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 REPLY BRIEF

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INTRODUCTION

In Nevada's judicial system, those subject to a child-support obligation are second-class citizens. The indigent, unable to afford representation, are not appointed counsel, but they face off against specialized lawyers from the District Attorney's Family Support Division (DAFS). A nonconstitutional child-support master decides the level of their support obligation and whether to hold them in contempt or imprison them. Unless they can afford to pay a fee to file an objection, the child-support master's decision becomes final—without notice to the district court in most cases, including the imposition of jail time. And for debtors deemed "underemployed," the question of whether to imprison them will be determined not according to the debtors' immediate access to funds, but rather according to a hypothetical wage that they should be earning. As DAFS puts it, those debtors have not "earned [their] keys" to get out of jail. (DAFS Br. 21.) In all of this, the burden of proof is placed on the debtors because the proceedings are deemed "civil contempt," and—unlike almost every other kind of debt or money judgment—child-support debt can land you in prison.

Even though Patricia Foley, the respondent original petitioner in

this case, has long lost interest in defending the orders and judgments below, DAFS has pressed on as an "amicus," urging this Court to maintain the status quo. DAFS's brief is more disquieting than reassuring, though; it confirms that the problems that beleaguered appellant Michael Foley are systemic.

I.

NRS 425.3844 VIOLATES THE SEPARATION OF POWERS

In all but one instance, the "orders" holding Michael in contempt and ordering his imprisonment were entered without the involvement—or even knowledge—of any judicial officer. The Legislature's enactment of this extrajudicial procedure impermissibly usurps judicial power and rulemaking authority. And for indigent respondents such as Michael, the procedure is also manifestly unjust.

A. The Orders Were Not Signed

DAFS falsely states that "[a]ll of the orders in this case were *signed* by the District Court." (DAFS Br. 15 (emphasis added).) Under NRS 425.3844(3)(a), all but the last of the child-support masters' recommendations were "deemed approved" without signature. Because Michael is challenging the statute on its face, moreover, the absence or

presence of a signature on any individual order is irrelevant.[1]

Subsection 7 does not change things. (*Contra* DAFS Br. 15–16.) It refers to the "approval of the court," but under subsection 3 that may be a "deemed" approval without actual notice to the district court. If DAFS agrees that approval requires actual notice and the district judge's signature, then this Court should treat the argument as a confession of error and clarify that requirement.

B. Without Notice, the District Court Cannot Exercise Supervisory Authority

DAFS asserts that "[c]learly" the clerk can enter a child-support master's recommendation as a judgment only with the district judge's

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[1] DAFS also represents that all of the warrants were "signed by a Judge." (DAFS Br. 5) First, a warrant to execute a contempt order is separate from the question of whether the *orders* imposing contempt were valid. Second, DAFS does not say whether the warrants were signed before or after Michael's arrest. When Michael was arrested on October 27, 2013, the arresting officer noted that Michael "argued that the warrant was not valid because the judge did not sign it, *and I could see that on page #3*," which prompted the officer to later confirm the warrant. (1 App. 93.) The warrant was filed with a signature only *after* Michael's arrest. (1 ROA 41 (file-stamped Oct. 28, 2013).)

Michael's subsequent arrests followed the same pattern. The warrant for his August 6, 2014 arrest was filed on August 7. (1 ROA 58.) The warrant for his April 9, 2015 arrest was filed on April 10. (1 ROA 110.) The warrant for his November 12, 2015 arrest was filed on November 13. (1 ROA 154.) There is no way of telling when the warrants were actually signed.

supervision. (DAFS Br. 16.) But that is not so clear under the statute, which does not even require the district judge to be notified of the recommendation or its deemed approval except when the recommendation adjusts the support obligation. NRS 425.3844(6). The legislative history confirms that the intent of the statute was to get around the presentment process that required the district judges' action. Minutes, Ass'y Comm. on Health & Human Servs., Feb. 23, 2009, at 11 (statement by Romaine Gilliland). As there are circumstances when the court clerk acts without court supervision,[2] this Court should not be confident that the district court's general authority to supervise its clerk cloaks an order—unsigned by any judicial officer—with the actual notice and approval of the district court.

C. Allowing, Rather than Requiring, the Unconstitutional Exercise of Judicial Power is Still Unconstitutional

Similarly, the statute's use of the verb "may" rather than "shall" with respect to the entry of judgment does not cure the erosion of judi-

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[2] For example, the clerk will often enter a peremptory challenge of a judge and reassign the case before the district judge has an opportunity to evaluate its propriety. *See* SCR 48.1(3); *Turnipseed v. Truckee-Carson Irr. Dist.*, 116 Nev. 1024, 1028, 13 P.3d 395, 397 (2000) (judge weighs in after the reassignment on a motion to strike).

cial power.

1. The Constitutional Problem in Arkansas and New Hampshire was the Delegation of Authority

DAFS criticizes Michael's citation to cases in Arkansas and New Hampshire that struck down similar statutes for similar reasons. (DAFS Br. 17; AOB 34–35.) The Arkansas statute attempted to make referees' orders in probate cases "final as if performed by the [probate judge]" unless objected to within 90 days. *Jansen v. Blissenbach*, 217 S.W.2d 849, 850 (Ark. 1949). The New Hampshire bill would have authorized masters in family-law cases to "'exercise the powers of the court' on matters within their subject matter jurisdiction." *Opinion of the Justices*, 509 A.2d 746, 748 (N.H. 1986).

The constitutional violation in each case was the "grant of legislative authority" to a nonjudicial officer, *Jansen*, 217 S.W.2d at 851, not the *mandate* to exercise that authority. The legislature does not avoid separation-of-powers problems by merely *allowing* a master to enter judgments as opposed to requiring it.

2. The Statute Does Not Confer Discretion on the Clerk Not to Enter Judgment

Here, in fact, the master's recommendations "*shall* be deemed ap-

proved" after 10 days. NRS 425.3844(3)(a) (emphasis added). The supposedly discretionary act is that the clerk "may file the recommendation pursuant to subsection 7 and judgment may be entered thereon." *Id.*

The most natural reading is that the deemed approval clears the way for the clerk to do something that used to be forbidden, not that the clerk can pick and choose when to file a recommendation as a judgment. There are, for example, no factors to guide the clerk's supposed discretion in accepting or rejecting a deemed-approved recommendation. And because the deemed approval itself is mandatory, it is hard to imagine how the clerk could refuse to enter judgment.

By every measure, the statute here operates just like the one declared unconstitutional in *Jansen*: the mere passage of time transforms a master's recommendation into a judicial decree.

3. Even if Discretionary, the Statute is Still Unconstitutional

But even if the statute does confer discretion on the clerk, another nonjudicial officer, it still offends the separation of powers. *Permitting* the exercise of judicial power is just as unconstitutional as *requiring* it.

D. NRS 425.3844 Unconstitutionally Intrudes on the Court's Rulemaking Authority

1. Statutes Cannot Regulate Court Procedure

Essential to the operation of a court is the power to regulate its own procedure. "While the legislature creates law, it has no constitutional authority to modify or enact statutes that overrule court rules of procedure." *Lombardo v. Seydow-Weber*, 529 N.W.2d 702, 704–05 (Minn. Ct. App. 1995) (citing *State v. Johnson*, 514 N.W.2d 551, 553–54 (Minn. 1994) and Maynard E. Pirsig & Randall M. Tietjen, *Court Procedure and the Separation of Powers in Minnesota*, 15 WM. MITCHELL L. REV. 141, 182 (1989)). "A statute which attempts to regulate practice and procedure is unconstitutional under the separation of powers . . . ." *Hines v. State*, 931 So. 2d 148, 150 (Fla. Dist. Ct. App. 2006) (interpreting Florida's similar constitutional provision).

While the legislature can enact substantive policy that "creates, defines, and regulates rights," it cannot "engulf" or "supplant[]" court rules without any alteration of the substantive rights. *Lear v. Fields*, 245 P.3d 911, 918 (Ariz. Ct. App. 2011).

2. NRS 425.3844(3)(a) Conflicts with Existing Court Rules

Local court rules already establish the role of a child-support master and the procedures for approving a master's recommendations. 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). Unobjected-to recommendations are "referred to the presiding judge" for entry of judgment. EDCR 1.40(e).

NRS 425.3844(3) prescribes a conflicting procedure: if ten days pass without objection, the recommendation is "deemed approved by the district court," allowing entry of judgment without notice to the court. The district court is entitled to review only if an objection is filed. NRS 425.3884(3)(b).

3. NRS 425.3844(3)(a) is an Invalid Procedural Statute

By its terms, paragraph 3(a) does not alter any substantive rights. It does not define the grounds for reviewing a master's recommendation or the relief to which a child-support respondent is entitled. Instead, it

tries to dictate the roles of judge, clerk, and master, supplanting the review and referral procedures in the court rules. That intrusion on the court's inherent right to regulate its procedure is unconstitutional.

E. The Statute Unfairly Burdens Indigent Defendants

Apart from its unconstitutionality, NRS 425.3844 is unfair. It demands that a party file an objection within 10 days to get district-court review. Without a filed objection, the statute, as interpreted by the child-support masters, does not even require notice to the district court before it is entered as an order. Yet indigent defendants like Michael are caught in a dilemma: they cannot afford the fees to appear and object, but obtaining a waiver based on poverty often takes more than 10 days.

Here, this problem prejudiced Michael. He timely applied to proceed *in forma pauperis*, attaching his objection. (1 ROA 122.) By the time the district court granted his application (1 ROA 151), however, the clerk had already entered judgment on the unsigned recommendation. (1 ROA 147.) Far from creating administrative difficulty, returning judicial power back to judicial officers would coordinate review of the *in forma pauperis* application with review of the underlying recommenda-

tion.

* * *

Constitutionally, DAFS is correct that "the Hearing Master has no control over whether the District Court Judge ultimately directs the District Court Clerk to enter the Master's Recommendation as an order." (DAFS Br. 17.) NRS 425.3844, however, purports to vest judicial power in the clerk and child-support masters by letting the clerk enter recommendations as orders without notice to the district court. That is why it is unconstitutional.

II.

IMPRISONMENT FOR CHILD-SUPPORT DEBTS IS UNCONSTITUTIONAL

Michael admits that this Court on several occasions has upheld the constitutionality of imprisonment for child-support debt. Those cases do not give a compelling reason for ignoring the constitutional proscription, however, especially in light of the drafting history. They should be overruled.

A. There is No Principled Basis to Read "Debts" to Exclude Child-Support Arrearages

On the constitutional issue, DAFS just refers to the cases that Mi-

chael seeks to overrule. (DAFS Br. 6.) Neither DAFS nor those cases articulate any principled distinction between child-support debts and other debts arising from tort or contract claims.

1. DAFS's Argument: Child Support is "More Important" than Other Debts

DAFS says only that "the support of a child as ordered by the Court is far more important than consumer debt" because nonpayment "could then fall on the tax payers," swelling welfare rolls. (DAFS Br. 18.)

a. ANY UNPAID JUDGMENT CAN CAUSE HARM

All kinds of tort and contract judgments can have devastating consequences if unpaid, however. Not only may an uncompensated accident victim turn to public assistance, but she may also be unable to afford essential medical treatment. Children orphaned by the wrongful death of their parents may grieve in poverty and again impose substantial burdens on the state. In almost every case when an impecunious plaintiff sustains damage at the hands of an impecunious defendant, both the plaintiff and the taxpayers suffer. But in none of these cases can the state imprison the defendant to make him pay.

b. EVEN IF CHILD-SUPPORT DEBTS ARE IMPORTANT, THEY ARE STILL DEBTS

Even if the relative "importance" of the debt at were a reasonable policy basis for exempting child-support debts, it is not a basis to read the constitution that way. The framers recognized the potential inequities and decided, as a policy matter, to exempt three especially odious categories of debts: fraud, libel, and slander. DEBATES AND PROCEEDINGS 777–78, 783 (1866); NEV. CONST. art. 1, § 14. But whatever distinctive qualities child support may have does not go to its character as a debt. The argument that child-support debtors are as bad or worse should be addressed by constitutional amendment.

2. The Rationale in Ex Parte Phillips*: Only Business Transactions Qualify*

The reason given in *Ex parte Phillips* is no longer persuasive. The Court there suggested that a "debt in the sense used in the Constitution alludes to an obligation growing out of a business transaction." 43 Nev. 368, 187 P. 311, 312 (1920). No "business transaction" is necessary for one person to slander, libel, or defraud someone, however. Those are ordinary torts. Yet the framers understood that "debt" would encompass such a tort judgment if not expressly exempted.

Nor has this Court hesitated to invalidate jail sentences imposed as "contempt" for failure to pay in contexts outside of business transactions. In *State ex rel. Hinckley v. Sixth Judicial District Court*, this Court considered a contempt order for failure to pay a fine after unlawfully diverting water. 53 Nev. 343, 1 P.2d 105, 108 (1931). This Court upheld the fine but invalidated "[s]o much of the judgment as imposes a jail sentence." *Id.* The purported restriction to "business" debts has not been taken seriously.

B. The Legislature Cannot Permit what the Constitution Forbids

It is no answer that the Legislature has authorized this practice by statute. "Disobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers" (NRS 22.010(3)) is generally a contempt punishable by imprisonment (NRS 22.100(2)). But that *statutory* authority runs up against *constitutional* limits: that is why ordinary judgment debtors who resist the judgment to pay may face enforcement proceedings but not imprisonment for the nonpayment. Even if NRS 425.382 permits incarceration for child-support debts, the constitution does not.

C. Imprisoning Indigent Child-Support Debtors is Bad Public Policy

The practice of incarcerating parents for nonpayment of child support is not a bulwark against child labor, slavery, and sex trafficking. DAFS attempts to draw just such a link between Nevada's citing articles that support no such link. (DAFS Br. 1.) To the contrary, the ACLUNV's amicus brief explains why the practice of incarcerating low-income parents has a deeply negative impact on both overall wage-earning capacity and family relationships generally. (ACLUNV Br. 12–15 (citing studies); *see also* Prof. Patterson Br. 13–16.)

* * *

The citizens of Nevada can amend the constitution to except child-support debts from the abolishment of debtor's prison. *See* Stephen J. Ware, *A 20th Century Debate about Imprisonment for Debt*, 54 AM. J. LEGAL HIST. 351, 362 (2014). Until then, nonpayment of child support is not a reason to go to jail.

III.

AS APPLIED, THESE CONTEMPT PROCEEDINGS VIOLATED DUE PROCESS AND THE RIGHT TO COUNSEL

These were criminal-contempt proceedings. The child-support

masters and district court did not follow safeguards to ensure that Michael was able to pay the sanction; they instead punished him for willful underemployment. They issued suspended sentences without a purge clause. And even if the inquiry had properly focused on ability to pay, Michael was procedurally disadvantaged in a lopsided system against DAFS's experienced, entrenched attorneys pursuing collection. Michael faced criminal contempt without a lawyer, without the presumption of innocence—without any of the safeguards that the Constitution guarantees.

A. The Court Improperly Applied an "Underemployment" Standard Rather than an "Ability to Pay" Standard

1. For Civil Contempt, the Ability to Comply Must be Immediate

Civil contemnors must "carry the keys of their prison in their own pockets" and so have the present "power to avoid any penalty." *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 633 (1988). According to DAFS, however, "[t]he ability to pay need not be immediate in the sense of presently having the money to pay the purge amount in one's pocket"; a child-support debtor must "earn[] his keys to the jail," and if he does not, he may be imprisoned without them. (DAFS Br. 21.)

DAFS's admission that it pursues incarceration as punishment for "failure to obtain the 'keys'" (DAFS Br. 21) is troubling. At the moment of incarceration, the noncustodial parent cannot change his financial situation, even if DAFS thinks that he *ought to* have done so earlier. Indeed, incarceration exacerbates the noncustodial parent's financial distress. (Prof. Patterson Br. 13–16; ACLUNV Br. 12–15.) A purge amount that corresponds to some deemed income under full employment is not really an invitation to purge the contempt; it is effectively an unconditional sentence. (*See* Prof. Patterson Br. 10–13.) That kind of punitive sentence is criminal contempt. *See Warner v. Second Judicial Dist. Court*, 111 Nev. 1379, 1383, 906 P.2d 707, 709 (1995).

2. The Court Substituted "Underemployment" for "Ability to Pay"

DAFS does not dispute that Michael was sentenced to contempt not based on a present ability to pay, but based on "an indication of possible underemployment." (*See* 1 ROA 191:3; 1 App. 244:1–2; 1 ROA 205–06.) Worse, DAFS suggests that this misapplication is routine. (DAFS Br. 21–22 (describing the "reality" that parents' prior spending choices may deprive them of the means to purge their contempt); *see also* Prof. Patterson Br. 6–9.) Michael, like so many others in this state, was im-

prisoned without a finding of his ability to pay.

B. Michael Had No Ability to Pay

1. Without a Finding of Ability to Pay, the Court Violated Due Process

Because ability to pay marks the "dividing line between civil and criminal contempt," skipping that determination violates due process. *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (citing *Hicks*, 458 U.S. at 635).

2. The Evidence Does Not Support a Finding of Ability to Pay

Even if the district court had not relied on the wrong standard, however, it could not have come to the conclusion that Michael had the ability to pay $833 a month in child support and to pay up to $2000 to get out of jail.

DAFS misrepresents Michael's ability to pay. It asserts that he makes "up to $18,000" a year, citing to Michael's financial statements. (DAFS Br. 3; *see also* DAFS Br. 4 (characterizing Michael's income as "ample").) Those statements, however, consistently show that Michael made between $9000 and $11,000. (DAFS App. 1, at Question 7 (bi-monthly gross wages in 2012 of $400, for a total of $9600, *before* deduc-

tions or expenses); DAFS App. 2, at Questions 7 and 15 (bimonthly gross wages in 2013 of $0–$40 *before* deductions or expenses, and annual net self-employment income of $5900); DAFS App. 3, at Questions 7 and 15 (no wages; annual net self-employment income in 2015 of $11,000); DAFS App. 4, at Questions 7 and 15 (no wages; annual net self-employment income in 2016 of $9000).[3]

Michael's current child-support obligation of $833 a month ($9996 a year) amounts to more than 90% of his income in his best year, and dwarfs his total income in many years. If there is to be compliance with the contempt orders that exceed Michael's ability to pay, it will not be from Michael's own resources. *See* Ware, *supra*, at 372–73 (describing the use of debtor's prison to coerce the debtor's friends and family to pay).[4]

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[3] DAFS also asserts that the e-mail address paraleagle@hotmail.com shows that Michael "works a paralegal" (DAFS Br. 13), but there is no evidence to support that. Had the issue been raised below, Michael could have explained that at one time he completed paralegal studies but has not been employed as a paralegal.

[4] DAFS also argues that because Michael was able to pay $200 to secure his release, that that must have been within his ability to pay. (DAFS Br. 8–9.) DAFS ignores the testimony that Michael was "asking people to gather up money to release him . . . from jail"—a practice that often does not work but when it does leaves Michael further in debt. (1 App. 177:21–24.)

Contrary to DAFS's representation (at DAFS Br. 3), Mr. Foley did accept public assistance in the past (*see* DAFS App. 1, at Question 9 (indicating $200 in SNAP benefits)), but that had no effect on his support obligation. (1 ROA 27–28.)

C. Purge Clauses were Not Given for Suspended Sentences

1. Criminal Contempt Triggers the Right to Counsel

DAFS does not dispute that in criminal contempt proceedings, the accused has a right to appointed counsel, and the contempt must be proved beyond a reasonable doubt. (DAFS Br. 4 (citing *Lewis v. Lewis*, 132 Nev., Adv. Op. 46, 373 P.3d 878 (2016) and *Bohannon v. Eighth Judicial Dist. Court*, 400 P.3d 756, 2017 WL 108006 (Nev. 2017) (unpublished)).) The hallmarks of criminal contempt include a determinate—rather than conditional—sanction, and the absence of a clause defining what the contemnor can do to purge the contempt and stop the sanctions. *Lewis*, 132 Nev., Adv. Op. 46, 373 P.3d at 880–81.

2. Even if Stayed, a Jail Sentence without a Purge Clause is a Conviction for Criminal Contempt

A suspended prison term for an unconditional period is, constitutionally, the same as an unconditional term that is immediately im-

posed. *Alabama v. Shelton*, 535 U.S. 654, 662 (2002). So "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' . . . ." *Id.* at 658 (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)).

That means that a contempt order setting a period of incarceration without a purge cause is criminal, even if the sentence is stayed contingent on future compliance. (*See generally* AOB 61–62 (discussing *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 836–37 (1994)).) This kind of suspended sentence can "easily become oppressive, since a suspended warrant of commitment could be activated by any subsequent failure to pay an instalment." Michael Lobban, *Consumer Credit and Debt*, *in* 12 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 838 (2010), *quoted in* Ware, *supra*, at 356.

That was the situation in *Lewis v. Lewis*. The district court sentenced the child-support respondent to 80 days in jail but stayed the sentence contingent on his compliance. 132 Nev., Adv. Op. 46, 373 P.3d at 881. Despite the stay, the absence of a purge clause transformed the order into a criminal sentence:

> [I]f the stay was lifted due to a missed payment by Wesley, he would have no way to purge his sentence to avoid or get out of jail. While it is possible that the district court intended for Wesley to be able to purge himself of his sentence and get out of jail in such a situation by paying any missed payment, the order does not so state. Therefore, we hold that because the district court's contempt order did not contain a purge clause, it was criminal in nature . . . .

Id. (distinguishing *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 789, 102 P.3d 41 (2004)).

3. Several of Michael's Sentences Lacked a Purge Clause and Amounted to Criminal Contempt

Here, too, the child-support masters frequently recommended a sentence of contempt without a purge clause.[5] DAFS nonetheless argues that no purge clause need appear until a bench warrant issues and the sentence is enforced. (DAFS Br. 25.) But the initial recommendation of incarceration, once it is "deemed approved" under NRS 425.3844, is already a sentence of contempt. Without a purge clause, it is a proceeding for criminal contempt. In refusing to appoint counsel, the child-support

[5] *See, e.g*, 1 ROA 28:17–26 (sentencing Michael to 25 days' imprisonment without a purge clause); 1 ROA 77:2–12 (sentencing Michael to 75 day's imprisonment without a purge clause); 1 ROA 97:23–98:5 (sentencing Michael to 70 days' imprisonment without a purge clause); 1 ROA 200:23–201:5 (sentencing Michael to 91 days' imprisonment without a purge clause).

masters violated Michael's constitutional rights.

D. The Proceedings against Michael are Driven by Experienced and Entrenched DAFS Attorneys

Even if the court had asked the right question—whether Michael was presently able to satisfy an order to purge his contempt—the court needed to implement procedural safeguards to ensure the accuracy and fundamental fairness of that determination. *See Turner v. Rogers*, 564 U.S. 431, 435 (2011) (emphasis added). Instead, the court let DAFS's attorneys run these proceedings, bringing their skill and experience to prosecute Michael. *Id.* at 449 (disapproving a situation where the child-support respondent is unrepresented and "*the prosecution is presented by experienced and learned counsel*") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462–463 (1938)) (emphasis in *Turner*) (brackets omitted).

1. This is Not Litigation for Patricia or the Children

Patricia Foley—the supposed beneficiary of DAFS's relentless crusade to incarcerate indigent parents such as Michael—has expressed no interest in defending the orders on appeal.

When the Court referred this case to the pro bono appellate program, this Court offered to appoint appellate counsel for Patricia

through the Legal Aid Center of Southern Nevada. (*See* Order Regarding Pro Bono Counsel, filed Sept. 16, 2016.) Patricia did not respond to multiple attempts to complete this process. (*See* Notice of Determination, filed Nov. 15, 2016.) And despite asking Michael's counsel about the submission of his brief, Patricia chose not to file a brief defending the orders below. Even if that decision does not constitute confession of error under Rule 31(d)(2),[6] it is clear that Patricia has no interest in upholding the orders from which Michael appeals.

There is no record, moreover, that the Foleys' children have expressed any support for DAFS's campaign to imprison their father.

2. DAFS's Role in Child-Support Enforcement is Statutorily Limited

DAFS has just limited authority to enforce child-support orders. Because Patricia is not receiving public assistance, the sole basis for DAFS's involvement was Patricia's own request. NRS 125B.150(1); NRS 425.3822(1). Patricia's decision to forgo an answering brief, however,

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[6] Ordinarily, "[t]he failure of respondent to file a brief may be treated by the court as a confession of error and appropriate disposition of the appeal thereafter made." NRAP 31(d)(2). Although the rule does not apply to unrepresented parties, the rule does not state the consequences of rejecting representation. *See id.*

eliminated DAFS's interest. *Compare to* NRS 425.360(2) (expressly authorizing the state to "prosecute or maintain any action for support" as necessary "to obtain reimbursement of money expended for public assistance," not applicable here).

3. DAFS Attorneys are Driving this Litigation at Every Level

DAFS has nevertheless acted as a party—and not a neutral one—at every stage of these proceedings. (AOB 56–57; ACLUNV Brief, at 15–22; Prof. Patterson Brief, at 17–19.) DAFS's persistence in filing an *amicus* brief defending the proceedings below is consistent with its outsize role in those proceedings. DAFS attorneys are the real drivers of these contempt proceedings against indigent parents.

NRS 125B.150(3) protects DAFS against a claim that it is the custodial parent's lawyer. But that does not change DAFS's fundamental adversity to Michael: the district attorney is seeking Michael's repeated and prolonged incarceration.

4. This Shows why Michael Needs Appointed Counsel in the District Court

DAFS's efforts really just bolster the argument Michael and his *amici* have made: because attorneys for the state are driving these col-

lection efforts and contempt proceedings, that asymmetry of representation calls for appointed counsel to represent Michael's due process interests in the district court. *See Turner*, 564 U.S. at 449. (*See* AOB 56–57; ACLUNV Brief, at 15–22; Prof. Patterson Brief, at 17–19.)

IV.

THE EROSION OF TRUST

This Court should understand why Michael feels betrayed by the judicial process that is supposed to protect his rights. While these issues are not essential to decide the appeal, they are very much part of the background that shaped how this case arrived here.

A. Michael Reasonably Did Not want to Voluntarily Appear in a Court that Repeatedly Denied Criminal Defendants their Rights

DAFS chastises Michael for not appearing at some of the child-support hearings. But given the masters' record of conducting criminal-contempt proceedings without providing counsel or other constitutional safeguards, Michael's fears were well-founded.

In particular, Michael had no promise that a suspended sentence without a purge clause would sprout a purge clause once activated. While in arrears, Michael's every appearance risked incarceration. And

without a finding of his present ability to pay, each appearance without counsel violated his constitutional rights.

B. Michael Supports his Children

DAFS also cherry-picks from the record to suggest that Michael has not supported his children in more than three years.

DAFS, however, obtains a right to collect payment itself—and demand that payment be made to DAFS rather than to the custodial parent directly—only when the custodial parent accepts public assistance. NRS 425.350(3)–(6); *cf.* 42 U.S.C. § 654b(a)(1). Although DAFS never obtained that right here, the child-support masters improperly refused to credit payments that Michael made to Patricia directly. (1 App. 77:1–4; 1 App. 210:22–24.)

In addition, despite his poverty, Michael is a devoted father. In addition to noneconomic support and companionship, Michael supports his children directly in myriad other ways, such as paying for their orthodontics and school-related expenses. (*See* 5 App. 508.)

C. The Contempt Proceedings Go One Way

Although Michael has been repeatedly jailed over more than 50 days for child-support arrearages, the district court is far less willing to

impose penalties on Patricia for violating the couple's custody arrangement and concealing the children from him (*see* NRS 200.359(1), (2)). (4 App. 502; 4 App. 506.) There is no DAFS program to assist parents enforce their custody orders; DAFS receives no federal incentive dollars. *Compare* 42 U.S.C. § 658a(a), (b)(6)(D) (Title IV-D incentive payments for child-support collection). Despite this Court's admonition that "children do better when they have two actively involved parents," Michael has faced nearly insuperable obstacles in enforcing the current custody arrangement, to say nothing of getting equal custody. *See Mosley v. Figliuzzi*, 113 Nev. 51, 63–64, 930 P.2d 1110, 1117–18 (1997), *overruled on other grounds by Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004).

V.

MASTER TEUTON SHOULD NOT HEAR THIS CASE ON REMAND

A. This Court has the Authority to Order Master Teuton's Recusal

Requesting a judge's or hearing master's recusal because of implied bias is daunting for any litigant, especially an unrepresented one. Appellate courts have therefore entertained requests to reassign a case

on remand regardless of whether the request was raised in the trial court. *See Liteky v. United States*, 510 U.S. 540, 554 (1994); *United States v. Tucker*, 78 F.3d 1313, 1323-24 (8th Cir. 1996).

Here, DAFS accuses Michael of waiver (at DAFS Br. 26), but this Court has inherent authority to order Master Teuton's recusal. Given the nature of these proceedings, several other child-support masters have already been involved in Michael's case, so the request is really just to reduce by one the pool of available masters.

B. Recusal is Appropriate because of the Appearance of Impropriety, Regardless of Actual Bias

DAFS also brushes away Michael's request because "[t]he facts of this case do not show any bias." (DAFS Br. 27.) Actual bias is not the issue, though. It is the appearance of impropriety in having Master Teuton review a case originally decided by her husband, Judge Teuton. *See* NCJC 2.13. To avoid that impression, the case should remain with the other, unrelated masters.

CONCLUSION

Although Michael asks this Court to overrule *Ex parte Phillips*, one aspect of that case is striking for its honesty: "The 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. Here, as much as DAFS wants to frame the contempt proceedings as merely encouraging compliance, both the structure of those proceedings and their outcome—largely out of view of the district court—betray the predominance of the punishment rationale. That punishment rationale transforms this into a case of criminal contempt in which Michael received none of the protections for criminal defendants.

This Court should reverse the judgment refusing to modify Michael's support obligation and vacate the sentences of contempt.

Dated this 20th day of February, 2018.

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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 5,065 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 20th day of February, 2018.

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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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