.2d 538, 538 (1931); *Lamb v. Lamb*, 83 Nev. 425, 428, 433 P.2d 265, 267 (1967).

C. Imprisonment for Child-Support Debts Violates the Text of the Constitution

These cases prove too much. Punishment, not coercion, is central to the concept of debtor's prisons. But punishment is an improper reason to imprison someone unable to pay child support.

1. The Constitution Trades Self-Help for the Rule of Law

A major point of debate in Nevada's constitutional convention was abolishing the right of men to "settle their little differences" in a duel. *See, e.g.*, DEBATES AND PROCEEDINGS 104 (1866) (statement by Mr. Warwick). Submitting disputes to a system of laws, rather than resorting to self-help, was seen as a meaningful sacrifice.

2. The Constitution Eliminates Imprisonment for Any Judgment Except Fraud, Libel, and Slander

So the provision eliminating debtor's prisons stoked some passionate voices precisely because of its breadth. Initially the provision made exception only for fraud, not libel or slander. Mr. Brosnan, for one, thought this outrageous:

> Thus, if you pursue the peaceable course of resorting to the law, in seeking redress for injuries done to you of such character, while you may obtain a judgment, through the verdict of twelve of your fellow citizens, as a solace for your injuries and wrongs, yet the *penniless*, characterless, ruthless, merciless ruffian who has thus smitten your reputation and honor, *not having the wherewith to respond in compensating damages*, goes forth free, and laughs with impunity not only at the wrongs he has perpetrated against his neighbor, but also at the powerlessness of the law.

Id. at 777–78 (emphasis added).[9] If the Constitution was going to pre-

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[9] Mr. Brosnan continued:

> I hold, Mr. President, that it is a greater offense, and should be so regarded, not only against the moral and divine law, but also against the laws of human society, to slander and to libel another, than it is to defraud him.
>
> * * *
>
> Why, sir, how much more enormous is the offense of a libel or slander than that of a fraud! The fraud is commonly circumscribed in its limits and effects. It may be known in the immediate neighborhood where the parties concerned are living, but the injury affects

vent dueling, "then let us at least place the slanderer and the libeler upon the same platform with the defrauder, the cheat, and the swindler." *Id.* at 778. Mr. Banks welcomed the amendment "chiefly because it places slander and libel in their proper places in the category of *crimes*, associating them with fraud and swindling." *Id.* (emphasis added).

It was undisputed that, without an express exception, *every* judgment to pay money would allow only collection, not imprisonment. *See id.* at 783 (exchange between Mr. Brosnan and Mr. McClinton). The suggestion in *Ex parte Phillips* that "debt" meant only "an obligation

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> only the purse, and the injured man is none the less respected by his fellows; whilst the slander or libel travels far and wide, speeds with the rapidity of lightning, fleet as the wind, and spreading as it goes, like rumor, magnifying itself. It rolls onward as would a magnetized globe of iron, gathering up in its course particles of cognate matter, until the original aspersion grows into a monster which finally poisons the very atmosphere, not of a single community alone, but of extended communities which hear its utterance. You look on and see this monster fastening its vulture-like talons in the heart of its victims, whilst the man, if he will respect the law, dare not use the weapons which the Almighty has given him for self-defense.

Id.

growing out of a business transaction" is false. 43 Nev. 368, 187 P. at 312.

The idea was that fraud, libel, and slander were all criminal or quasi-criminal acts;[10] the wrongdoer's inability to pay a civil judgment would leave justice's demand for retribution unsatisfied. Indeed, the punishment was precisely for those lacking "wherewith to respond in compensating damages." DEBATES AND PROCEEDINGS, *supra*, at 777–78.

Notwithstanding the lack of a specific exception, in approving contempt for alimony debts, *Ex parte Phillips* explicitly adopted this punishment rationale: "[t]he imprisonment is not alone to enforce the payment of money, but to punish the disobedience of the party." 43 Nev. 368, 187 P. at 312.

D. Punishment is No Longer an Appropriate Basis for Imposing Civil Contempt

The rationale for *Ex parte Phillips* has since eroded. Punishing child-support debtors who cannot pay is unconstitutional.

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[10] Mr. Brosnan points out that one of the reasons for specifically adding slander is that unlike libel, slander was not an indictable offense, so "the only remedy would be an action for damages." *Id.* at 778. Without the amendment, a judgment in a slander suit would "constitute a debt" just like any other. *Id.* at 783.

This Court and the U.S. Supreme Court have ended the use of civil contempt for punishment. Indeed, imprisoning someone to punish their past defiance of a court order, regardless of that person's present ability to comply, is the hallmark of *criminal* contempt. *Lewis*, 132 Nev. at ___, 373 P.3d at 880 (citing *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804–05, 102 P.3d 41, 45–46 (2004)); *accord Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 633 (1988) ("An unconditional penalty is criminal in nature because it is solely and exclusively punitive in character." (internal quotation marks omitted)).

Criminal contempt for nonpayment is an unconstitutional sentence as applied to those who are too poor to pay. Due process and equal protection prohibit "*punishing* a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983) (emphasis added); *see also id.* at 672–73 (holding that imprisoning someone who made bona fide efforts to pay violates "the fundamental fairness required by the Fourteenth Amendment").

Thus, the D.C. Circuit held that a contempt order based on nonpayment of a judgment to a former spouse was "obnoxious" to D.C.'s statute forbidding imprisonment for debt, "for necessarily it threatens

the defendant with punishment as for contempt of court if he fails to pay certain sums of money, at certain times in the future, in satisfaction of an existing debt." *McGrew v. McGrew*, 38 F.2d 541, 544 (D.C. Cir. 1930). Obnoxious, too, are the holdings in *Ex Parte Phillips*, *In re McCabe*, and *Lamb v. Lamb* to Nevada's constitutional ban on imprisoning someone unable to pay a debt.

E. Restoring the Constitutional Ban is Good Policy

1. Civil Contempt Proceedings Disproportionately Burden the Poor and Unrepresented

Go to the Child Support Center on East Flamingo and listen to a nonsupport hearing. The overwhelming majority of respondents in these cases are not wealthy.[11] They are struggling. They are unrepresented. And although they have committed no crime, they are routinely shamed for their poverty. The child-support masters do not think twice about having long contempt sentences "hanging over your head." (Hr'g Tr. 4/25/12, at 9:4–7.) All too often, those sentences are actually im-

[11] *See Turner*, 564 U.S. at 445–46 (estimating 70% of arrears owed by parents making less than $10,000) (citing ELAINE SORENSEN, LILIANA SOUSA, & SIMON SCHANER, THE URBAN INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION 22 (2007), *available at* http://aspe.hhs.gov/hsp/07/assessing-CS-debt/report.pdf).

posed. To the impecunious debtor, fellow inmates, and the sheriff, it makes little difference that the court has pronounced a sentence for civil contempt rather than for a crime. *See generally* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 116–19 (2008) (surveying levels of indigent incarceration).

The child-support masters' practice of conditioning a prisoner's release on the payment exorbitant sums beyond the prisoner's ability to pay also creates perverse incentives. Any payment toward the outstanding arrearages reduces the amount of cash in hand to purge a contempt. Without cash, purging the contempt becomes impossible. So respondents repeatedly threatened with incarceration have an incentive *not* to pay down the arrearage so that they will have at least some cash to potentially secure a release from jail.

2. The Court's Broad Authority to Reach Income and Assets Obviates the Need for Imprisonment

The constitutional abolishment of debtor's prisons does "not take away the entire remedy" for collecting child-support payment, "only so far as imprisonment forms a part of such remedy." *See Mason v. Haile*, 25 U.S. 370, 378–79 (1827).

Nevada law is well-stocked with tools other than imprisonment for executing against a delinquent parent. *See generally* NRS 125B.140–.144. The state can withhold income, intercept federal and state taxes, and establish a lien against real and personal property. *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 809, 102 P.3d 41, 48 (2004) (citing *Mead v. Batchlor*, 460 N.W.2d 493, 503 (Mich. 1990)). Child-support debtors may not invoke the homestead exemption. *Breedlove v. Breedlove*, 100 Nev. 606, 609, 691 P.2d 426, 428 (1984). And those debts are not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(5). *See generally Turner*, 564 U.S. at 444 (citing 45 CFR pt. 303, 42 U.S.C. §§ 666(a), (b), and 654(24) and describing the "elaborate procedural mechanism" by which the federal government assists in child-support collection).[12]

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Since *Ex parte Phillips*, the only rationale given to imprison child-supports debtors is that the practice "has been approved many times"

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[12] Although theoretically contempt might be a way to coerce payment from someone whose available assets are otherwise unreachable, Michael's counsel has not been able to identify such categories.

Imprisoning someone merely because they could—but do not—earn more is problematic, not only for the reasons in section IV below, but also because of the Thirteenth Amendment's prohibition on involuntary servitude.

before. *See Hildahl v. Hildahl*, 95 Nev. 657, 662–63, 601 P.2d 58, 61–62 (1979); *accord In re McCabe*, 53 Nev. 463, 5 P.2d 538, 538 (1931) (citing *Ex Parte Phillips* without additional reasoning); *Lamb*, 83 Nev. at 428, 433 P.2d at 267 (citing *Ex Parte Phillips* and *In re McCabe* without additional reasoning); *Bero-Wachs v. Law Office of Logar & Pulver*, 123 Nev. 71, 76 n.5, 157 P.3d 704, 707 n.5 (2007) (citing *Ex Parte Phillips*, *In re McCabe*, and *Lamb* without additional reasoning).

"It is revolting to have no better reason for a rule of law than that so it was laid down in [1920]. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), *quoted in Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

It is time to overrule *Ex parte Phillips* and reinstate the constitutional command that "there shall be no imprisonment for debt"—including child-support debts. *See* NEV. CONST. art. 1, § 14.

IV.

INCARCERATION IS UNCONSTITUTIONAL WHEN THE RESPONDENT HAS NO PRESENT ABILITY TO PAY

Even if *Ex parte Phillips* and its progeny are not overruled, the contempt sentences in this case were unconstitutional under current case law.

The child-supports masters and the district court confused two separate tasks—setting the child-support obligation and setting the amount that will secure a contemnor's release. In *setting* the award, underemployment is a proper consideration. *Minnear v. Minnear*, 107 Nev. 495, 498, 814 P.2d 85, 86 (1991). But it is not a proper consideration in *imprisoning* a delinquent parent.

A. Willful Underemployment is Relevant to the Level of Support

This Court has approved consideration of a parent's willful underemployment only in determining the monthly support obligation, *Minnear*, 107 Nev. at 498, 814 P.2d at 86, a defendant's ability to retain private counsel, *Rodriguez*, 120 Nev. at 807, 102 P.3d at 47, and the necessity of appointed counsel, *id.* at 812, 102 P.3d at 50.

B. Willful Unemployment is Irrelevant to the Sentence of Contempt

Incarceration as punishment for willful underemployment is a different story.

1. A Contemnor Must Be Able to Immediately Purge his Contempt

When a court imprisons someone without the protections of a criminal proceeding, the constitutional concerns are grave: "The interest in securing . . . the freedom from bodily restraint[] lies at the core of the liberty protected by the Due Process Clause . . . [and] its threatened loss through legal proceedings demands due process protection." *Turner*, 564 U.S. at 445 (internal citations and quotation marks omitted); *see also Rodriguez*, 120 Nev. at 811, 102 P.3d at 50.

The law thus restricts the use of civil contempt as a tool to compel future compliance, not as punishment for "past bad acts." *Rodriguez*, 120 Nev. at 805, 102 P.3d at 46.

In *Lewis v. Lewis*, this Court recognized that a respondent in a child-support delinquency proceeding cannot be charged with contempt without "the opportunity to purge himself of the contempt sentence by complying with the terms of the contempt order." 132 Nev. at ___, 373

P.3d at 879. And in *Rodriguez v. Eighth Judicial District Court*, this Court clarified that the district court must set the release amount at a level so that the contemnor "actually possesses the ability to secure his freedom." 120 Nev. at 814, 102 P.3d at 51.

Constitutionally, that ability to pay must be immediate. Those charged with civil contempt must "carry the keys of their prison in their own pockets" and so have the present "power to avoid any penalty." *Hicks*, 485 U.S. at 633. "[P]unishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Id.* at 638 n.9. *See generally* Gupta Letter, *supra* at 3.

2. Imposing Contempt Based on Willful Underemployment is Unconstitutional Punishment

Willful underemployment is an inappropriate consideration. Someone who is willfully underemployed *should* have been able to earn income but does not *actually* have that income. Imposing a contempt sentence as punishment for that failure to earn income violates the principle that the contemnor should be capable of immediately securing his release.

Thus, in *Rodriguez* this Court was troubled that the district court's 25-day contempt sentence seemed to *punish* the respondent for his past willful underemployment rather than coerce the respondent to pay what he now could. 120 Nev. at 814, 102 P.3d at 51–52. This Court disapproved imposing any sentence until the district court set an amount left respondent "in control of his own destiny"—i.e., able to free himself immediately with the funds he had. *Id.*; *see also* NRS 22.110(1) (authorizing further imprisonment "when the contempt consists in the omission to perform an act *which is yet in the power of the person to perform*" (emphasis added)), *quoted in Hildahl*, 95 Nev. at 663, 601 P.2d at 62.

C. Michael was Improperly Jailed without the Ability to Pay for his Release

None of the contempt orders here purport to reflect Michael's ability to pay. In fact, in every instance Michael offered undisputed evidence that he *could not pay*. Michael was nonetheless jailed, repeatedly, without the means to secure his release.[13] The district court appears

[13] The practice of arresting and *incarcerating* civil contemnors while they await an in-custody hearing also violates NRS 22.140, which was drafted to protect due process rights. That statute bars the arresting officer from "confin[ing] a person arrested upon the warrant in a prison,

to have relied on "an indication of *possible* willful underemployment" (1 ROA 186:3), which is improper: the child-support master made no such finding; in any case, imposing contempt as punishment for that past behavior is unconstitutional.

The sentences of contempt must be vacated.

V.

INDIGENT CHILD-SUPPORT RESPONDENTS NEED APPOINTED COUNSEL WHEN DISTRICT ATTORNEYS SEEK CONTEMPT

The contempt process under which Michael and hundreds of other Nevadans have been repeatedly incarcerated violates due process. *See Turner*, 564 U.S. 431; Gupta Letter, *supra*. The district court at a minimum should have appointed counsel.

A. The Family Court Offers Neither Counsel Nor Constitutionally Required Safeguards

1. The State's Discretion to Withhold Counsel is Not Unbounded

In *Turner v. Rogers*, the U.S. Supreme Court considered the pro-

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or otherwise restrain[ing] him or her of personal liberty, except so far as may be necessary to secure his or her personal attendance." The goal in executing a civil-contempt warrant is to get the contemnor to *court*, not to *jail*. Here, there was no evidence that Michael would have resisted going to court; nothing justified Michael's repeated imprisonment on a contempt warrant.

cedural due process requirements of civil contempt proceedings for non-payment of child support. 564 U.S. 431 (2011). The Court applied the framework from *Mathews v. Eldridge* that weighs (1) the importance of the affected due-process interest (2) the risk of an erroneous deprivation of that interest without the requested procedures; and (3) the countervailing interest in not providing such procedures. *Turner*, 564 U.S. at 444–45 (citing 424 U.S. 319, 334 (1976)). Notwithstanding the "core" liberty interest at stake—freedom from bodily restraint—the Court held that the Fourteenth Amendment does not *automatically* require appointed counsel for respondents in *every* child-support case. *Id.* at 448 (recognizing the disadvantages to a "categorical" rule).

But that flexibility comes with "an important caveat": the state must implement "alternative procedures that assure a *fundamentally fair* determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order." *Id.* at 435 (emphasis added).

It is not fair if the court imposing contempt does not enter an express finding that the respondent has the ability to pay after a thorough hearing on the subject. *Id.* at 447–48. And it is not fair if the govern-

ment has its own counsel advocating for collection. *Id.* at 449. "The average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel*." *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462–463 (1938)) (emphasis in *Turner*) (brackets omitted).

2. Family Court Does Not Provide the Constitutionally Required Safeguards

In child-support proceedings in the Eighth Judicial District, the safeguards *Turner v. Rogers* envisioned are nowhere to be found.

a. THERE IS NO FINDING OF ABILITY TO PAY

The form recommendations have no entry for an express finding on respondents' ability to pay. And although the masters could do so in the space for miscellaneous findings, that never happened here. (*E.g.*, 1 ROA 210:14–17).

b. THE DISTRICT ATTORNEYS CREATE LOPSIDED REPRESENTATION AGAINST INDIGENT RESPONDENTS

Moreover, appointing counsel would not disturb the symmetry in representation; it would *restore* it. In *Turner*, the unrepresented wife argued on her own against her unrepresented husband in somewhat in-

formal proceedings. 564 U.S. at 447. Here, by contrast, Michael is up against the district attorney, who is at the forefront of the collection efforts and contempt charges—present at every hearing, filing all of the motions and responses, and leading the examination into Michael's finances.

The state is not a neutral party: it is using lawyers in pursuing collection for its own interests, the millions of federal incentive dollars at stake. *See* 42 U.S.C. § 658a(a), (b)(6)(D) (Title IV-D incentive payments); Audrie Locke, Clark County District Attorney's Office, *Clark County District Attorney Family Support Receives National Award*, Oct. 13, 2016 (boasting of nearly $127 million in collections in 2015), *available at* http://www.clarkcountynv.gov/public-communications/news/Pages/Clark-County-District-Attorney-Family-Support-Receives-National-Award.aspx; *cf. United States v. Philpot*, 733 F.3d 734, 738 (7th Cir. 2013) (describing the temptation to abuse the promise of incentive payments). That is why the child-support masters are emphatic that funds must be paid to the state, not the custodial parent directly, or else "You don't get credit. And go to jail." (1 App. 77:1–4; *accord* 1 App. 210:22–24.)

The Blue Ribbon for Kids Commission recommended appointing counsel for "every indigent parent at the earliest stages," with the expectation that appointment "will result in enhanced family engagement, improved communication and less protracted litigation." SOPHIA GATOWSKI, PH.D. & HON. STEPHEN M. RUBIN (RET.), BLUE RIBBON FOR KIDS COMM., FINAL REPORT, MARKING OUR PROGRESS: MOVING FORWARD TOGETHER FOR CLARK COUNTY'S CHILDREN 18 (Sept. 26, 2016).

Because these proceedings are already very much directed by lawyers—the state's collection agents—appointing counsel would not cause asymmetry problems; it would solve the existing systemic bias.

3. The Violations are Depriving Indigent Respondents of their Constitutional Rights

Because the respondent's ability to pay marks the "dividing line between civil and criminal contempt," *Turner*, 564 U.S. at 445 (citing *Hicks*, 458 U.S. at 635), getting the wrong answer means wrongly stripping a criminal defendant of the protections the Constitution demands—proof beyond a reasonable double, protection from double jeopardy, and a jury trial where the sentence could be more than six months. *Id.* (citing cases).

For Michael—and doubtless many others—the lack of counsel led

the district court to the wrong answer. There was no dispute that Michael could not afford the sums to purge his contempt; there was not even a finding of underemployment. This converted the contempt hearing into criminal proceedings in which Michael received none of the protections of the criminal law.

4. Appointed Counsel would Protect Indigent Respondents Like Michael

Moreover, even if counsel were not constitutionally mandated, counsel should have been appointed to assist Michael with his nuanced legal positions and complicated circumstances:

> In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.

Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33–34 (1981) (praising as "enlightened and wise" states that appoint counsel in dependency and neglect proceedings). Given the monumental deprivation of liberty that occurs when the state incarcerates indigent respondents, this court should appoint counsel in child-support contempt cases, just as it now does in cases terminating parental rights.

B. Indigent Respondents Cannot be Blamed for Not Appearing

Without representation, indigent respondents like Michael risk a lot just by showing up to the contempt hearing. These proceedings catapult indigent respondents into the "cycles of poverty that can be nearly impossible to escape." Gupta Letter, *supra*, at 2. When incarceration is "hanging over your head" (1 App. 9:4–7), it can be too much to risk attempting to show an inability to pay. This is especially true in light of research showing that indigent respondents face an uphill battle in furnishing adequate proof and the "grave potential" that judicial perceptions and attitudes will lean against the respondent. Patterson, *supra*, at 119–26 (recording disturbing patterns and admissions of bias among judges).

Michael can hardly be blamed for not appearing at sham proceedings on the question of his ability to pay when his appearance would all but assure his incarceration. Indeed, although the child-support master insisted that "if you were struggling, we would have accepted that" (1 App. 179:9–10), in practice the master ignored Michael's proof that he lacked the means to purge his contempt. (1 App. 177:25–7:5; 11:7–9 (setting the release amount at $200 even though Michael testified,

without opposition, that he had just $67).)

C. At Least Some of the Contempt Orders Violate *Lewis v. Lewis*

1. Contempt without a Purge Clause is a Criminal Sanction

In *Lewis v. Lewis*, this Court held that a contempt order without a purge clause is criminal, triggering the Sixth Amendment right to counsel and other protections of criminal procedure. 132 Nev. at ___, 373 P.3d at 881.

Several of the contempt orders here omitted a purge clause and thus triggered Michael's rights under the criminal law, including his right to counsel. (*See, e.g.*, 1 ROA 28:17–23.)

2. Deferred Imposition Does Not Transform the Contempt into a Civil Sanction

The hearing master's practice appears to be that if it enters a contempt order but stays its imposition, it will not include a purge clause. (*See, e.g.*, 1 ROA 28:17–23.)

But the U.S. Supreme Court has held that that is not enough to make them civil contempt orders. In *International Union, United Mine Workers of Am. v. Bagwell*, the district court announced in advance the

fines that it *would* impose as contempt for future violations of a no-strike order. 512 U.S. 821, 836–37 (1994). Suspending their imposition did not prevent the fines from constituting criminal contempt—it was just like notice that someone can avoid criminal punishment by obeying the law. *Id.* The contempt was criminal—and required a jury trial—because the sanctionable conduct "did not occur in the court's presence or otherwise implicate the court's ability to maintain order and adjudicate the proceedings." *Id.* at 837.

VI.

MASTER TEUTON SHOULD NOT HEAR JUDGE TEUTON'S CASE

In general, close relatives should not rule on each other's cases without the parties' consent. Rule 2.13 of the Nevada Code of Judicial Conduct counsels that "[i]n making administrative appointments, a judge . . . shall avoid nepotism." The term "appointments" includes "referees, commissioners, special masters." RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 10.2-2.13 (2017–2018 ed.).

To avoid the appearance of impropriety, a referee or hearing master should not entertain a case in which it will need to review the pro-

priety of rulings by a judge who is a close relative. In this Court, Justice Gibbons appropriately recuses himself from the initial decision whether to grant a petition for review, which necessarily involves a review of his brother's judicial acts on the Court of Appeals.

Here, child-support master Sylvia Teuton should not review the propriety of child-support orders entered in divorce cases decided by her husband, Judge Robert Teuton. Since Judge Teuton presided over the parties divorce here, the case should be reassigned from Master Teuton on remand.

CONCLUSION

Respondents in child-support matters face a cascading loss of rights. *Cf.* Gupta Letter, *supra*, at 5. In many cases, driver's licenses and other business licenses are revoked or suspended even when the respondent cannot pay the arrearage. That is unconstitutional by itself. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that driver's licenses "are not to be taken away without that procedural due process required by the Fourteenth Amendment"); Gupta Letter, *supra*, at 6. Worse, the penalty makes it even harder to earn an income. *See Bell*, 402 U.S. at 539 (recognizing that driver's licenses "may become essen-

tial in the pursuit of a livelihood"). But worst of all is the routine, punitive use of the court's civil contempt power to incarcerate and humiliate those unable to pay their debts.

"The use of arrest warrants as a means of debt collection, rather than in response to public safety needs, creates unnecessary risk that individuals' constitutional rights will be violated." Gupta Letter, *supra*, at 6. Broad garnishment and execution procedures, rather than arrest and incarceration, are both more effective and less constitutionally fraught. *See id.* & n.7 (citing Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 505, 527–28 (2011)).

For the foregoing reasons, this Court should reverse the judgment and contempt orders and declare the practices that led to those orders unconstitutional.

Dated this 21st day of June, 2017.

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NRAP 28(f) ADDENDUM

A. U.S. Constitution

Fifth Amendment

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

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Nevada Constitution

Article 1, Section 14

> Exemption of property from execution; imprisonment for debt. The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted; And there shall be no imprisonment for debt, except in cases of fraud, libel, or slander, and no person shall be imprisioned [sic] for a Militia fine in time of Peace.

Article 3, Section 1

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution

Article 6

> **Sec. 1. Judicial power vested in court system.** The judicial power of this State is vested in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace. The Legislature may also establish, as part of the system, courts for municipal purposes only in incorporated cities and towns.

* * *

Sec. 6. District Courts: Jurisdiction; referees; family court.

1. The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts. They also have final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law. The District Courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction. The District Courts and the Judges thereof shall also have power to issue writs of Habeas Corpus on petition by, or on behalf of any person who is held in actual custody in their respective districts, or who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction.

2. The legislature may provide by law for:

(a) Referees in district courts.

(b) The establishment of a family court as a division of any district court and may prescribe its jurisdiction.

C. 42 U.S.C. § 658a

(a) In general. In addition to any other payment under this part, the Secretary shall, subject to subsection (f) of this section, make an incentive payment to each State for each fiscal year in an amount determined under subsection (b) of this section.

(b) Amount of incentive payment

* * *

(6) Determination of applicable percentages based on performance levels

* * *

(D) Collections on child support arrearages

(i) Determination of arrearage payment performance level. The arrearage payment performance level for a State for a fiscal year is equal to the total number of cases under the State plan approved under this part in which payments of past-due child support were received during the fiscal year and part or all of the payments were distributed to the family to whom the past-due child support was owed (or, if all past-due child support owed to the family was, at the time of receipt, subject to an assignment to the State, part or all of the payments were retained by the State) divided by the total number of cases under the State plan in which there is past-due child support, expressed as a percentage.

(ii) Determination of applicable percentage. The applicable percentage with respect to a State's arrearage payment performance level is as follows:

[Table omitted]

D. Nevada Revised Statutes

NRS 22.140

Whenever, by the provisions of this chapter, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring the person before a court or judge, the inability, from illness or otherwise, of the person to attend shall be a sufficient excuse for not bringing the person up; and the officer

shall not confine a person arrested upon the warrant in a prison, or otherwise restrain him or her of personal liberty, except so far as may be necessary to secure his or her personal attendance.

NRS 425.3844

1. A recommendation entered by a master pursuant to NRS 425.382 to 425.3852, inclusive, including a recommendation establishing paternity, must be furnished to each party or the attorney of the party at the conclusion of the proceedings or as soon thereafter as possible.

2. Within 10 days after receipt of the recommendation, any party may file with the district court and serve upon the other parties a notice of objection to the recommendation. . . .

3. If, within 10 days after receipt of the recommendation, a notice of objection is:

(a) Not filed, the recommendation entered by the master shall be deemed approved by the district court, and the clerk of the district court may file the recommendation pursuant to subsection 7 and judgment may be entered thereon; or

(b) Filed, the district court shall review the matter pursuant to NRS 425.3834.

* * *

6. If a recommendation entered by a master, including a recommendation establishing paternity, is deemed approved by the district court pursuant to paragraph (a) of subsection 3 and the recommendation modifies or adjusts a previous order for support issued by any district court in this State, that district

court must be notified of the recommendation by the master.

7. Upon approval by the district court of a recommendation entered by a master pursuant to NRS 425.382 to 425.3852, inclusive, including a recommendation establishing paternity, a copy of the recommendation, with the approval of the court endorsed thereon, must be filed:

(a) In the office of the clerk of the district court;

(b) If the order of the district court approving the recommendation of the master modifies or adjusts a previous order issued by any district court in this State, with the original order in the office of the clerk of that district court; and

(c) With any court that conducts a proceeding related thereto pursuant to the provisions of chapter 130 of NRS.

8. A district court that approves a recommendation pursuant to this section shall ensure that, before the recommendation is filed pursuant to subsection 7, the social security numbers of the parents or legal guardians of the child are provided to the enforcing authority.

9. Upon the approval and filing of the recommendation as provided in subsection 7, the recommendation has the force, effect and attributes of an order or decree of the district court, including, but not limited to, enforcement by supplementary proceedings, contempt of court proceedings, writs of execution, liens and writs of garnishment.

E. Eighth Judicial District Court Rules

EDCR 1.31(b)(5)

> (b) The presiding judge is responsible for the following judicial duties:
>
> * * *
>
> (5) Child Support Calendars:
>
> (i) To refer all child support cases to hearing masters, direct the appointment of said masters with the approval of the family division judges, hear all objections to the master's findings, unless another family division judge has been assigned to the matter, and direct the enforcement thereof as may be appropriate.
>
> (ii) Meet with and supervise the activities of the child support hearing masters in the performance of their duties under Rule 1.40.
>
> (iii) Review and sign off on recommendations of the child support masters with respect to disposition of all child support petitions unless the matter has been assigned to a specific family division judge.

EDCR 1.40

> (a) Every child support master must be in good standing as a member of the State Bar of Nevada. The compensation of the masters may not be taxed against the parties, but when fixed by the presiding judge (with the approval of the remaining family division judges) and concurred in by the chief judge, such compensation must be paid out of appropriations made for the expenses of the court.
>
> (b) Except as otherwise herein provided, the proceedings of the child support masters must be in ac-

cordance with the provisions of N.R.C.P. 53.

(c) The master may request a district court judge serving in the family division to make an immediate determination of appropriate sanctions for contemptuous behavior, issue a bench warrant, quash a warrant or release persons arrested thereon.

(d) The master's report must be furnished to each party at the conclusion of the proceeding and the court will accept the master's findings of fact unless clearly erroneous.

(e) Within 10 days after the conclusion of the proceeding and receipt of the report, either party may serve written objections thereto upon the other party. If no objection is filed, the report will be referred to the presiding judge and without further notice, judgment entered thereon.

(f) If a written objection is filed pursuant to this rule, application to the court for action upon the report over the objection thereto must be by motion and upon notice as prescribed in Rule 2.20.

F. Nevada Code of Judicial Conduct, Rule 2.13

(A) In making administrative appointments, a judge:

(1) shall exercise the power of appointment impartially and on the basis of merit; and

(2) shall avoid nepotism, favoritism, and unnecessary appointments.

(B) [Reserved.]

(C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

COMMENT

[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).

[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 11,574 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 21st day of June, 2017.

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CERTIFICATE OF SERVICE

I certify that on June 21, 2017, I submitted the foregoing APPELLANT'S REPLACEMENT OPENING BRIEF for filing *via* the Court's eFlex electronic filing system.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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