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

PETITION FOR LIMITED REHEARING

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PETITION FOR REHEARING

Appellant Michael Foley seeks limited rehearing. This Court correctly vacated the February 2016 order approving a hearing master's decision to imprison Michael for not paying child support: "the district court deprived Foley of his due process rights by affirming the special master's recommendation of civil contempt without specific findings of his ability to pay" the amount set to purge the contempt and secure his release from jail. (Order 5.) This Court left unresolved, however, two issues that affect Michael's rights going forward: first, whether a child-support hearing master can exercise judicial power without notice to the district court; and second, whether Michael can continue to be denied counsel despite (a) this Court's finding that the district court is not policing the line between civil and criminal contempt, (b) the imbalance of Michael's having to oppose the state's attorneys who are driving these proceedings, and (c) the repeated entry of sentences that, without purge clauses, constitute criminal contempt.[1]

[1] Michael's *pro bono* appellate counsel cannot represent him on remand, so the only way for Michael as an indigent party to get representation is through court appointment.

This Court overlooked those issues for four reasons, NRAP 40(a)(2): First, this Court did not have the benefit of an answering brief[2] or oral argument, so the finding that the constitutionality of NRS 425.3844 is unreviewable without following that statute's objection requirement (Order 3 n.1) was not advanced by any party or tested adversarially, and Michael could not address concerns of which he was unaware. Second, the Court overlooked the systemic barriers that obstruct an indigent party's ability to object under NRS 425.3844(2) and that ensnared Michael. Third, this Court misunderstood Michael to be seeking "a categorical right to counsel in every civil contempt proceeding where the contemnor is indigent" (Order 6 n.2); the right here arises because the proceedings violated the very conditions that the U.S. Supreme Court and this Court set for avoiding the appointment of counsel. And fourth, as this Court was already vacating the sentence of contempt, this Court did not appreciate that these constitutional questions still need to be resolved.

[2] Respondent Patricia Foley elected not to have *pro bono* counsel (Notice of Determination, filed Nov. 15, 2016) or to file an answering brief.

This Court should grant rehearing and set the petition for oral argument.

ISSUES ON REHEARING

1. **Separation of Powers.**

a. This Court can consider a constitutional question at any time. Michael also raised the issue of NRS 425.3844(3)(a)'s constitutionality below and even tried to follow the objection procedure that he considered unconstitutional. Can this Court consider NRS 425.3844(3)(a)'s constitutionality?

b. NRS 425.3844(3)(a) lets a child-support hearing master enter orders of contempt and imprison child-support debtors without notice to the district judge, unless an objection is filed. Does the transfer of decisional power from a district judge to a hearing master violate the separation of powers?

2. **Appointment of Counsel.**

a. Should the court appoint counsel for a child-support debtor in the narrow circumstance where the court imprisons the debtor without a finding of the debtor's ability to pay and where the state, rep-

resented by its attorneys, directly opposes the debtor without participation from the custodial parent?

b. Is a stayed but unconditional sentence of imprisonment a criminal sentence that calls for appointed counsel?

BACKGROUND ON REHEARING

The recommendations of nonconstitutional child-support hearing masters were repeatedly treated as judicial orders and used to justify arresting and jailing Michael for more than 50 days.

The Hearing Masters Make their Sentences Unconditional but Never Appoint Counsel

In April 2012, Michael presented unrebutted evidence to a hearing master that his job loss left him unable to meet his child-support obligation. (1 App. 3:20–4:4.) Nonetheless, acting without judicial oversight, the master found Michael in contempt and sentenced him to 25 days in jail. (1 App. 9:4–7; 1 ROA 27–28.) Though the sentence was temporarily stayed, it was unconditional in that it contained no "purge clause"—an amount that Michael could pay to secure his release if the stay were lifted and he were arrested. (1 ROA 28:17–26.)

This is typical. The hearing master enters (or reenters) a sentence

of contempt at every hearing—even those that should not be happening at all—and unless Michael is incarcerated, the master omits a purge clause. At one hearing, Michael was sentenced to 75 days even though the warden would not let Michael attend. (1 ROA 77:2–12; 1 App. 171:9–10.) At another, Michael was sentenced to 70 days even though Michael had a conflicting hearing in federal court. (1 ROA 97:23–98:5; 1 App. 193:20–195:18.) At a third, Michael was sentenced to 91 days even though the hearing master had lost jurisdiction because of a pending objection before District Judge Burton. (1 ROA 200:23–201:5; 1 App. 238:5–19.)

The Contempt Sentences of Child-Support Hearing Masters Do Not Clearly State that They Are Court Orders

After the April 2012 hearing, Michael thought that the recommendation would go to the district court for review. Michael had been told that the child-support hearing master would report its recommendation to the district court "in the manner provided in Eighth Judicial District Court Rule 1.40" (1 ROA 12:25–28), which requires a referral to the presiding judge even if no one objects to the recommendation. *See* EDCR 1.40(e). And while the recommendation noted that NRS 425.3844 ena-

bled it to be "deemed approved" by the district court after ten days without objection, the recommendation specifically disclaimed that it would be so treated: "the Master's Recommendation is not an Order/Judgment unless signed and filed by a Judge." (1 ROA 29:20–21; *see also, e.g.*, 1 ROA 38:6–7.) With the signature line for "District Court Judge, Family Division" blank, Michael understood that the recommendation did not have the power of a district-court order.

Michael Is Jailed under the Recommendation, and this Court Alerts Him to NRS 425.3844, which Bypasses the District Judge

Michael later discovered, when he was arrested and incarcerated, that the court clerk and sheriff's office treated these unsigned recommendations as judicial decrees. When Michael filed an emergency writ petition asking for his release (1 App. 80), this Court pointed him to NRS 425.3844(3)(a) and (9), authorizing child-support hearing masters to issue judicial decrees without notice to the district court—unless the parties object within ten days of the recommendation. (1 App. 166.)

The First Objection: The Clerk Turns Michael Away because of Poverty

So the next time a hearing master sentenced him to 25 days in jail over testimony that he could not afford his payment obligation, Michael

tried to object. (1 App. 200:24–201:3, 204:11–17.) But the clerk refused to file the objection without a $240 filing fee, which Michael could not afford. (1 App. 204:11–17.)

The Second Objection: The Master Won't Recognize Michael's Oral Objection and Won't Appoint Counsel to Help Him File One

At the in-custody hearing after Michael's next arrest, Michael tried to object on the record under EDCR 1.40(e), but the hearing master cut him off, 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 recommendation was enforced as though an order from the court, even though this one, too, provided that "the Master's Recommendation is not an Order/Judgment unless signed and filed by a Judge." (1 ROA 116:7–8.)

The Third Objection: The District Judge Is Bypassed While It Considers Michael's Poverty Waiver

Finally, although the court refused to give Michael counsel to navigate the process (1 App. 209:2–5), Michael realized that he needed to apply for a poverty waiver—an application to proceed *in forma pauperis*—to file his written objection. (1 ROA 122.) So less than ten days after this recommendation, Michael timely filed the application and attached his objection. (1 ROA 122, 137–139.)

But although Judge Burton granted the waiver in recognition of Michael's poverty (1 ROA 151), by that time the clerk had already—without notifying the district judge—entered judgment on the unsigned recommendation as though it had not been objected to. (1 ROA 147.)

The Fourth Objection: This Court Sustains the Objection for Due Process Violations

After Michael's fourth arrest, Michael testified from jail about his inability to pay and argued that "the Master's recommendation is not an order or judgment unless it's signed by a district court judge." (1 App. 223:16–18, 225:14–15, 226:1–3, 228:4–8.)

Even though Michael was not served with the recommendation that kept him in jail (1 ROA 161:1–2), he objected. (1 ROA 230, 233.) This was the first that the clerk actually filed. Michael served his entire sentence before the district court heard his objection. (1 App. 228:12–15; 1 ROA 172:8, 190:15.) And although the district court rejected the objection, this Court sustained it for the violation of Michael's due process rights. (1 App. 230, 233, 1 ROA 205–06; Order 3–6.)

SUMMARY OF THE ARGUMENT

This Court should grant rehearing to make clear that just because

indigent parties face systemic obstacles, this Court will still hear and decide their appeals—including the pressing constitutional questions that they present. This Court overlooked part of Michael's appeal supposedly because Michael had not timely objected. In fact, Michael tried to object but was repeatedly turned away because of his poverty and lack of legal expertise. Regardless, this Court can address constitutional issues raised at any time, particularly when those issues will continue to plague future proceedings.

Here, two constitutional defects cry out for rehearing. First, Michael faces imprisonment based on contempt sentences that no district judge saw or approved. The statute that strips the decisional power from district judges and gives it to nonconstitutional hearing masters violates the separation of powers. Second, while Michael does not contend that a child-support debtor is entitled to counsel in every case, the undisputed and repeated violations of *Turner v. Rogers*, 564 U.S. 431 (2011) and *Lewis v. Lewis*, 132 Nev., Adv. Op. 46, 373 P.3d 878 (2016) entitle Michael to a lawyer on remand.

ARGUMENT

I.

THE CONTEMPT SENTENCES—ALL ENTERED WITHOUT NOTICE TO THE DISTRICT COURT—ARE VOID

A. The Constitutional Question is Properly Presented

This Court refused to consider the constitutionality of NRS 425.3844(3)(a) on the misconception that "Michael failed to timely object to the master's recommendations on which the contempt orders were entered." (Order 3 n.1.) The question is properly presented for this Court's review, and resolving it would provide crucial guidance.

1. Constitutional Questions May Be Raised at Any Time

A constitutional question can be raised by the parties or the court at any stage of the proceedings, including by this Court on appeal. *Barrett v. Baird*, 111 Nev. 1496, 1511–12, 908 P.2d 689, 699–700 (1995), *overruled on other grounds by Lioce v. Cohen*, 122 Nev. 1377, 149 P.3d 916 (2006). That includes questions about separation of powers. *Id.*

Parties can even challenge procedures that they had stipulated to, *Gordon v. Geiger*, 133 Nev., Adv. Op. 69, 402 P.3d 671, 674 (2017); *McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983), so

"failure to follow the unconstitutional procedure" does not foreclose this Court's review. *See Spooner v. E. Baton Rouge Par. Sheriff Dep't*, 835 So. 2d 709, 711, 713 (La. Ct. App. 2002) (invalidating an administrative remedy based on an unconstitutional statute).

Here, even if it were true that Michael did not try to object to the recommendations, this Court should still consider Michael's constitutional objection to that procedure.

2. Michael Repeatedly Raised the Issue

Michael, in any case, raised the issue timely and repeatedly: the recommendation of a child-support hearing master, unless signed by a district judge, is not a valid court order. (1 App. 212:9–215:4, 228:4–8; *see also* 1 App. 212:9–215:4.) *See* NRCP 60(b)(4).

3. Despite Systemic Obstacles, Michael Tried to Object

And even if a party had to try to follow an unconstitutional procedure in order to challenge it, Michael did so. Michael's first objection was rejected because he was too poor to pay the filing fee. (1 App. 204:11–17.) His second, made from jail, was rejected because it was oral. (1 App. 211:25, 212:7–8.) His third was ignored because the clerk

entered the recommendation without notice to the district court that was then considering—and ultimately granted—Michael's *in forma pauperis* application that attached his objection. (1 ROA 122, 137–139, 147, 151.) And as this Court recognized, his final objection was timely filed. (Order 2.)

The problem is that the contradictory language of the recommendations and the restrictions on filing objections create systemic obstacles for impoverished, unrepresented parties. That only one of Michael's four objections made it to a district judge for consideration underscores the due process violation. It is not a reason to shut the door on Michael's petition.

4. Going Forward, Michael Needs to Know whether the Statute is Constitutional

Most important, the issue is not moot. In vacating the last contempt order, this Court sent Michael back to the same system that violates the constitutional separation of powers. All parties need to know whether the district court can continue to be barred from overseeing cases before a child-support hearing master except upon a party's filed

objection.[3]

B. NRS 425.3844(3) Is Unconstitutional

As Michael discussed in the briefs (at AOB 29–40, ARB 2–10), the statute that eliminates notice to the district court for unobjected-to recommendations usurps judicial power and is facially unconstitutional.

1. The Legislature Cannot Limit District-Court Review of a Hearing Master's Decision

The separation of powers prohibits a nonconstitutional referee, such as a hearing master, from exercising the decisional power of a district judge. *Cosner v. Cosner*, 78 Nev. 242, 245, 371 P.2d 278, 279 (1962). That is because "a master does not possess the same powers conferred to a . . . judge through Article 6, Section 6 of the Nevada Constitution." *In re A.B.*, 128 Nev., Adv. Op. 70, 291 P.3d 122, 127 (2012). Only the judge "makes the dispositional decision in a matter." *Id.* So a master's determination of the issue is "advisory only"; as a matter of constitutional principle "the trial judge has the right to disregard it." *Conser*, 78 Nev. at 246, 371 P.2d at 280.

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[3] While this Court alluded to the denial of Michael's writ petition in Docket No. 64351 (Order 4 n.1), that summary denial merely alerted Michael to NRS 425.3844(3)(a) without address its constitutionality.

This Court has rejected efforts to limit the district court's review of a master's decisions, such as a rule that would bind the district court to the master's findings unless clearly erroneous. *In re A.B.*, 128 Nev., Adv. Op. 70, 291 P.3d at 127. The Constitution does not let a master's decision become a binding order without express judicial approval. *Id.*[4]

Requiring parties to object to trigger district-court review still offends separation of powers. *Jansen v. Blissenbach*, 217 S.W.2d 849, 851 (Ark. 1949); *cf. also Opinion of the Justices*, 509 A.2d 746, 748 (N.H. 1986) ("orders and decrees" of masters "would have no legal effect, without approval and adoption by" a judge). The line between recommending and deciding marks the boundary of judicial authority, which must be exercised by one properly appointed and tenured. *Opinion of the Justices*, 509 A.2d at 748. Parties cannot by mere waiver or forfeiture

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[4] *Henry v. Nev. Comm'n on Judicial Discipline*, 135 Nev., Adv. Op. 5, ___ P.3d ___ (Feb. 28, 2019) involved the opposite issue: whether hearing masters' powers can be legislatively *limited*. Because the Legislature has express constitutional authority to "provide by law for . . . [r]eferees in district courts," NEV. CONST. art. 6, § 6(2)(a), the Legislature can also enable the Commission on Judicial Discipline to regulate those same referees. *Henry*, 135 Nev., Adv. Op. 5, at 4–5, ___ P.3d. at ___. That is quite different from the Legislature's stripping decisional power from the district courts, which the Legislature is not authorized to create or eliminate, and giving it to hearing masters.

keep the district judge from ensuring the propriety of the court's decrees. *Cf. Garner v. State*, 78 Nev. 366, 372–73, 374 P.2d 525, 529 (1962) (the court has an independent duty to see that a defendant gets a fair trial).

2. The District Court Tried to Preserve Judicial Oversight by Rule

Here, before the Legislature's interference, district judges had the power under local rule 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). This was true regardless of whether any party objected: "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 were not entitled to further notice, at least one judicial officer had to actually see the recommendation, approve it, and direct the clerk to enter judgment.

3. The Statute Bypassing the District Court Violates the Separation of Powers

As read to let the passage of time transform a master's recommendation into a judgment, NRS 425.3844(3)(a) violates the separation of

powers and the due process rights of child-support debtors such as Michael. The statute states that if no objection is filed within ten days of a hearing master's recommendation, it "shall be deemed approved by the district court" and "judgment may be entered thereon." The district judge has no right even to *notice* of the recommendation or its deemed approval. NRS 425.3844(6). And the unsupervised recommendation gets "the force, effect and attributes of an order or decree of the district court." NRS 425.3844(9).

The exercise of judicial power without notice to any judicial officer is more egregious than the "clearly erroneous" standard of review rejected in *In re A.B.* A child-support hearing master is not "the duly constituted judge." *Cosner*, 78 Nev. at 245, 371 P.2d at 279; NRS 425.381(2)(b); NEV. CONST. art. 6, § 5. In fact, cutting out the district judge was the point:

> 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 facilitate 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, 22 (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."). NRS 425.3844(3)(a) is indistinguishable from the statute invalidated in *Jansen*.

Conditioning review on a "filed" objection is no cure to the constitutional intrusion. First, most child-support debtors who languish in jail cannot afford the sums required for their immediate release. (Patterson Br. 2, 6–9.) Indigent, unrepresented child-support debtors face insuperable obstacles to correcting an unlawful determination: as Michael demonstrated, one can try over and over to object but not have the objection considered because of poverty and the lack of guidance. Second, judicial power and the duty of a district court to protect parties' constitutional rights cannot be conditioned on the parties' acts to protect that power. *Garner*, 78 Nev. at 372–73, 374 P.2d at 529.

Under this statute, many Nevadans are going to jail notwithstanding overwhelming and unrebutted evidence of the debtor's inabil-

ity to pay—a gross violation of due process, *see Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 809, 102 P.3d 41, 49 (2004)—merely because an unlawful sentence of contempt was entered upon the recommendation of a hearing master without judicial notice or approval.

4. Past or Future Contempt Recommendations Entered without Judicial Authority Are Void

"One may not be held in contempt of a void order." *Daines v. Markoff*, 92 Nev. 582, 587, 555 P.2d 490, 493–94 (1976) (citing *Ex Parte Gardner*, 22 Nev. 280, 39 P. 570 (1895); *Cline v. Langan*, 31 Nev. 239, 101 P. 553 (1909); *Culinary Workers v. Eighth Judicial Dist. Court*, 66 Nev. 166, 207 P.2d 990 (1949)).

The invalidity of NRS 425.3844(3)(a) leaves the recommendations without the authority of a judicial decree until approved by a district judge. The contempt orders against Michael based solely on NRS 425.3844(3)(a) are void.

C. The Orders are Contradictory and Ambiguous

1. An Ambiguous Contempt Order is Void

"An order on which a judgment of contempt is based must be clear

and unambiguous . . . ." *Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 454–55, 92 P.3d 1239, 1245 (2004) (quoting *Cunningham v. Eighth Judicial Dist. Court*, 102 Nev. 551, 559–60, 729 P.2d 1328, 1333-34 (1986)). So, too, must the written order of contempt "contain a specific description of the conduct held to be contemptuous." *Houston v. Eighth Judicial Dist. Court*, 122 Nev. 544, 555, 135 P.3d 1269, 1276 (2006) (interpreting NRS 22.030). A civil contempt order must be "clear and specific" so as to "yield[] only one reasonable interpretation." *Ex parte Durham*, 921 S.W.2d 482, 486 (Tex. App. 1996) (citing *Ex parte Johns*, 807 S.W.2d 768, 773 (Tex. App. 1991)). "Any ambiguity in a decree or order must be resolved in favor of an alleged contemnor." *In re Blaze*, 76 Cal. Rptr. 551, 553 (Cal. Ct. App. 1969)).

2. The Recommendations Do Not Clearly State that They Are Orders

Here, the recommendations that were treated as orders were far from clear that they constituted orders without a district judge's signature. Michael had been told that, regardless of whether any party objection, the recommendations would ultimately be reported to an Article 6 district judge "in the manner provided in Eighth Judicial District Court Rule 1.40." (1 ROA 12:25–28.) In fact, despite the reference to

NRS 425.3844(3)(a) at the end of each recommendation, the recommendation had earlier stated that "the Master's Recommendation is not an Order/Judgment unless signed and filed by a Judge." (1 ROA 29:20–21; 1 ROA 38:6–7.)

Even if NRS 425.3844(3)(a) were not unconstitutional, the vacillation about the recommendation's enforceability as a court order is not the kind of notice that due process demands. Neither Michael nor any other child-support debtor should be incarcerated on the basis of recommendations that are not even clear about their own enforceability.

II.

CHILD-SUPPORT DEBTORS ARE BEING UNCONSTITUTIONALLY SENTENCED TO CRIMINAL CONTEMPT WITHOUT COUNSEL

A. Michael Is Just Asking this Court to Follow *Turner v. Rogers* and *Lewis v. Lewis*

This Court misunderstood Michael to be seeking a "categorical right to counsel in every civil contempt proceeding where the contemnor is indigent" (Order 6 n.2), a position that Michael acknowledged was rejected in *Turner v. Rogers*, 564 U.S. 431, 445 (2011).

Rather, Michael argued that while *Turner* envisioned "substitute procedural safeguards" for courts that did not want to appoint counsel

to child-support debtors, 564 U.S. at 447, the proceedings here lacked those crucial due process protections. (AOB 54–62, RAB 15–24.) This Court overlooked Michael's argument under *Lewis v. Lewis*, 132 Nev., Adv. Op. 46, 373 P.3d 878 (2016), that the practice of entering unconditional contempt sentences at every hearing, then staying their imposition, still amounts to a criminal sentence that triggers the right to counsel. (AOB 61–62, ARB 19–22.)

Michael is not asking for a categorical right to counsel. But if the district court does not want to appoint counsel, it must stop violating *Turner* and *Lewis*.

B. The Requirements of *Turner* and *Lewis*

While "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order," *Turner*, 564 U.S. at 448 (quoted in Order 6 n.2), the U.S. Supreme Court "attach[ed] an important caveat" to that flexibility, *id.* at 435. Because the child-support debtor's ability to pay "marks a dividing line between civil and criminal contempt," due process requires additional safeguards, if not a lawyer,

to ensure that the court is not criminally imprisoning impecunious debtors. *Turner*, 564 U.S. at 445 (citing *Hicks v. Feiock*, 485 U.S. 624, 635 n.7 (1988)).

1. Express Finding of Ability to Pay

At a minimum, the court must make an express finding that the debtor has the ability to pay the purge amount. *Id.* at 448. This is consistent with Nevada's statutory requirement that civil contempt to coerce someone to do something must identify the "act which is yet in the power of the person to perform." NRS 22.110(1).

2. No Collection Efforts by State Attorneys

And if the government does not want to appoint counsel for the debtor, it must not throw its legal weight against the debtor: "the person opposing the defendant at the hearing" should not be "the government represented by counsel but the custodial parent unrepresented by counsel." *Turner*, 563 U.S. at 446.

3. Purge Clause

Finally, this Court requires every civil-contempt order to contain a purge clause. Because even "a suspended sentence that may 'end up in the actual deprivation of a person's liberty'" is a criminal sentence that

requires "'the guiding hand of counsel,'" *Alabama v. Shelton*, 535 U.S. 654, 658, 662 (2002) (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)), a stayed order of contempt against a child-support debtor, if entered without a purge clause, amounts to criminal contempt requiring counsel. 132 Nev., Adv. Op. 46, 373 P.3d at 881 (noting that "if the stay was lifted due to a missed payment . . . , he would have no way to purge his sentence to avoid or get out of jail").

C. The Master's Recommendations Make No Finding about Ability to Pay

As this Court recognized, the district court imprisoned Michael without making "specific findings regarding Michael's present ability to pay the purge amount." (Order 5; *see also, e.g.*, 1 ROA 210:14–17.) That made the contempt unconstitutional. (Order 5.) *See also Turner*, 564 U.S. at 448. Because that finding is a substitute safeguard to appointing counsel, its absence calls for appointed counsel on remand.

D. State-Driven Litigation Tilts the Tables

And rather than letting the custodial and noncustodial parent argue unimpeded, "the person opposing [Michael] at the hearing is . . . the

government represented by counsel," creating asymmetries of representation that "more closely resemble debt-collection proceedings." *See Turner*, 564 U.S. at 446, 449. State attorneys lead every hearing and question Michael, and even on appeal, when respondent Patricia Foley elected not to defend, the state appeared *amicus* to defend its debt-collection practices. As the ACLUNV explained, the majority of courts in this circumstance recognize a right to counsel to correct the asymmetry. (*See* ACLUNV Br. 15–22.)

E. "Stayed" Sentences without a Purge Clause Are Criminal

Michael was repeatedly sentenced to weeks or months of criminal contempt with no way to purge the contempt. This happened most often when no hearing should have occurred. Conceding the practice, the state argued that neither a purge clause nor appointed counsel is necessary until the sentence is carried out. (DAFS Br. 25.) But as even a stayed sentence can result in imprisonment if the stay is lifted, these contempt orders without a purge clause amounted to criminal sentences requiring appointed counsel. *Lewis*, 132 Nev., Adv. Op. 46, 373 P.3d at 881. The hearing master cannot repeatedly have that criminal punishment "hanging over your head" (1 App. 9:4–7), then later impose a

purge clause at the time of incarceration to eliminate a right to counsel.

Once Michael's constitutional rights were violated by the imposition of a criminal sentence, he was entitled to appointed counsel.

* * *

These proceedings do exactly what *Turner* and *Lewis* forbid, threatening to imprison indigent debtors without counsel in cases that may amount to criminal contempt. It is time to give Michael counsel.

III.

THIS COURT SHOULD SET ORAL ARGUMENT ON THE PETITION

This Court does not ordinarily allow oral argument on a petition for rehearing. NRAP 40(a)(2).

Michael requests argument here, though, not merely because this case is in the *pro bono* program, but also because this case could benefit from a frank discussion with the Justices. Michael understands that this Court can try to reach a correct result, even when the respondent forgoes an answering brief—just as a district court has a right to review and correct the recommendations of a hearing master, even when the debtor does not or cannot object. If this Court is inclined to rule on an issue that no one raised, this Court should address those concerns to

Michael in oral argument.

CONCLUSION

Although this Court invalidated the latest order under which Michael was jailed, Michael still faces threats to his liberty in proceedings that are systemically and constitutionally defective. To set the constitutional ground rules for remand, this Court should grant the petition.

Dated this 27th day of March, 2019.

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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 4638 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 27th day of March, 2019.

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CERTIFICATE OF SERVICE

I certify that on March 27, 2019, I submitted the foregoing PETITION FOR LIMITED REHEARING 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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