

1 Eighth Amendment’s prohibition against Cruel and Unusual Punishment applies to the States via
2 the Fourteenth Amendment.

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

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

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

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

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

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

25 11. The proportionality test applicable to a cruel or unusual punishment challenge to a
26 sentence is whether the punishment is in excess of any that would be suitable to fit the crime; the
27 decency test applicable to a cruel or unusual punishment challenge to a sentence looks to
28 comparative law for guidelines in determining what penalties are widely regarded as proper for

1 the offense in question. *People v Stevens*, 128 Mich App 354, 340 NW2d 852 (1983).

2 12. The proper procedure is to attack the constitutionality of the statute itself rather than
3 a sentence imposed within the limits of the statute where a party contends that a statute provides
4 for punishment thought to be cruel or unusual. *People of Oak Park v Glantz*, 124 Mich App 531,
5 335 NW2d 80 (1983).

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

11 14. The Michigan Supreme Court:

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

26 15. Per the Michigan Supreme Court being one penny short, or one second late,
27 regardless of intent, is a felony punishable by up to 4 years imprisonment and/or a \$2,000.00 fine
28 per each incident. Twelve months of payments either one second late or one penny short results

1 in criminal liability with up to 48 years in jail (12 shortages x 4 years); even if at the end of the
2 year the Obligor/Defendant has paid his \$0.12 arrearage on a private debt.

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

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

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

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

1 under further violations of the Section. This, as opposed to MCL § 750.165's one penny short,
2 one second late 4 year felony.

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

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

11 VIOLETES DUE PROCESS & EQUAL PROTECTION

12 22. The controlling question under this ground for Issuance of the Writ is; whether it is
13 fundamentally unfair to prosecute & maintain a conviction against Petitioner for an alleged
14 violation of MCL § 750.165 when from the very onset of the family law related case, from
15 whence the alleged Order for Support emanated, to the arrest and prosecution, Michigan laws are
16 implemented in Discriminatory fashion against males in the enforcement of stereotypes, the
17 aggrandizement of state employee political careers, and the raking in of Title IV-D Federal
18 Block Grant Funds to the State.

19 23. Petitioner is male.

20 24. The Fourteenth Amendment to the United States Constitution states in pertinent part:
21 “. . . nor shall any State deprive any person of life, liberty, or property, without due process of
22 law; nor deny to any person within its jurisdiction the equal protection of the laws.” Article 1, §
23 17 of the Michigan Constitution states: “No person shall be compelled in any criminal case to be
24 a witness against himself, nor be deprived of life, liberty or property, without due process of
25 law.”

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

1 26. Only a few decades ago our nation was rampant with family law statutes that
2 explicitly expressed the then dominant position of our society that mothers were the natural sole
3 custodian, and that father's had to be coerced into taking on their allotted singular role of
4 "provider." Statutes, both State & Federal, were literally titled the "Dead Beat Dad" law(s).

5 27. Those statutes had to be struck down as unconstitutional relics of the past and
6 discriminatory.

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

12 29. From observation, information & belief, mothers are still routinely awarded sole
13 custody of their children in contested cases at a rate exceeding 10:1; men are regularly denied
14 access to their children without a finding that they are unfit, unwilling, or unable to parent, while
15 this is not so for women (See *In re Troxel*, 530 U.S. 57); these very same men are brought before
16 our courts on show cause hearings and prosecuted under MCL § 750.165 at rates at or exceeding
17 4:1, and receive sentences averaging 1.4 times more than that of women so charged (based upon
18 Michigan Dept. of Corrections statistics).

19 30. This discrimination is funded, and the State given an incentive, under Title IV-D of
20 the Social Security Act. Under this Act the states receive funding for the rate of support orders,
21 collection of current support, and the collection of arrears. The counties receive an additional
22 incentive from the State for the rate of paternity orders and cost effectiveness per case.

23 31. The monies that flow to the State under Title IV-D's child support system can and do
24 exceed the expenditures in the majority of the states, thereby representing a profit for the state in
25 creating single parent families. Michigan's excess inflow of IV-D funds resulted in a profit of
26 \$34,000,000.00 in 1996, and \$43,000,000.00 in 1998, a profit of \$77,000,000.00 in two years.

27 32. The outstanding child support owed by fathers is not an indication that fathers are
28 unfit, unwilling, or unable to parent, but rather, a testament of the continued Discrimination

1 against them and the violation of our children's corresponding right to access to both parents for
2 a profit!

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Petitions Prays this Honorable Court to:

5 1. Strike down MCL § 750.165(1) as Unconstitutional for Violation of our Rights to be
6 Free from Cruel and/or Unusual Punishment;

7 2. Memorialize as Absolutely Void the Alleged Criminal Conviction for Violation of
8 Petitioner/Defendant's Due Process and Equal Protection Rights;

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

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