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STATE OF MICHIGAN
IN THE 6TH JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

RANDALL ANTHONY SCOTTI

Petitioner/Defendant,

v.

SHERIFF MICHAEL BOUCHARD; & THE
PEOPLE OF THE STATE OF MICHIGAN,

Respondents/Plaintiff.

CASE No.: 2013-244387-FH / 1263446-FY

**PETITION FOR WRIT OF HABEAS
CORPUS**

TO EACH PARTY AND TO THE ATTORNEY OF RECORD FOR EACH PARTY OF
INTEREST IN THIS ACTION:

YOU ARE HEREBY NOTICED THAT BRIAN DOWNS, PETITIONER, on behalf of
RANDALL ANTHONY SCOTTI, Sues out this Petition for a Writ of Habeas Corpus to the
Oakland County Circuit Court, 1200 North Telegraph, Pontiac, Michigan 48341; on the Grounds
stated below.

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I - JURISDICTION & VENUE

1. THIS COURT HAS JURISDICTION pursuant to MCL § 600.4301 et seq.; MSA 27A.4301 et seq., & MCR §§ 3.303 as the causes for this action arises under the Michigan and United States Constitutions and laws.

2. Under MCL § 600.4307. Habeas corpus; right to bring action. “An action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever, except as specified in section 4310. ”

3. This Petition for a Writ of Habeas Corpus is to secure release from the restraints on Petitioner/Defendant’s liberty who is detained and supervised by Sheriff Michael Bouchard.

4. AS TO VENUE; The Oakland County Circuit Court is proper Venue as the Oakland County Jail is within its territorial Jurisdiction.

II – BRIEF DISPOSITION OF THE CASE

5. Randall Anthony Scotti was Ordered to pay Child Support in his Divorce Matter, Case No. 2004-695786-DM.

6. It is alleged by the State that SCOTTI failed to pay support between July 1, 2012 through December 1, 2012 at the time or in the amount Ordered in Violation of MCL § 750.165.

III – GROUNDS FOR ISSUING THE WRIT

A – CRUEL & UNUSUAL PUNISHMENT

7. Under the Eighth Amendment of the United States Constitution and Art. I, § 16 of the Michigan Constitution MCL § 750.165 is cruel and/or unusual punishment for its infliction of 4 years imprisonment and/or a \$2,000.00 fine or both for being late (even by one second) or short (even by one penny) in making a child support payment.

8. The Eighth Amendment to the United States Constitution states in pertinent part: “. . . nor cruel and unusual punishments inflicted.”

9. In *Trop v. Dulles*, 356 U.S. 86 (1958), the Earl Warren Court held that “The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

10. In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court held that the Eighth Amendment’s prohibition against Cruel and Unusual Punishment applies to the States via the Fourteenth Amendment.

11. In *Solem v. Helm*, 463 U.S. 277 (1983), the U. S. Supreme Court held that incarceration, standing alone, could constitute cruel and unusual punishment if it were disproportionate in duration with respect to the offense and the harshness of the penalty. In measuring disproportionality the Court weighed: i) the gravity of the offense and the harshness of the penalty; ii) the sentences imposed on other criminals in the same jurisdiction; and, iii) the sentences imposed for commission of the same crime in other jurisdictions.

12. Though retreating somewhat in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the split Court still held to a “gross disproportionality principle.”

13. The Supreme Court again confirmed its approach to Cruel and Unusual as an evolving measure of decency and what is cruelly disproportionate to the offense in *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

14. Article I, § 16 of the Michigan Constitution states in pertinent part: “. . . cruel or unusual punishment shall not be inflicted. . .”

15. The dominant test controlling determination of cruel or unusual punishment under both federal and state constitutional provisions is whether the punishment is in excess of any that would be suitable to fit the crime. *People v Turner*, 123 Mich App 600, 332 NW2d 626 (1983); *People v McCarty*, 113 Mich App 464, 317 NW2d 659 (1982); *People v Tanksley*, (1981) 103 Mich App 268, 303 NW2d 200; *People v Key*, (1982) 121 Mich App 168, 328 NW2d 609.

16. Violation of Michigan’s Constitutional prohibition against cruel or unusual punishment is determined by a three-pronged analysis: the first focuses upon proportionality; the second considers the evolving standards of decency; the third considers the prospect for rehabilitation. *People v Walker*, 146 Mich App 371, 380 NW2d 108 (1985).

17. The proportionality test applicable to a cruel or unusual punishment challenge to a sentence is whether the punishment is in excess of any that would be suitable to fit the crime; the decency test applicable to a cruel or unusual punishment challenge to a sentence looks to comparative law for guidelines in determining what penalties are widely regarded as proper for the offense in question. *People v Stevens*, 128 Mich App 354, 340 NW2d 852 (1983).

18. The proper procedure is to attack the constitutionality of the statute itself rather than a sentence imposed within the limits of the statute where a party contends that a statute provides for punishment thought to be cruel or unusual. *People of Oak Park v Glantz*, 124 Mich App 531, 335 NW2d 80 (1983).

19. In examining the application of proportionality we turn to the Michigan Supreme Court in the case of *The People of the State of Michigan v. Vito Monaco* (474 Mich. 48; 710 N.W.2d 46; 2006 Mich. LEXIS 196), which held that each month is a separate event, such that if the Defendant has been late by even one second or short by even one penny of the support order, he may be prosecuted under MCL § 750.165.

20. The Michigan Supreme Court:

An individual is guilty of felony nonsupport under MCL § 750.165(1) if the individual "does not pay the support in the amount or at the time stated in the order" The word "or," when read in context ("does not pay"), indicates that the statute is violated if the individual neither pays the ordered amount nor pays that amount when it is due. Thus, the plain language of MCL § 750.165(1) indicates that "the crime of felony nonsupport is complete when an individual fails to pay support in the amount ordered at the time ordered. In other words, an individual may be guilty of felony nonsupport if the individual either pays the full ordered amount after the due date or pays an amount less than the ordered amount before the due date and the due date passes without the individual making full payment. Thus, anyone who fails to pay the full ordered amount at the time ordered may be prosecuted under MCL § 750.165(1) even if that individual later becomes current on the obligation. . . . a person is subject to conviction and punishment each time the statute is violated . . ." *The People v. Monaco* (supra; emphasis added).

21. Per the Michigan Supreme Court being one penny short, or one second late, regardless of intent, is a felony punishable by up to 4 years imprisonment and/or a \$2,000.00 fine per each incident. Twelve months of payments either one second late or one penny short results in criminal liability with up to 48 years in jail (12 shortages x 4 years); even if at the end of the year the Obligor/Defendant has paid his \$0.12 arrearage on a private debt.

22. A temporary lay-off, a check lost in the mail, a bounced deposit that results in a nonpayment for insufficient funds, an internet interruption that prevents a money transfer going through, or any other number of life's unpredictable events can result in a criminal charge under MCL § 750.165.

23. By comparative analysis Wisconsin's felony nonsupport statute requires an intentional failure to pay any support for at least 120 days. *See* Wis. Stats. § 948.22 et seq.; *State of Wisconsin v. Oakley*, 2001 WI 103; 245 Wis. 2d 447; 629 N.W.2d 200; 2001 Wisc. LEXIS 434. This, as opposed to MCL § 750.165's one penny short, one second late 4 year felony.

24. By comparative analysis Indiana's felony nonsupport statute § 35-46-1-5 et seq. requires that "A person who knowingly or intentionally fails to provide support to the person's dependent child commits nonsupport of a child, a Class D felony [up to 3 years]. . ." and a class C felony (up to 8 years) if the unpaid support amount that is due and owing is at least \$15,000.00. An inability to pay as well as providing direct support in the form of food, clothing, shelter or medical care constitutes support as a defense. Therein, a support obligor could be significantly behind in Court Ordered Support payments, and still be supporting his/her child(ren). *See Grimes v. State*, 693 N.E.2d 1361, 1363 (Ind. Ct. App. 1998). This, as opposed to MCL § 750.165's one penny short, one second late 4 year felony.

25. By comparative analysis Ohio's felony nonsupport statute, § 2919.21 et seq. is similar to Indiana's. In pertinent part; § 2919.21(A) "No person shall abandon, or fail to provide adequate support . . . (B) No person shall abandon, or fail to provide support as established by a court order, to another person whom, by court order or decree, the person is legally obligated to support." Under § (D) the inability to pay is an affirmative defense. Under § (G) (1) the first offense is a first degree misdemeanor (6 months / \$1,000.00). If the offender has a prior conviction or "has failed to provide support . . . for a total accumulated period of twenty-six weeks out of one hundred four consecutive weeks" then it is a felony in the fifth degree (12 months / \$2,500.00) or may be held to a felony of the fourth degree (18 months / \$5,000.00) under further violations of the Section. This, as opposed to MCL § 750.165's one penny short, one second late 4 year felony.

26. Upon cursory review of Illinois and the remaining 46 states, Michigan is the only one penny short, one second late felony wherein the focus is on time and payment verses actual support of one's children. And, where there is no defense as to intent, ability to pay, or direct support in the form of food, clothing, shelter, or medical care.

27. To punish an individual for being one penny short or one second late with four (4) years of imprisonment and/or a \$2,000.00 fine for each event is cruelly disproportionate to the alleged offense, and is so by any reasonable measure established by the Michigan & U.S. Supreme Courts.

B – DEBTOR'S PRISON

28. MCL § 750.165 is in violation of the Fifth, Sixth, & Fourteenth Amendments of the United States Constitution as a Debtor's Prison scheme.

29. The Fourteenth Amendment to the United States Constitution states in pertinent part: “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

30. The United States Supreme Court has explicitly prohibited the practice of debtors' prisons. See *Williams v Illinois*, 399 US 235, 241-242; 90 S Ct 2018; 26 L Ed 2d 586 (1970), (“[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.”); *Tate v Short*, 401 US 395, 398; 91 S Ct 668; 28 L Ed 2d 130 (1971) (“[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.”) (quotation marks and citation omitted).

31. The United States Supreme Court has held that once a criminal defendant is sentenced to probation for a crime, it violates the Fourteenth Amendment to revoke his probation and sentence him to jail if he lacks the resources to pay it. See *Bearden v. Georgia*, 461 U.S. 660, 667-668 (1983); See also *Banks v. United States*, 614 F.2d 95, 100 n.13 (6th Cir., 1980); and, *Gross v. State* . . . 312 F2d. 1279 (US App Ct Illinois, 1963).

32. Statutes that punish persons for nonpayment of debts without permitting them to present evidence of their inability to pay are repugnant to the Constitution. Similarly, automatically revoking probation because one cannot pay their fine, without determining that they had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment do not exist is unconstitutional. Therein, revoking probation when the petitioner, through no fault their own, cannot pay the fine violates due process and equal protection because it is contrary to the fundamental fairness required by the Fourteenth Amendment. See *Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983). In *Bearden* the Court approvingly cited Justice Powell's *Zablocki* concurrence, which emphasized the distinction between "persons who shirk their moral and legal obligation to pay . . . from those wholly unable to pay." *Bearden v Georgia*, more particularly pp. 661-662, 672-673. See also *Zablocki v Redhail*, 434 US 374; 98 S Ct 673; 54 L Ed 2d 618 (1978).

33. Numerous Michigan court rulings (the *In Re Likine* aberration noted) have followed the Federal Courts in that statutory language as to the ability to pay is required in order to avoid violating the Fourteenth Amendment. Noteworthy cases include: *People v Ditton*, 78 Mich App 610 at 614-615; 261 NW2d 182 (1977). As to the inability to pay in contempt proceedings; it is only "the wilful, the recalcitrant, the obdurate or deceitful" . . . are not excused from their legal obligations." *Reed v Reed*, 53 Mich App 625, 627; 220 NW2d 199 (1974). Re a defendant's responsibility to pay for a court appointed attorney; "[o]nce an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship." *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). When criminal restitution payments are required; if a defendant asserts the inability to pay restitution or costs, the court must inquire into the defendant's ability or lack of it. *People v Music*, 428 Mich 356; 408 NW2d 795 (1987).

34. The Michigan Supreme Court, using extraordinarily harsh terms, struck down a statute because it permitted the jailing of a person for failure to fix his sidewalk even though he was ". . . so poor and indigent as to receive support from his charitable neighbors." *City of Port Huron v. Jenkinson*, 77 Mich. 414, 420 (1889). The Court held:

No legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible to perform, and then make his nonperformance of such a duty a crime for which he may be punished by both fine and imprisonment. . . . It is hardly necessary to say these two sections of the statute are unconstitutional and void. . . . They are obnoxious to our constitution and laws [and] are a disgrace to the legislation of the state. [Id. At 419-420].” (Emphasis added).

35. Numerous Courts have overturned debtor's prison schemes as unconstitutional. The courts have held that the defendant's inability to pay precludes imprisonment for either civil or criminal contempt. If the party does not have the money, it cannot be coerced – nor can it be extorted from third parties. This is true whether the party chose to frustrate the court Order or whether the inability is unintentional. See: *Rohleder*, 424 S.W.2d at 892; *Lynch v. Lynch*, 342 MD. 509, 677 A.2d 584 (1996); *Jones v. Hargrove*, 516 So.2d 1354 (Miss. 1987); *Wilborn v. Wilborn*, 258 So.2d 804 (Miss 1972); *In re: Nichols*, 749 So.2d 68 (Miss 1999); *Ex parte Rojo*, 925 S.W.2d 654 (Tex. 1996) (citing *In re Dustman*, 538 S.W.2d at 410); *Going v. Going*, 148 Ten. At 256, 256 S.W. 890 (1923); *State ex rel. Alderson v. Gentry*, 1990 WL 2976 (Tenn. Ct. App 1990); *Moss v. Moss*, LLR No. 9609060.CA (September 25, 1996).

36. In applying the Statute, MCL § 750.165(4) reads in pertinent part: The court may suspend the sentence of an individual convicted under this section if the individual files with the court a bond in the amount and with the sureties the court requires. At a minimum, the bond must be conditioned on the individual's compliance with the support order. If the court suspends a sentence under this subsection and the individual does not comply with the support order or another condition on the bond, the court may order the individual to appear and show cause why the court should not impose the sentence and enforce the bond. After the hearing, the court may enforce the bond or impose the sentence, or both, or may permit the filing of a new bond and again suspend the sentence”

37. Thereby, MCL § 750.165(4) provides for conditional sentencing which allows those defendants, by whatever fate, in a financial position to pay the bond (a debt which is 25% of their arrears) to retain their freedom, and those that cannot face incarceration and additional sanctions.

38. Therefore: MCL § 750.165 is a debtor's prison scheme where one's liberty is conditioned, explicitly so, upon an act, and wherein the Defendants' inability to meet the condition, i.e. pay the alleged debt, costs them their freedom. For the enforcement of private debt Defendants are incarcerated without the keys to their release.

C – EXCESSIVE BAIL

39. The Eighth Amendment to the United State Constitution provides that;
“Excessive bail shall not be required . . .”

40. Does the Eighth Amendment’s Excessive Bail clause of the United States Constitution apply to the States via the Fourteenth Amendment?

41. It is in violation of Art. I, §§ 15 & 16 of the Michigan Constitution to charge, hold, prosecute, try, and/or convict Petitioner under MCL § 750.165 when this statute violates our rights to Bail.

42. Art. I, §§ 15 & 16 of the Michigan Constitution states in pertinent part: “. . . All persons shall, before conviction, be bailable by sufficient sureties. . . . §16: Excessive bail shall not be required . . .”

43. Money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his presence is required or to assure the protection of the public. *People v. Edmund*, 81 Mich.App 743. The lawful considerations are: 1. the seriousness of the offense; 2. the protection of the public; 3. the previous criminal record; and, 4. the probability of the accused appearing at trial. The bail is to be a sum of money and there is no statutory authority to impose any other conditions on release. *People v. Williams*, 196 Mich.App 404.

44. Under MCL § 750.165(3) there is no bail available, but rather a pledge of payment of past debt in the form of a bond.

45. MCL § 750,165(3) reads in pertinent part:
Unless the individual deposits a cash bond of not less than \$500.00 or 25% of the arrearage, whichever is greater, upon arrest for a violation of this section, the individual shall remain in custody until the arraignment. If the individual remains in custody, the court shall address the amount of the cash bond at the arraignment and at the preliminary examination and, except for good cause shown on the record, shall order the bond to be continued at not less than \$500.00 or 25% of the arrearage, whichever is greater.

46. Herein bail is disallowed, rather a bond is required against the alleged arrearage (debt), which is in Violation of the United States and Michigan Constitutions.

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D – VIOLATION OF DUE PROCESS & EQUAL PROTECTION

47. The controlling question under this ground for Issuance of the Writ is; whether it is fundamentally unfair to prosecute and convict Petitioner for an alleged violation of MCL § 750.165 when from the very onset of the family law related case, from whence the alleged Order for Support emanated, to the arrest and prosecution, Michigan laws are implemented in discriminatory fashion against males.

48. Petitioner is male.

49. The Fourteenth Amendment to the United States Constitution states in pertinent part: “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Article 1, § 17 of the Michigan Constitution states: “No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.”

50. The U.S. Supreme Court held that “[w]hen government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.” *United States v Salerno*, 481 US 739, 746; 107 S Ct 2095; 95 L Ed 697 (1987).

51. Only a few decades ago our nation’s family law and child support statutes, both State & Federal, contrary to equal protection requirements, were expressly gender biased against men. These statutes assumed the near singular roles of male “provider” female “nurturer” regardless of family practices to the contrary.

52. Those statutes have been struck down as unconstitutional relics of the past and discriminatory.

53. The hearts and minds of humankind are not purified by the striking down of their prejudices that have been institutionalized in statutes and procedures. As a prime example, *Brown v Board of Education* was required nearly 90 years after the civil war settled the rights of African Americans. Though we struck down the “Dead beat Dad” laws, the prejudices and singular dimension stereotypes of “male provider” continue.

54. From observation, information and belief, mothers are still routinely awarded sole

custody of their children in contested cases at a rate exceeding 8:1; men are regularly denied access to their children without a finding that they are unfit, unwilling, or unable to parent, while this is not so for women (See *In re Troxel*, 530 U.S. 57); these very same men are brought before our courts on show cause hearings and prosecuted under MCL § 750.165 at rates at or exceeding 4:1 (based upon Michigan Dept. of Corrections statistics), and receive sentences averaging 1.4 times more than that of women so charged.

55. The prosecution of the Defendant is in violation of the U.S. Supreme Court's holding in *United States v Salerno*, 481 US 739, 746; 107 S Ct 2095; 95 L Ed 697 (1987), in that MCL § 750.165 is not being implemented in a fair manner.

56. Moreover, In Michigan family court proceedings the support ordered is determined under the "preponderance of the evidence" standard. In criminal proceedings the standard is "beyond a reasonable doubt," with a broad spectrum of constitutional protections which are not safeguarded in the family courts. These distinctions are not cognized in the criminal statute, nor in practice in the criminal courts. The child support order by explicit MCL § 750.165 language is integrated into the criminal proceedings. And thereby the criminal trial standard of "beyond a reasonable doubt" is diminished and the burden of proof is shifted to the defendant in violation of due process and equal protection rights under the Fourteenth Amendment.

IV - PRAYER FOR RELIEF

WHEREFORE, in the following order, Petitioner Prays this Honorable Court to:

1. Strike down MCL § 750.165(1) as Unconstitutional for Violation of our Rights to be Free from Cruel and/or Unusual Punishment;
2. Strike down MCL § 750.165(4) as an Unconstitutional Debtor's Prison Scheme;
3. Strike down MCL § 750.165(3) as Excessive Bail, or as a Bond in place of Bail where Bail is required, in Violation of our Constitutional Rights;
4. Dismiss the Criminal Prosecution for Violation of Petitioner/Defendant's Due Process Rights;

5. Grant other such Relief the Court Deems Appropriate and/or Necessary for the protection of Petitioner's Rights under the United States & Michigan Constitutions.

Dated this 21th day of May, 2013.

Brian Downs
Attorney for Defendant(Pro Bono)
29630 Orchard Lake Road
Farmington Hills, Michigan 49341

PROOF OF SERVICE

Service of a copy of this document was made this day upon all parties who have appeared or their attorneys of record by delivery or mail pursuant to MCR 2.107(c). I declare that the statement above is true to the best of my information, knowledge, and belief.

Date _____

Brian C. Downs(P47646)