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

REPLY BRIEF ON PETITION FOR LIMITED REHEARING

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INTRODUCTION

Amicus District Attorney Family Support Division (DAFS) is no friend of the Court. Only petitioner Michael Foley sought rehearing, yet DAFS now attacks the order of reversal. Worse, the DAFS wanders outside the record to malign Michael and asks this Court to enter factual findings in the first instance.

The issues on which this Court ordered briefing remain unaddressed. Michael still faces criminal contempt sentences without purge clauses, collection efforts by government inquisitors, and imprisonment without "specific findings regarding Michael's present ability to pay the purge amount." (Order 5.) These unique circumstances demonstrably violate Michael's rights under *Turner v. Rogers*, 564 U.S. 431 (2011) and *Lewis v. Lewis*, 132 Nev., Adv. Op. 46, 373 P.3d 878 (2016), and call for the appointment of counsel.

I.

DAFS ADDRESSES THE WRONG ISSUES

This Court directed DAFS to a clear path: address whether the district court's due process violations entitle Michael to appointed counsel. Instead, DAFS bucked and entangled itself in the underbrush, kicking

against this Court's decision and rummaging through a thicket of allegations for facts absent from the record. This Court should not join them in the muck.

A. This Court Already Found Error; DAFS Did Not Seek Rehearing

Patricia and DAFS chose not to seek rehearing. Yet DAFS refuses to acknowledge the violations that this Court identified.

1. The District Court Did Not Make a Proper Finding of Michael's Present Ability to Pay

In contrast with a monthly support obligation, what a contemnor must pay to get out of jail cannot be based on willful underemployment. *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 805, 102 P.3d 41, 46 (2004). Civil contempt cannot be imposed as punishment for "past bad acts" that leave a debtor broke. *Id.* The purge amount must reflect specific findings about the debtor's *present* ability to pay to secure an immediate release. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 633, 638 n.9 (1988).

Again and again, DAFS insists that the district court "found that Mr. Foley has the ability to pay." (Br. 5, 9, 11, 14.) But that was based

on "possible willful underemployment," the wrong standard. (Order 5.)

2. DAFS Cannot Relitigate the Violation

This Court vacated the district court's order for "depriv[ing] Foley of his due process rights." (*Id.*) However much DAFS disagrees, it forwent rehearing and cannot complain now.

B. This Court Cannot Reject Michael's Indigency in the First Instance

DAFS's brief is sluiced with slings and slurs against Michael. They slither in from outside the appellate record. They are false. None are for this Court's resolution.

1. Indigency Is Not Before this Court

Michael's ability to pay "has not been established" and "will be addressed on remand" under the proper standard. (Order 6 n.2.) This Court abstained from resolving that factual issue.

2. DAFS Flouts the Appellate Record

Even if this Court were equipped to conduct an evidentiary hearing, it could not credit what DAFS spews forth here. This Court "cannot consider matters not properly appearing in the record on appeal." *Carson Ready Mix, Inc. v. First Nat. Bank of Nev.*, 97 Nev. 474, 476, 635

P.2d 276, 277 (1981). DAFS nonetheless lards its brief with mischaracterizations in defiance of the record.

- One favorite refrain is that Patricia "has not received any financial help from Mr. Foley since 2014" (Br. 3; *accord* Br. 1, 4-7, 12, 15),[1] but the record from the district court stops in 2016. (2 App. 318.)
- Elsewhere, DAFS hypothesizes that Michael "works as a paralegal" based on an e-mail address (Br. 9); the record cite (1 App. 222) provides no support.
- DAFS also characterizes financial records in the separate divorce case; none are made part of the record. (Br. 10 n.3.)
- DAFS cites nothing for its accusation that Michael's employer pays his expenses directly to evade the support order. (Br. 6-7.)

This Court should not countenance such open contempt for the appellate record.

[1] Highlighting a temporary reduction in Michael's support obligation, DAFS ignores that it was increased back to $833/month. (2 App. 310:11-12, 311:25, 312:8.)

3. DAFS's Accusations Are False

The extrarecord allegations are not just improper evidence; they are false.

Some concern Michael's support, which is irrelevant to the issues on rehearing. Reprising the fallacy that debtors must funnel all payments through the state,[2] DAFS surmises that Michael has paid nothing while this case has been on appeal. The only record evidence from after 2016 shows that Michael *has* been providing continuous financial and other support (5 App. 508), including food, clothing, education, and medical needs.

Other misrepresentations challenge Michael's ability to pay. Michael previously debunked the falsehoods that he makes $18,000 a year or works as a paralegal. (Br. 2, 9; ARB 17-18 & n.3.)

4. Michael Cannot Pay a Large Purge Amount

DAFS's misapprehension of the facts and legal standards do not inspire confidence for remand. No legal presumption holds that Michael "makes more income than he claims" unless he produces profit-and-loss

[2] NRS 125B.150(1) and NRS 425.3822(1) authorize the state only to recoup public assistance. (ARB 23-24.)

statements and tax returns. (Br. 4.) During Michael's last imprisonment, he offered undisputed evidence that he had just $119 to pay for his release, not $2,000. (1 ROA 209:5; 1 App. 226:1, 228:12-21.) Were the matter not expressly left for remand, the only reasonable inference would be that Michael *cannot* pay $2,000.

II.

GIVEN THE CONSTITUTIONAL VIOLATIONS, MICHAEL IS ENTITLED TO COUNSEL

Because DAFS keeps insisting that the district court did not err, it leaves Michael's petition unchallenged. Michael has been sentenced to what amounts to criminal contempt in violation of due process and the right to counsel. The repeated violations necessitate appointed counsel.

A. The District Court Trampled the Line Between Civil and Criminal Contempt

Whether a contemnor "actually possesses the ability to secure his freedom" "is an important distinction between civil and criminal contempt." *Rodriguez*, 120 Nev. at 814, 102 P.3d at 51. The consequences of a wrong answer on ability to pay are grave: an indigent defendant is criminally imprisoned without counsel and without the means to secure a release. *Turner*, 564 U.S. at 445, 448.

This Court found that the process leading to Michael's imprisonment did not ensure that Michael would serve just a civil-contempt sentence, with the "keys of [his] prison in [his] pocket[]" to free himself at any time, *Hicks,* 485 U.S. at 633—rather than a criminal-contempt sentence that was expressly or effectively unconditional.

1. Michael Was Sentenced to Criminal Contempt without Counsel

Loudest rings DAFS's silence on Michael's objection to contempt sentences entered without a purge clause. This is the practice of staying unconditional sentences of contempt, but leaving the debtor no way to purge the contempt if the stay dissolves. (AOB 61-62; ARB 19-22; Pet'n 24-25.) In contrast to the *Turner v. Rogers* factors discussed below, unconditional sentences do not merely pose a *risk* of criminal punishment; they *are* criminal punishment. *Lewis*, 132 Nev., Adv. Op. 46, 373 P.3d at 881.

There is no dispute that Michael faced such unconditional sentences and that, under *Lewis*, Michael's "Sixth Amendment right to counsel was violated when the contempt order was entered after proceedings in which he was not represented by counsel." *Id.*

2. DAFS Seeks Collection, Even After Patricia Stopped

Turner cautions that government involvement in child-support collection creates asymmetries of representation that "more closely resemble debt-collection proceedings." 564 U.S. at 446, 449. That asymmetry increases the risk that the court will favor the government's argument that a debtor can pay a large purge amount over the debtor's argument that he cannot. Consistent with *Turner*, state courts across the nation recognize a right to counsel in this circumstance. (ACLUNV Rh'g Br. 2-3; ACLUNV Br. 15-22.)

Here, DAFS spearheads a collection crusade that Michael and his children never authorized and that Patricia (who knows that Michael is supporting his children) abandoned. DAFS exalts itself as "a neutral party" "here to assist both sides" in "performing a public service" (Br. i, 14), a facade that crumbles with DAFS's assessment that "this case leans well in favor of the Mother" and Michael becomes "the adverse party." (Br. 3-4.) But neutrality, sincere or feigned, scarcely matters.[3]

[3] Neutrality (or its appearance) poses its own problems: the fiction that DAFS evenhandedly supports child-support debtors heightens the danger that district judges will take DAFS's arguments more seriously than those of the unrepresented debtor.

DAFS "tr[ies] to get Mr. Foley to provide support for his children" (Br. 14), and when experienced DAFS attorneys and Michael disagree about Michael's ability to pay, DAFS wins.

3. The District Court Found Only "Underemployment," Not a Present Ability to Pay any Purge Amount

Crucial to getting the right answer on "ability to pay" is asking the right question. Asking the wrong question, such as the debtor's under-employment instead of the debtor's *present* funds to secure a release, deprive the debtor of liberty without due process. DAFS lays bare its preference for a *criminal* standard, punishing an impecunious debtor for "[mis]spend[ing] the 'keys'" to his liberty "on other things." (Br. 12, 13.)

Here, as this Court found, the district court excused the absence of "an express finding that he has the ability to pay." (1 App. 244:1-2) on grounds that "[w]e also take into consideration willful unemployment or underemployment." (1 App. 244:3-4.) The district court asked the wrong question, violating Michael's due process.

B. DAFS Does Not Dispute: Such Violations Call for the Appointment of Counsel

The violations are undisputable. The question is the remedy. The

unique circumstances of this case—the number, degree, and irreversibility of the violations—merit the appointment of counsel.

1. If Michael Is Found Indigent, He Must Be Appointed Counsel

Once a contemnor's constitutional rights are violated, he must "be appointed counsel if is he found to be indigent." *Lewis*, 132 Nev., Adv. Op. 46, 373 P.3d at 883. DAFS seems to equate indigency to destitution, looking for indications that Michael "was living on the streets, or unable to take care of his own needs" (Br. 1)—even suggesting that Michael "donate plasma"[4] and "collect and recycle cans and metals" (Br. 7). But indigency is not total destitution, such as might drive a person to panhandle or collect cans for recycling deposits, merely that "payments *for counsel* would place an undue hardship on his ability to provide the basic necessities of life for himself and his family." *Rodriguez*, 120 Nev. at 805-06 & n.12, 102 P.3d at 46 & n.12 (emphasis added) (citing *Nikander v. Dist. Court*, 711 P.2d 1260, 1262 (Colo. 1986) ("lack[ing] the necessary funds, on a practical basis, to retain competent counsel.")).

[4] Presumably DAFS wants Michael to *sell* his plasma, not donate it.

Based on *in forma pauperis* applications already granted, and Legal Aid's determination of income qualification, there is little question that Michael is indigent and entitled to appointed counsel.

2. Michael's Circumstances Call for Appointed Counsel

But even before that indigency determination, this Court should appoint counsel under the unique circumstances of this case.

a. CUMULATIVE VIOLATIONS

Even discrete violations entitle a debtor to counsel following an indigency determination. In *Rodriguez*, there was no purge-clause violation and the contempt was requested by the custodial parent, not the government. Likewise, in *Lewis*, the debtor faced the custodial parent.

In Michael's case, though, the violations pile one upon another: the purge-clause violations of *Lewis*, the absence of "ability to pay" findings of *Rodriguez*, *and* collection proceedings led by government attorneys, not Patricia.

b. UNCONSTITUTIONAL SENTENCES ALREADY SERVED

Both *Rodriguez* and *Lewis* came to this Court on a *stayed* sentence of contempt. This Court averted the worst constitutional harm—imprisonment without the means to pay—by directing the district court to

determine indigency first, and "thereafter to determine whether [the debtor] is in contempt." *Rodriguez*, 120 Nev. at 814, 102 P.3d at 52. Because imprisonment is such a severe deprivation of liberty, *Turner*, 564 U.S. at 445, the debtor's right to counsel *must* be resolved first. *Cf. In re Halverson*, 123 Nev. 493, 519, 169 P.3d 1161, 1178 (2007).

But Michael appeals after having completed consecutive sentences under an unconstitutional standard. He languished in jail before having the chance to object to the master's recommendation, and even after objecting, Michael served the full sentence before the objection was heard. There is no "determin[ing] indigency first" for him. He should not have to *again* prove indigency to be accorded the right of counsel.

CONCLUSION

DAFS's brief is disheartening, not just for its content but for the manner of its argument. DAFS ignores the task on rehearing, resurrecting a rejected standard and misapplying it to accusations outside the record. DAFS deploys these tactics in the district court, too, baiting unrepresented litigants into parrying the accusations—rather than calling out the improper practices and standards, as appointed counsel would.

Elsewhere, courts not only appoint counsel when the government

seeks an indigent debtor's imprisonment, but *inform* the debtor of this right. *In re Finding of Contempt in re Paternity of J.S.R.*, 2012AP1704, 2013 WL 12182221, at *2 (Wis. Ct. App. Apr. 18, 2013). What a difference that makes to impoverished debtors, disproportionately fathers of color and other oppressed groups, who are caught in this unforgiving system.

Michael did not have that chance. The district court applied a criminal-contempt standard, and Michael paid with his liberty. Having been treated like a criminal, Michael is entitled to counsel to defend against the contempt. This Court should grant rehearing.

Dated this 25th day of July, 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 2230 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 25th day of July, 2019.

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CERTIFICATE OF SERVICE

I certify that on July 25, 2019, I submitted the foregoing REPLY BRIEF ON 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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