

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

ROCKINGHAM SUPERIOR COURT

DOCKET # _____

DAVID W. JOHNSON v. ALBERT WRIGHT, JAIL SUPERINTENDENT

PETITION OF DAVID W. JOHNSON FOR WRIT OF HABEAS CORPUS

NOW COMES David W. Johnson, Petitioner in the above-name Petition, by and through is attorney Paula J. Werme, Esq., and hereby petitions this honorable Court for a WRIT OF HABEAS CORPUS pursuant to the provisions of RSA 534. In support of said Petition, Petitioner states the following:

1. The Respondent was found in “civil contempt” via an ORDER from the Derry Family Division **based on the fact that he failed to comply with his support obligation. In fact, what the court actually implicitly found was the elements of criminal contempt.** Under the facts found by the Court, he is entitled to a *trial de novo* in the superior court. RSA 599:1
2. Criminal contempt, however, has different due process protections than civil contempt. Among them are:
 - A. An action for criminal contempt should be treated as a misdemeanor. Mortgage Specialists v. Davey, 153 N.H. 764 (2006)
 - B. Criminal Contempt is criminal in nature, and as such this Court has jurisdiction over all appeals from criminal proceedings. RSA 592-A:2, RSA 599:1
 - C. Proof beyond a reasonable doubt of all elements of the crime, i.e. the existence of a valid court order, Defendant’s knowledge of the order, and wilful failure to comply. He challenges both the validity of the court order and whether or not his failure to comply was wilful, and he is entitled to a finding by a jury on all elements prior to incarceration.
 - D. Complainant appealed his finding of “civil contempt” to this Court, said appeal being dismissed in violation of RSA 599.1.

3. As a result of the Derry Family Division's finding of "civil contempt" a Writ of Capias was issued, and Petitioner was arrested and jailed on or about March 20, 2007. The Derry Family Division then promptly set a bail hearing for Monday, March 26, 2007. The very fact that the court set a bail hearing is indicative of the fact that the court itself doubted the Petitioner's ability to pay the past due child support it ordered to be paid by March 18, 2007.
4. "The purpose of the imposition of bail is to assure the defendant's appearance in court, and therefore the amount of bail may be set no higher than that figure reasonably required to accomplish this result. See ABA Standards Relating to Pretrial Release 5.3(b) and (d) (Approved Draft, 1968). Once bail is set at an amount determined to be reasonable the addition of the assessment contemplated by House bill 387 would render the total amount excessive, in violation of N.H. Const., pt. I, art. 33 and the eighth amendment of the United States Constitution." OPINION OF THE JUSTICES, 117 N.H. 382 (1977)
5. Bail is inappropriate for civil contempt in the first instance, particularly when it applies to the payment of past due child support. The client is jailed in this case under inappropriate civil contempt proceedings so that he complies with an order he cannot comply with in the first instance. Said ORDER clearly entitled him to a Writ of Habeas Corpus.
6. In this case, the "bail" is set in an amount to ensure compliance with the court order, and as such **is not for the amount of ensuring the Defendant's appearance in court**. The matter has been tried. There was a finding of the elements of **criminal contempt**, not civil contempt. He is entitled to a *trial de novo* in the Superior Court before a jury before being jailed.
7. The trial court has failed to make "findings of fact and rulings of law" submitted to the Court by the Defendant outlining the elements of both civil and criminal contempt, findings that make clear that the court has exceeded its authority by jailing the defendant on "civil contempt" absent a finding that he has the present ability to pay. State v. Wallace, 136 N.H. 267 (1992)
8. The trial court has also ignored the law handed to in to the judge at the bail hearing of March 27, 2006, that of the US Supreme Court case, Hicks v. Feiock, 485 U.S. 624 (1988), which states that fathers cannot be incarcerated for failure to pay child support if they are unable to comply with the order.
9. The trial court has failed in the first instance to set child support according to statutorily mandated guidelines, and has been asked to rectify that in a separate Motion for Guidelines Child Support submitted to the Court on March 28, 2007. It is noteworthy that the issue raised in support of said Motion is that **it was an abuse of the master's discretion** to order child support payments from the custodial parent to the non-custodial parent in the first instance absent any Child Support Guideline Worksheets being completed in the case in the first instance. In the Matter of Rohdenburg, 149 N.H. 276

(2003).

10. This issue that is was an automatic abuse of discretion for the master to order the custodial parent to pay the non-custodial parent child support over a period of years was NOT raised in the Petitioner's appeal in the NH Supreme Court, and the Motion for Guidelines's Child Support does not ask for retroactive relief. In the Matter of Rohdenburg, 149 N.H. 276 (2003). It does ask that the Petitioner's outstanding child support be held in abeyance until an order for guidelines child support from the mother to the father generates enough credit to wipe out the Petitioner's arrearage.
11. The trial court (Derry Family Division) is attempting to "vindicate" its authority using this finding of criminal contempt - **made without the due process protections of criminal law** - with respect to orders it made that were a clear abuse of discretion in the first instance. In addition, it plainly failed to make the requisite finding of valid court orders AND the Respondent's **current ability to pay** the arrearage in making its erroneous finding of **civil contempt**. Furthermore, it upheld those orders in its March 27 bail order when it was absolutely informed of both New Hampshire and US Supreme Court authority to the contrary. In its March 27, 2007 bail ORDER, the Court stated incorrectly, and in undersigned's opinion based on the contents of the bail hearing, http://werme.8m.net/Fathers_Rights/David_Johnson/civil_bail_hearing.html, knowingly, that it made a finding it never made with respect to the Petitioner's ability to Comply. Bail ORDER, 3/27/07, ¶ 2.
12. To the extent that the Derry Family Division made a finding that its original order was "valid" when it was informed both of the elements of civil contempt and criminal contempt, to the extent that its subsequent orders were in clear violation of the law, the court either upheld the order based on the fact that it "found," absent any evidence in the record that Respondent had the ability to pay the sum required of bail. It was also clearly asked to vacate its finding at the bail hearing of March 27, 2007 based on failure to make findings of fact on the record that Respondent had the ability to pay. To the extent it refused to do so, it either abused its discretion, knowingly affirmed its clearly erroneous finding of ability to pay, and/or outright lied in affirming its finding for purposes of punishing Respondent.
13. RSA 534:23 Bail, Crimes, states, "If the person is committed for aailable offense the court or justice may bail him by ordering him to recognize, with sufficient surety or sureties, in a reasonable sum, for his appearance at the court having cognizance of the offense, and shall certify the recognizance into the court."
14. Petitioner was not committed for aailable offense. His "bail" was set in the amount of a large portion of his past due child support arrearage ordered to be paid absent any finding that he had the ability to pay it. The Court has already had one illegal bail hearing, and has another one scheduled for Thursday, April 12, 2007. The Respondent cannot make the "bail" amount set by the court because he does not have it. Furthermore, no further

hearings are scheduled in the matter with the exception of the “bail review hearing.” It is not for purposes of ensuring his appearance at court because absent bail, he will be transported for his appearance. Bail may have been appropriate had he been charged in the first instance of criminal contempt to ensure his appearance at trial, but to set bail after a finding of “civil contempt” which includes an element of ability to pay is clearly erroneous. His remedy is for the Court to vacate the finding or release on a Petition for Writ of Habeas Corpus- not to post bail for a trial that has already happened.

WHEREFORE, Petitioner respectfully requests the following relief:

- A. That the Court examine the authority of the lower Court to issue a Writ of Capias based on contempt proceedings, as authorized under RSA 534:25.
- B. That this Court issue a Writ of Habeas Corpus forthwith.
- C. That the matter be scheduled on the docket within three business days pursuant to RSA 534:21.
- D. For other and such relief as may be just.

Respectfully submitted by and through his attorney,

David W. Johnson

April ____, 2007

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading was hand-delivered to _____, Rockingham County Department of Corrections, pursuant to service provisions in RSA 534: 14 this ____ day of April, 2007.

Paula J. Werme

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To: Albert Wright, Jail Superintendent
Rockingham County Jail
101 North Road
Brentwood, NH 03833

[L. S.] We command you that the body of David W. Johnson, in your prison, under your custody detained and restrained of his liberty, as is said, together with the day and cause of the taking and detaining of the said David Johnson by whatever name the said David Johnson may be called, or charged, you have before our justices of our superior court, holden at Raymond W. Taylor, Clerk, 10 Route 125, PO Box 1258, Kingston, NH 03848-1258 , within and for our county of Rockingham, immediately after the receipt of this writ, to undergo and receive what our said justices shall then and there consider of him in this behalf; and have you then and there this writ.

This writ shall be made returnable in such mode as to secure to the applicant the enjoyment of it in the most free, easy, cheap and expeditious manner.

Witness at Brentwood, NH , this day of, in the year 2007.

Judge

A true copy, attest.

Section 534:14

534:14 Service. – The service of the writ may be made by any person, by delivering the original to the person to whom it is directed, or, if the person for whom application is made is in prison, by leaving it with the jailer or deputy keeper at the prison, and paying or tendering the sum indorsed on the writ, if any.

Source. RS 202:14. CS 215:14. GS 224:14. GL 243:14. PS 239:14. PL 350:14. RL 406:14.

534:21 Hearing. – Whenever any person is brought before a court or any justice thereof as aforesaid the court or justice shall, within three days thereafter, examine the causes of detention.

Source. RS 202:21. CS 215:21. GS 224:21. GL 243:21. PS 239:21. PL 350:21. RL 406:21.

534:22 Judgment. – If the person imprisoned or restrained is so imprisoned or restrained without sufficient cause or due order of law, he shall be discharged; but if otherwise he shall be remanded.

Source. RS 202:22. CS 215:22. GS 224:22. GL 243:22. PS 239:22. PL 350:22. RL 406:22.

534:23 Bail, Crimes. – If the person is committed for aailable offense the court or justice may bail him by ordering him to recognize, with sufficient surety or sureties, in a reasonable sum, for his appearance at the court having cognizance of the offense, and shall certify the recognizance into the court.

Source. RS 202:23. CS 215:23. GS 224:23. GL 243:23. PS 239:23. PL 350:23. RL 406:23.

534:25 Contempt. – If the person is imprisoned or restrained by order of a justice, or of any court or authority other than the supreme or superior court or a justice thereof, for contempt, the proceedings in the order and the cause thereof may be revised, and the order affirmed, modified or reversed by the superior court or a justice thereof.

Source. 1862, 2600:1. GS 224:25. GL 243:25. PS 239:25. PL 350:25. RL 406:25.

534:27 Disobeying Writ. – If a person to whom a writ of habeas corpus is directed refuses to receive it, or conceals himself or avoids, so that the writ cannot be delivered to him, or, after the receipt thereof, and payment or tender of expenses when required as aforesaid, he refuses or neglects to yield obedience thereto, unless prevented by the sickness of the person detained or other necessity, he shall forfeit for every such offense, to the person aggrieved, the sum of five hundred dollars.

Source. RS 202:26. CS 215:26. GS 224:27. GL 243:27. PS 239:27. PL 350:27. RL 406:27.

534:30 Reimprisonment. – No person enlarged by habeas corpus shall again be imprisoned or restrained of his liberty for the same cause, unless he shall be indicted therefor, or convicted thereof, or shall neglect to appear according to his recognizance, or to find bail when required thereto; and if an officer or other person shall wilfully again imprison or restrain the person so discharged, except as aforesaid, he shall forfeit to the party aggrieved eight hundred dollars.

Source. RS 202:29. CS 215:29. GS 224:30. GL 243:30. PS 239:30. PL 350:30. RL 406:30.