IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL FOLEY, Appellant, vs. PATRICIA FOLEY, Respondent.	Supreme Court No.: 69997 District Court No.: R-11-162425-R UPI-294910200A

BY REQUEST OF THE COURT ORDER DATED 5/10/2019, THIS ADDITIONAL AMICUS BRIEF IS PROVIDED BY THE CLARK COUNTY DISTRICT ATTORNEY, FAMILY SUPPORT DIVISION

COMES NOW, the CLARK COUNTY DISTRICT ATTORNEY'S OFFICE, FAMILY SUPPORT DIVISION, through STEVEN B. WOLFSON, District Attorney, by and through Robert J. Gardner, Chief Deputy District Attorney, and files this Additional Amicus Brief. This Amicus Brief is made and based upon the pleadings and papers on file herein, the attached Points and Authorities, exhibit(s), if any, and oral argument, if any, at the time of the hearing.

Dated this ___24th ____ day of May, 2019.

Respectfully submitted,
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

By: Robert J. Gardner
ROBERT J. GARDNER, ESQ.
Deputy District Attorney
Nevada Bar #06983

LIMITED ISSUE IN OPPOSITION TO REHEARING REGARDING APPOINTMENT OF COUNSEL IN CIVIL CONTEMPT CHILD SUPPORT HEARINGS

This additional Amicus Curiae brief is provided at the Court's request by the Clark County, Nevada, District Attorney's Office, Family Support Division, ("DAFS"). This Amicus Brief is provided in support of the position that DAFS is the enforcing authority tasked with enforcing the Court's child support orders but we also assert that we are here to assist both sides of the case. Per NRS 125B.150(3) DAFS does not represent either party but is performing a public service on behalf of the State of Nevada.

In light of this key statute, DAFS would argue that this agency already assists parties on both sides of the case, specifically this Deputy tried to assist Mr. Foley by filing a Motion to Modify on 2-1-16, alleging income of at least $800 per month, but Mr. Foley failed to appear for the hearing on 5-7-2016 and the motion was denied. The Hearing Master is already able to order the D.A. to file motions or investigate items on behalf of parties on either side of the case. Additionally, Federal Performance Measures are set up to insure that parties on both sides of the case are treated fairly by the law. As such, the "government" does not represent either party on this case but is trying to guide the proceedings for the court to set reasonable orders that will actually get paid on a monthly basis.

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INTRODUCTION

The narrow issue remaining in Appellant's request for re-hearing of his appeal is whether he is entitled to an appointed attorney. Anytime the Court deems it appropriate, an attorney could be appointed to assist an indigent party, however, Mr. Foley has failed to demonstrate indigence and the record and testimony reflects that he has earned income from various types of self-employment over the years, including work and income doing Computer Technical Support, Real Estate Agent work, and Software work.

ISSUE PRESENTED

1. There is no requirement for appointed counsel on these facts using the *Rodriguez v Eighth Judicial Court*, 120 Nev. 798, 102 P.3d 41(2004), and *Turner v. Rogers*, 564 U.S. 431 (2011), analysis.

STATEMENT OF THE CASE

The Appellant's request for rehearing has been denied in part by the Court's Order filed 5/10/2019. Appellant has still failed to pay any child support since August of 2014, yet he has consistently reported that he is employed or self-employed. Mr. Foley's claims of indigency are refuted by the court findings and records over the years. Mr. Foley has never indicated he was living on the streets, or unable to take care of his own needs.

STATEMENT OF RELEVANT FACTS

The history of this case shows that Mr. Foley has repeatedly refused to provide tax returns or other profit and loss statements regarding his true income. Based on the testimony of Mr. Foley and the four financial sheets he has filled out (which are lodged with the court and usually not filed unless needed as evidence[1]), he indicates he was grossing up to $18,000 a year (Foley Financial Statement, April 15, 2015, See Amicus Exhibits - Financial Statements, 1-4 App 1-4). There were three different hearings scheduled for the express purpose of setting his child support based on his ability to pay (1 ROA 192-196, 65-71, 20-26). Mr. Foley refused to attend those hearings and refused to provide his tax returns as required by law and expressly stated in the Hearing Master's Recommendations which was approved by the Judge. NRS 125B.080(3); (ROA 74, MROJ (filed 6-8-2016, pg. 4).

The Hearing Master and District Court have made findings and orders that are based on the known information that was before the Court and determined that Mr. Foley does have the ability to make child support payments and that there is an

[1] Unfortunately several of Mr. Foley's Financial Statements are difficult to read as he filled them out by hand before the hearing, and they are scanned into our paperless system after court and sometimes they are difficult to read, but this is in part why the Court has frequently ordered him to provide additional proof of his income.

indication of possible willful underemployment. (See AA Vol. 2 at page 266 to 267, Order on Objection by Judge Rebecca Burton, dated 1/28/2016).

ARGUMENT

Appointing an attorney for Mr. Foley would not necessarily result in any better outcomes in light of his pattern of failing to cooperate with Court orders to provide proof of his income. Mr. Foley would still be required to attend all of his court hearings to testify and provide proof of his income, and to answer the Court's questions about work, assets, income, ability to work, bartered income, capable earnings, friends and family supporting him, etc. In light of the facts of this case, and the law as defined in the *Rodriguez* case, we believe Mr. Foley does not require an attorney to be appointed.[2]

The D.A. also believes that balancing the interests at stake on this case leans well in favor of the Mother – Patricia Foley, who has not received any financial help from Mr. Foley since 2014, despite the efforts of the Courts. (See *Id*, indicating the interests of the government and the child are that the Court order be

[2] The three enumerated financial factors of the *Rodriguez* case are difficult to evaluate when Mr. Foley fails to participate in the Court hearings, and his brief on appeal and re-hearing also fails to address these factors. Factors particularly relevant to the determination of whether a party to a civil proceeding is indigent are (1) the party's employment status and income, including income from government sources such as social security and unemployment benefits, (2) the ownership of any unencumbered assets, including real or personal property and monies on deposit, and finally, (3) the party's total indebtedness and any financial assistance received from family or close friends. *Id* at 805, 47.

enforced as efficiently and economically as possible, outweigh the interests of the adverse party where the case lacks complex issues and the adverse party has the ability to communicate any defenses to the court. *Id* at 50-51, and 812-813.).

Respondent's failure to participate in many of the child support hearings has been one of the largest problems on this case and the Court can properly assume his failure to provide proof of income is because it would show he makes more income than he claims. Of the ten (10) hearings that have occurred in the child support court, Respondent has failed to appear for six (6) of those hearings, which resulted in bench warrants for his failure to appear and resulted in his order not getting modified due to his failure to appear or provide proof of his 2015 and 2016 tax returns or profit and loss statements.

As far back as 8-11-2014, the Court has explained to him and his attorney at the time (Ms. Maskall) that his failure to come to court hearings and only make payment when arrested on a bench warrant or when the D.A. takes an involuntary payment from his bank account is the problem. "But deciding to pay zero, waiting to get arrested, it's not helping your case at all sir. There are three children that you have." **(Appellant's Appendix, hereinafter referred to as AA, Volume 1, pages 177 to 179. Transcript of 8-11-2014 Child Support Court Hearing).**

The Court temporarily modified his order down to $300 per month at that same hearing on 8-11-2014. DAFS and the Court have given Mr. Foley several

opportunities to modify his order, yet he has failed to provide the items requested, failed to attend hearings, and he has failed to make payments, even partial payments, toward the support of his children since 8/13/2014 when a $200.00 cash payment was received by DAFS as a purge/jail release from the hearing on 8/11/2014. Despite Mr. Foley's claims that he only had $17.00 in his bank account and his claim that he only had $50.00 on him when he was arrested, he was able to make the $200.00 cash jail purge release payment to get out of custody, as was wisely set by the Court based on his true ability to pay. **(See AA Vol. 1, page 182).**

Mr. Foley testified at the 4-15-2015 hearing that he needed to get out of custody and get back to work for various people who depend on his services. **(See AA Vol. 1, page 208, transcript of hearing 8/11/14).** On his financial sheets he lists his occupation as being Self Employed - Technical Support, and he testified he makes $800.00 to $1,000.00 per month and that he could bring records to prove his income. **(See AA Vol 1 at pg 176).** The District Court Judge's order on objection filed 2-22-2016 specifically found that Mr. Foley has the ability to pay**. (See AA Vol. 2 at page 266 to 267, Judge Rebecca Burton).** It should also be noted that the Hearing Master hand types the findings of the court as the hearing is occurring, as such the minutes and transcript often show many more details about Mr. Foley's income, and lack of efforts to find any other employment, and this

further explains how the Court finds the ability to pay and is ruling on the issues presented. (See *Noble v. Noble,* 86 Nev. 459, 465, 470 P.2d 430, 433, (Nev. 1970) "Findings may be implied if the record is clear and will support the order or judgment." Citing also *State ex rel. Dept. of Highways v. Olsen*, 76 Nev. 176, 351 P.2d 186 (1960); *Chisholm v. Redfield*, 75 Nev. 502, 347 P.2d 523 (1959).

At the 11/16/2015 hearing, Mr. Foley admits that he is working making $275 per week ($1,191.66 per month). **(See AA vol 1, page 222 Transcript from hearing 11-16-2015).** The record and findings indicate he is not indigent; rather he intentionally fails to pay support when he in fact has work and money. He has failed to make any payments for child support since 8/13/2014 $200.00 cash received by DAFS from the hearing on 8/11/2014. His order was modified down to $300 per month for these three children at that same hearing 8/11/14, yet he still failed to make any effort to make even partial payments after that hearing. He seems to be putting his needs over the needs of the children.

The record further indicates, Mr. Foley makes money doing computer work according to his ads on Craigslist, and his ads indicate he has a long list of clients and keeps busy. **(See AA, Vol. 1, pages 205 to 206, transcript of hearing 4-15-15 argued on the record).** Petitioner also advised DAFS that he now works for an employer and in lieu of a pay check he gets monthly housing, food, and his

employer pays for his car, all in an apparent ongoing effort to avoid paying child support.

This office, and the Clark County Child Support Court, handles more than 1900 hearings in court per month involving child support, and believes that the Court is an expert at determining whether litigants are truly unable to make payments, as compared to cases like this where the record reflects that Mr. Foley testified on numerous occasions that he is working and even admits income between $800 to $1000 per month or more, but the record shows he is not paying any child support since 8-13-2014. Zero paid since then (over four years ago by the time this brief is filed).

Many other cases with far fewer assets and income seem to be able to make payments without the need for the imposition of contempt time. For those that are truly unemployed, the Career Connections program is offered by the Goodwill Program to help them look for jobs and find employment. Some donate plasma, some collect and recycle cans and metals, and many do side jobs to earn money to pay their support order. Mr. Foley on the other hand seems determined to avoid and delay making any payments for years. The Court has to be able to apply reasonable pressure on Mr. Foley in order to persuade him into making payments to support his children under these facts. (See *Lamb v. Lamb*, 83 Nev. 425, 428, 433 P.2d 265, 267 (Nev. 1967), indicating the court has inherent power to enforce

its orders by contempt. Citing also *In re Chartz*, 29 Nev. 110, 85 P. 352 (1907), this court said: "The power of courts to punish for contempt and to maintain decency and dignity in their proceedings is inherent, and is as old as courts are old."). The Child Support Court has tremendous expertise at setting the right amount of time and purge amounts to civilly persuade payments to be made even in difficult situations such as this case.

On average, seventy-five percent of cases throughout the nation pay child support by wage withholding. In cases like this where the paying party has chosen to remain self-employed, and where he seems to continually work for cash or bartered income, the Court is the last line of defense to enforcing the Court's orders to pay child support and to coerce him to comply with the Court's directives. (See *Rodrigues v Eighth Judicial Court*, 120 Nev. 798, 102 P.3d 41, 2004 (Nev. Dec. 9, 2004) discussing how civil contempt is appropriate when the Court is assessing the ability to pay or the appointment of counsel).

An obligor asserting indigence, whose behavior over the years suggests that he is intentionally under-employed to avoid paying child support must provide convincing proof that his asserted indigence is due to circumstances other than avoidance of child support. The burden is upon the Respondent to show that it was not in his power to obey the Order. See *Steeves v. Second Judicial Dist. Court*, 59 Nev. 405, 411, 94 P.2d 1093, 1095 (Nev. 1939) (discussing how in a

divorce case the information regarding the financial condition and ability to pay is peculiarly within the knowledge of the party who owes child support.). The Respondent in the present case has not met this burden.

Remaining self-employed for years, while steadfastly insisting that the self-employment yields income less than someone working full time at minimum wage does not provide such proof. Indeed, if it proves anything, it proves that the obligor is intentionally under-employed to avoid paying child support. Not having shown through proof that he is indigent, and not having been found by a Court to be indigent (other than for purposes of excusing filing fees), Father has no right to an appointed attorney. This is not a *Turner v. Rogers*, 131 S.Ct. 2507 (2011) situation as Mr. Foley is not indigent. The District Court specifically found that he did have the ability to pay in the order on objection filed and dated 2/22/2016. **(See AA Vol. 2 at page 266 to 267, Judge Rebecca Burton).** The maximum purge amount ever set for Mr. Foley was $2000.00, and often much less. (ROA 172). DAFS and the Child Support Courts are in full compliance with the law and spirit of the *Rodgriguez* and the *Turner* cases.

This case is not about an indigent person's rights. Mr. Foley uses an email address that indicates he works as a paralegal – (PARALEAGLE@HOTMAIL.COM), and he admits he does tech support, software, and computers in general, making $275 per week ($1,191.66 per month).

(See AA vol 1, page 222). The chronic litigation on the issue of Mr. Foley's true income and the court records also suggest he would rather spend his time fighting the legal system than cooperating with the process to provide reasonable financial support for his three children. (See *Minnear v. Minnear*, 107 Nev. 495, 814 P.2d 85, indicating the Court can consider willful underemployment or unemployment in setting child support orders).

Since his Family Court case #D-08-403071began in 2008 Father has steadfastly chosen to remain self-employed while insisting that his income from such self-employment is meager, at best.[3] As the record reveals in both the D case and the R case, Father's claims of indigence from being self-employed have been rejected by the lower courts.

Here, the Court noted at the 11-16-2015 hearing, Father's failure to pay any child support for longer than a year. The Court listened patiently to Respondent's excuse for not paying and his conflicting answers about his income – see above

[3] In his 12/22/08 Financial Disclosure Form filed in his D case Father stated that his total average net monthly income was only $576.29 while his monthly expenses were $5,283. This wasn't believed by the Court when it set Father's child support at $700 per month in the 09/25/09 divorce decree. In his 02/24/11 Financial Disclosure Form filed in the D case Father indicated that he was self-employed – as a real estate agent -- but had no income. At an in-custody hearing in his R case on 10/30/13 Father said that he does side jobs through a private party and earns between $100 and $150 per week. Back in his D case, Father filed a motion on 02/14/14 seeking to modify custody and support. At page 4 of his motion he stated that his financial condition "has not changed much" and that his income from self-employment was $600 per month. At the 08/11/14 hearing in the R case Father indicated to the master that he was self-employed and earned about $800 to $1,000 per month.

footnote, where Father states on the one hand that he lives within his means but then later says that he is behind in his bills – and the master drew the only reasonable conclusion given the facts and record. Father was in contempt of the Court's support order. Mr. Foley also testified that he had $119.00 on his books at the time of the 11/16/2015 hearing. **(See AA Vol. 1, page 226).** The court came to the conclusion that the imposition of some jail-time and a release/purge amount that was far less than what Father was supposed to have paid during the preceding year, was the proper way to use civil contempt to try and coerce him to make a child support payment. The court should not be limited to what Mr. Foley has in his pocket at the time of any given hearing, since that would make nearly every case a non-paying case at the time of any court date. The overall picture of the case is what the court is using to make these rulings and such decisions should not be overturned on appeal since the lower court is much more familiar with the individual facts of the overall case.

The proper method of addressing this issue would be for Mr. Foley to voluntarily participate in each court hearing and provide the court with all of the information that was requested in those court proceedings. The District Court ruling specifically found that Mr. Foley had the ability to pay. **(See AA Vol. 2 at page 266 to 267, Order on Objection by Judge Rebecca Burton).**

Mr. Foley has chosen to avoid coming to court and instead seeks to fight the legal system through this appeal, while at the same time refusing to pay any child support since the year 2014. Refusing to work and support your children is absolutely a violation of the court order to pay child support. To see it any other way would mean that every parent subject to a child support order could quit their job and immediately stop paying child support. Appellant's willful underemployment was contemptuous behavior he committed in order to avoid paying child support. See, *Hildahl v. Hildahl*, 195 Nev. 657 (1979). As such, remanding him to jail with a purge amount based on his ability to pay was appropriate. The imposition of jail time is meant to encourage future compliance, and instill in the Appellant a desire to make sure he has the keys to the jail or complies with the order which is precisely the point of civil contempt. *Rodriguez v. Eighth Judicial District Court*, 120 Nev. 798, 815 & 814 (2004).

The ability to pay need not be immediate in the sense of presently having the money to pay the purge amount in one's pocket. The reality is that individuals who fail to pay child support sadly spend the "keys" on other things rather than choosing to pay child support. The spirit of *Turner* requires that any amount of a purge clause be within that person's ability. Mr. Turner frankly had no ability to pay a $5700 release amount. *Turner*, 564 U.S. at 437. This is especially true when considering his monthly obligation was approximately $200. *Id* at 436. The purge

amount was 28 times his monthly amount. In this case the highest purge amount set was $2000. (1 ROA 148:10). This was approximately 2.5 times Mr. Foley's monthly amount of $833.

To the extent this Court lends any credence to Mr. Foley's continued claims of indigency despite ample evidence to the contrary, the case should be remanded for Mr. Foley to provide the evidence ordered by the court and with the requirement that he appear at his hearings. The burden of proving his inability to comply with the order is on Mr. Foley. *Turner,* 564 U.S. at 436. Mr. Foley has continued to thumb his nose at the court by failing to provide his income tax returns as required (NRS 125B.080 and 1 ROA 74, &99). He has never provided any profit or loss statement or other accounting of his self-employment. 125B.080. He failed numerous times to appear in court and explain himself as is required under civil contempt. Under civil contempt the burden is on the contemptor to prove indigency and inability to pay, and why he is not in contempt of the court's order. *Turner,* 564 U.S. at 437 *Rodriguez v. Eighth Judicial District Court,* 120 Nev 798, 805 & 806; 102 P.3d 41, 46 & 47 (2004). Mr. Foley has refused to appear in court and refused to provide the evidence ordered by the court. As such, Mr. Foley literally left the court no choice but to find him in contempt for his failure to pay child support.

At the heart of every contempt hearing is the ability to pay. When Appellant was served with the "Order to Show Cause" that fact was highlighted in bold on page 2 of the document (ROA 12-13). It stated, "**The focus of this hearing will be your ability to pay.**" (emphasis in original, 1 ROA 13:1). The notice was clear and he was provided with a Financial Statement at his hearing (when he appeared) to fill out as required by *Turner,* 564 U.S. 449. (See Amicus Exhibits - Financial Statements, 1-4 App 1-4). There is every indication here that Mr. Foley had the ability to pay something each month but is choosing to spend his money elsewhere.

The District Attorney is acting as a neutral party and rendering a public service as representatives of the state pursuant to statute. NRS 125B.150 (3). The D.A. does not represent either party in an action such as this where no welfare is involved. Even in cases where cash assistance has been paid, the state only gets reimbursed for what was paid out up to the amount of the court's order. The State here is simply trying to get Mr. Foley to provide support for his children as is his duty as a parent. Part of the reason Child Support Programs exist is to ensure, where possible, that children do not become a burden to the State and tax paying public. Appointing an Attorney under these facts would amount to an additional strain on the tax payers that is not justified under these facts.

CONCLUSION

Based on the foregoing points and authorities, Mr. Foley's appeal should be denied, remittitur should be granted, and the bench warrant ordered at the last hearing should remain in effect in light of no payments being made since the year 2014 for child support. If Mr. Foley provides proof of his current financial status and cooperates with the Court, then the Court should consider modification of his order.

Dated this __24th _ day of, 2019.

Respectfully submitted,
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

By: Robert J. Gardner
ROBERT J. GARDNER, ESQ.
Deputy District Attorney
Nevada Bar #06983

ATTORNEYS CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(9), and NRAP 32 (4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This brief has been prepared in a proportionally spaced typeface using WORD 97-2003 in 14-point font using style, Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29 and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

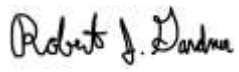
[x] Proportionately spaced, has a typeface of 14 points or more, and contains 3,696 words from the Statement of the Case to the Conclusion. DAFS requests permission of the court to slightly exceed the page and word limitations based on this brief being at the request of the Court for Additional Amicus Briefing;

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this ___24th ___ day of May, 2019.

Respectfully submitted,
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

By: 

ROBERT J. GARDNER, ESQ.
Deputy District Attorney
Nevada Bar #06983 and

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a copy of this Additional Amicus Curiae Brief upon all parties to the appeal as follows:

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

Daniel F. Polsenberg, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas Nevada 89169
Counsels for Appellant

Patricia Foley
8937 Austin Ridge Avenue
Las Vegas Nevada 89178
Respondent Pro Se

Dated this 24th day of May, 2019.

Signature of Moving Party

Somara Hok
Printed Name of Moving Party

1900 East Flamingo Road, Suite 100
Address

Las Vegas, Nevada 89119
City/State/Zip

(702) 671-9476
Telephone