O/A 11-7-84

IN THE SUPREME COURT OF FLORIDA

EUGENIA BOWEN, et al.,

Petitioners,

vs. Case No.: 64,906

FRANKIE L. BOWEN,

Respondent.

_____/

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the constitutional requirement of due process of law prohibits the imposition of a punitive sentence of incarceration in a civil contempt proceeding.

STATEMENT OF THE FACTS AND THE CASE

The respondent accepts the statement of the facts and the case as set forth in the initial brief of the petitioner.

SUMMARY OF ARGUMENT

The Second District's decision in this case applies the simple and long-established principle that no person shall be imprisoned as punishment, without due process of law. As such, the decision of the court below does not conflict with previous decisions of the Florida Supreme Court. Rather, the decision represents the consistent development of this principle of due process established by the Supreme Courts of Florida and the United States.

Stated most simply, the Second District Court of Appeal held that a jail sentence may be imposed in a civil contempt proceeding only if the sentence is accompanied by a "purge" condition that is fully within the power of the contemnor to accomplish. A jail sentence not accompanied with such a purge must necessarily be imposed to punish, rather than coerce, the prisoner. While such punishment often is a legitimate exercise of judicial power, the punitive sentence is in the nature of a criminal sanction and must only result from a procedure in which the accused is afforded due process of law.

The Supreme Court's decision in Faircloth, the primary case relied upon by the petitioner, does not seek to undermine this constitutional requirement of due process. Rather, Faircloth focuses on the adjudicatory phase of the contempt hearing. Faircloth held that a defendant may be held in contempt if he cannot prove that his failure to pay previously

ordered child support was because of a legitimate inability to pay. Bowen does not alter this result.

Bowen then addresses an issue wholly untouched by Faircloth, but fully addressed by many other decisions of the Florida Supreme Court: What are the prerequisites for a civil incarceration order after an adjudication of contempt? Bowen, in full recognition of constitutional requirements and Supreme Court precedent, answers that the jail sentence must be conditional; the order must establish a means by which the contemnor may purge his contempt, and the purge (whether payment of money or any other condition) must be something that the contemnor has the present ability to accomplish.

This result is supported not only by precedent but by common sense. The purpose of civil contempt is to achieve compliance with the existing support order, where such compliance is possible. Only if the purge is within the contemnor's ability can the goal of compliance be attained.

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IS MANDATED BY CONSTITUTIONAL CONCEPTS OF DUE PROCESS OF LAW.

This case involves the incarceration of a man under an order to pay support for his child. The courts below found that the somewhat incomplete record[1] supported a finding that the defendant, at some time in the past, had willfully or negligently divested himself of the ability to comply with the support order for the purpose of frustrating the order. However, the courts below also found that the defendant did not have the present ability to fully catch-up his support payments.

The trial court, in a proceeding with all of the hallmarks of a civil contempt proceeding, found that the past divestiture constituted

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[1] The defendant appeared without counsel; no court reporter attended the hearing; the only "pleading" filed in this phase of the case was a computer-generated Order To Show Cause; the only evidence presented by HRS as the moving party was a computer printout; and the contempt order was entered on a preprinted form with preprinted "findings of fact". The only factual information contained in the record on appeal appeared in the Settlement of Facts entered by the trial court as part of the appeal process pursuant to Rule 9.200(b)(3), Florida Rules of Appellate Procedure.

contempt of court.[2] The court imposed a jail sentence of 5 months, 29 days. In an effort to preserve the "civil" nature of the proceedings, the

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[2] This action to enforce the payment of child support was initiated by the Florida Department of Health and Rehabilitative Services, and not by the individual petitioner. Child support enforcement became a matter for state involvement in the civil courts in 1975 with the passage of P.L. 93-647, codified at 42 USC secs. 651 et seq., which added Title IV, Part D to the Social Security Act. Thus, these HRS enforcement actions in civil court are often known as "IV-D" actions. Section 101 of P.L. 93-647 created a wide array of support enforcement tools, and employed a system of incentives and sanctions to force the states actively to pursue the collection of child support, primarily to recoup welfare payments made under the AFDC program, as in the present case.

Before 1975, states' efforts to enforce the support obligation had occurred mostly through criminal abandonment and nonsupport actions, and the failure of the states to devote sufficient resources to such efforts was viewed by Congress as a significant cause of the increased cost of welfare programs. See Senate Report 93-1356, 4 U.S. Code Cong. & Admin News at 8149.

As a result of the federal requirements of Title IV-D, the State of Florida enacted Florida Statutes secs. 409.2551 et seq. in 1976. Section 409.2561 provides that an absent parent owes an obligation to the State for any welfare payments to his or her children. It provides that the custodian of children, by receiving AFDC payments, is deemed to have assigned to the State the full rights of the custodian and the children to seek support payments from the absent parent. This assignment of rights previously has been upheld by Florida courts. See Lamm v. Chapman, 413 So. 2d 749 (Fla. 1982); Parmer v. Parmer, 431 So. 2d 257 (Fla. 2 DCA 1983).

The act specifically permits HRS to petition courts "to utilize the contempt power" to enforce the support obligation. Fla. Stat. sec. 409.2561(1). The act, however, permits HRS to pursue these support remedies only "after determination of the responsible parent's reasonable ability to pay." Fla. Stat. sec. 409.2564(1). Actions are to be prosecuted by the IV-D program attorney in each judicial circuit. Id. Similarly, Florida Statutes sec. 61.181(4)(a) requires the administrator of any local support enforcement system "to investigate and enforce" support payments.

It should be noted that, in fact, this action for contempt was started by a computer print-out of a order to show cause, with no petition from HRS or anyone else, no investigation of reasonable ability to pay, and no participation by the program attorney until after the appeal was filed. This order to show cause was prepared by the local 61.181 office and submitted to a judge for signature, with no investigation of the circumstances of nonpayment. If HRS had followed the law and investigated the case before preparing a petition, its attorney would have seen that Mr. Bowen did not have the present ability to pay, due to involuntary unemployment. (Polk County's unemployment rate was almost 18% at the time.) Both common sense ("you can't get blood from a stone") and Rule 2.050(d) ("The signature of an attorney shall constitute a certifi-

trial court also ordered that the defendant could purge himself of his contempt by paying $916 to HRS.[3] The court made no finding that the defendant had the ability to pay this purge amount, and, indeed, ruled a few days later that the defendant was indigent for purposes of the appeal of his sentence.

In reviewing the sentence, the Court of Appeal looked behind the formality of the purge provision, and held that an unrealistic purge was the equivalent of no purge at all. See also Smith v. Miller, 9 FLW 1272 (Fla. 4 DCA 1984). If there is no effective purge, the court ruled, the sentence necessarily is punitive and the procedure to arrive at the sentence should have had the characteristics of a criminal contempt proceeding. As summarized by the court below: "[E]ither the entire proceeding was civil in nature and the petitioner should not have been sentenced to prison, or the proceeding became criminal in nature and petitioner could properly have been imprisoned but was entitled to counsel at the contempt hearing." Bowen v. Bowen, 9 FLW 294, 296 (Fla. 2 DCA 1984).

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[2] continued

cate by him that he has read the pleading or other paper; [and] that to the best of his knowledge, information, and belief there is good ground to support it ....") would have intervened to prevent the initiation of contempt proceedings against Mr. Bowen and hundreds of other unemployed individuals. HRS' complaint, at page 11 of its brief herein, that those who petition for contempt will now have to investigate the truth of their allegations of willful nonpayment, shows clearly the desire on the part of HRS and its attorneys to continue violating Rule 2.050(d) and Florida Statutes sec. 409.2564.

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[3] This was the entire amount that the defendant had fallen behind on his support payment.

THE SUPREME COURT'S DECISION IN FAIRCLOTH ESTABLISHES THE CONDITIONS FOR AN ADJUDICATION OF CIVIL CONTEMPT, BUT DOES NOT DISCUSS THE CONDITIONS UNDER WHICH INCARCERATION CAN BE THE SANCTION FOR SUCH CONTEMPT. BOWEN INVOLVES ONLY THE CONDITIONS OF SENTENCING TO JAIL.

The Second District's discussion of the sentencing phase of a contempt proceeding should not be confused with the Supreme Court's discussion of the adjudicatory phase of such proceedings contained in Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976).[4] The Faircloth decision focused on the elements necessary to sustain an initial adjudication of civil or criminal contempt. For both varieties, there must be an express finding that either "(1) the petitioner presently has the ability to comply with the order and willfully refuses to do so, or (2) that the petitioner previously had the ability to comply, but divested himself of that ability through his fault or neglect designed to frustrate the intent and purpose of the order." 339 So. 2d at 651. Faircloth then stated, in passing, that a defendant could be jailed for either sort of contempt. Id. at 652. But Faircloth did not attempt to set forth the various conditions upon which jailing might be a permissible sanction for criminal or civil contempt; that

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[4] See, e.g., Smith v. Miller, 9 FLW 1272 (Fla. 1 DCA 1984), where the court noted exactly this distinction and affirmed the finding of contempt under the "second prong" of Faircloth, described infra.

issue simply was not before the Court.[5]

The Faircloth decision itself cites with approval the "logic and reasoning of Judge Smith in his cogent dissent to the decision here under review." That decision states:

> The mandate of State ex rel. Trezevant v. McLeod [citation] seems to me to be clear enough: that an order of commitment for civil contempt, arising from a party's willful refusal to obey an order entered to coerce his action for the benefit of another, must be based on an affirmative finding that the party has power to obey, "else it is void". The District Court of Appeal, Third District, has honored that rule. Ratner v. Ratner, 297 So. 2d 344 (Fla. App. 3rd 1974).
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> A finding that he upon whom the order operates must have present power to obey is required by the historic nature of the contempt process. Faircloth v. Faircloth, 321 So. 2d 87, 92-93 (Fla. 1 DCA 1975) (Smith, J., dissenting), rev'd, 339 So. 2d 650 (Fla. 1976).

It is worth noting that the majority decision of the First District Court of Appeal in Faircloth, which was reversed by the Supreme Court, specifically held that a civil contempt order could jail a defendant regardless of present ability to pay the purge because "[p]unishment may also be necessary in civil contempt in order to get the offender's attention and

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[5] The petitioner's repeated claim that Bowen "effectively eradicates the second prong of the Faircloth test" simply ignores the fact that a trial court can still hold a defendant in civil contempt for his past willful failure to comply with a support order. Bowen, and the numerous prior decisions of the Supreme Court discussed at p. 10, infra, only prohibit the judge from punishing the defendant for the civil contempt. The judge can still fashion an order to force the defendant to remedy his past violation. The defendant, if healthy, can be ordered to look for work; if he has assets, they can be ordered transferred to the plaintiff; if he has wages, they can be attached. The petitioner insults the creativity of Florida's trial judges with the suggestion that judges can only enforce orders by throwing people in jail.

thereby obtain future compliance after release." 321 So. 2d at 90. Any civil imposition of a "rehabilitative" jail sentence, historically the province of criminal incarceration, was rejected by Judge Smith and by the Supreme Court. This theory of "preemptive coercion" propounded by the First District, and rejected by the Supreme Court, is very similar to the argument now presented to the Court by HRS: If we cannot terrorize support payors, none of them will pay.[6]

The argument was rejected in 1976 and should be rejected now. Due process is not compatible with using a civil jail sentence "to get the offender's attention," id., or "to coerce the absent parent to comply with the court's order in the future." Brief of the Petitioner at 28.

Faircloth neither mandates nor permits a holding that adjudication under its "two prong" test justifies incarceration of a civil contemnor without regard to his actual ability to comply with the purge provision in the order. Bowen properly recognizes that such a holding would be violative of due process; and Bowen therefore holds that a sentence of incarceration imposed in the absence of a finding of ability to comply, supported by facts in the record, can be imposed only in the context of a criminal contempt proceeding.

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[6] The Brief for the Petitioner at 28 sums up the core of HRS' argument as follows: "Incarceration in civil contempt proceedings does not serve as punishment but rather to coerce the absent parent to comply with the court's order in the future. Petitioner suggests that if an absent parent is aware that he may be incarcerated he will meet those obligations when he has the ability to do so. Conversely, if he knows that he cannot be incarcerated so long as he does not have the ability to do so on the day of hearing, then he has no incentive to meet those obligations during the period of time when he does have the ability to do so."

BOWEN'S REQUIREMENT OF A PURGE WITH WHICH THE CONTEMNOR CAN COMPLY IS IN FULL ACCORD WITH ESTABLISHED PRECEDENT OF THE FLORIDA SUPREME COURT.

The decision of the district court of appeal is directly supported by, and is in full accord with, a line of Supreme Court decisions beginning at least with State ex rel. Trezevant v. McLeod, 126 Fla. 229, 170 So. 735 (1936), and continuing through Demetree v. State ex rel. Marsh, 89 So. 2d 498 (Fla. 1956), Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976), Pugliese v. Pugliese, 347 So. 2d 422 (Fla. 1977), and Andrews v. Walton, 428 So. 2d 663 (Fla. 1983). The Bowen decision also is in direct accord with decisions of the First and Third District Courts of Appeal. See Robbins v. Robbins, 429 So. 2d 424 (Fla. 3 DCA 1983); Ponder v. Ponder, 438 So. 2d 541 (Fla. 1 DCA 1983).

The line of precedent directly supporting the Bowen decision begins with State ex rel. Trezevant v. McLeod, 126 Fla. 229, 170 So. 735 (1936). Because this is an older decision, it is necessary to recall that the content of the "due process" protection has changed and expanded over time,[7] as has the terminology of the distinction between civil and criminal

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[7] For example, the generalized right to counsel in criminal cases resulting in possible imprisonment was established by the United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963). The right to counsel was expanded to include those actions denominated "civil" if incarceration was a possible result in 1967. See In re Gault, 387 U.S. 1 (1967). In 1972 the right to counsel was established in all cases involving possible jail sentences, even brief sentences. Argersinger v. Hamlin, 407 U.S. 2006 (1972). The right to the full range of criminal-law due process protections for defendants in criminal contempt proceedings was recognized by the Supreme Court of Florida in Aaron v. State, 284 So. 2d 673 (Fla. 1973). That this includes appointed counsel for indigents threatened with punitive incarceration for contempt was recognized in Andrews v. Walton, 428 So. 2d 663 (Fla. 1983).

contempt. Nevertheless, it is unmistakably clear that the Florida Supreme Court in Trezevant reached precisely the same conclusion as did the Second District in Bowen.

Trezevant, in the language of the day, recognized the difference between a "process" contempt and a "contempt being in its nature a punishment." A process contempt is a "commitment for refusing to obey an order ... based on an affirmative finding that it is within the power of the defendant to obey the order, and such finding must be made to appear on the fact of the order of commitment ...." Id. 170 So. at 735. It is the equivalent of our modern civil contempt order. Compare Andrews, 428 So. 2d at 665. By contrast, the punitive contempt is "predicated solely on a finding of past noncompliance with the court's order, and not on any present failure to comply therewith, although able to do so." 170 So. 2d at 735. This version of contempt is equivalent to our modern indirect criminal contempt.

The defendant in Trezevant had failed to pay alimony as ordered in the divorce decree. The trial court sentenced the defendant to jail "until he complies", but the trial judge made no finding that the defendant was presently able to comply. The Supreme Court held that, in the absence of such a finding, the sentence could not be a "process" or civil contempt.[8] The Court held that the defendant must be discharged from

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[8] Confronted repeatedly with the empty formality of trial court "findings" of ability to pay, several appeals courts later added a requirement that the record must also support the finding of fact. See, e.g., Murphy v. Murphy, 370 So. 2d 403 (Fla. 3 DCA 1979) ("orders holding a person in contempt must show on their face the requisites for their validity and the record must support these elements"); Smith v. Miller, 9 FLW 1272 (Fla. 1 DCA 1984). The issue of the sufficiency of the factual showing for a finding of ability to pay is not before the Court in this case, since the courts below specifically found that Mr. Bowen did not have the present ability to pay the purge as ordered. Nevertheless, HRS seeks to

custody because of the indeterminate punitive sentence. Id. at 735-36[9]

In Trezevant the Court held, in effect, that a defendant who could in the past but not in the present comply with a court order was entitled to criminal-law due process, as it existed in that era.[10] In Bowen. the court of appeal has simply held that a defendant in exactly the same

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[8] continued

introduce this issue repeatedly in its brief. Although respondent addresses the HRS argument, infra at 18, respondent suggests that this case should not be the vehicle for the Court's resolution of the proof-of-ability issue.

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[9] As Judge Smith stated in his dissenting opinion adopted by the Supreme Court in Faircloth: "The Supreme Court might have regarded the Trezevant commitment as a coercive civil order void for lack of a finding that the defendant had power to obey or as a punitive criminal contempt order void for lack of a definite term of imprisonment. The Court chose the latter course." Faircloth v. Faircloth, 321 So. 2d 87, 93 (Fla. 1DCA 1975)(Smith, J., dissenting), rev'd, 339 So. 2d 650 (Fla. 1976).

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[10] Compare the following language of the United States Supreme Court, which articulated the same rule of law eleven years later:

> Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or if it violates an order of the referee, a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow. It should not be necessary to say that it would be a flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed. Maggio v. Zeitz, 333 U.S. 56, 64 (1948) (emphasis added).

It would seem that such ransom is exactly what HRS has in mind in this case. Starting from the premise that the defendant has divested himself of the ability to pay the support obligation (and whether this is wrongful or not, it means that such payment is presently impossible), the brief of the petitioner takes the position that the defendant will come up with the purge amount from somewhere: "Criminal contempt proceedings will serve to punish, as they are intended to do, but will not serve to coerce the absent parent into compliance with the court's order. While a criminal contemnor is serving his sentence, his children are either starving in the street or being supported by the taxpayers of the state. A criminal contemnor could not be released from confinement even if he paid ten

position is entitled to the level of due process protection generally afforded criminal defendants in our era.

That decision by the Second District Court of Appeal was not a departure from existing law. In fact, the Florida Supreme Court directed exactly this result in Garo v. Garo, 347 So. 2d 418 (Fla. 1977).[11] In Garo, the Court stated: "Petitioner contends that the order of contempt is fatally defective in that it lacks specific findings as to his present ability to pay. We agree and have so held in Faircloth ...." Id. at 419.

Similarly, Pugliese v. Pugliese, 347 So. 2d 422 (Fla. 1977), when read in conjunction with Andrews v. Walton, 428 So. 2d 663 (Fla. 1983), dictates the result reached by the Second District in Bowen. In Pugliese the Court held that due process required a trial judge, if he was of a mind to punish rather than coerce a defendant, to treat a contempt proceeding from the start as a criminal action under Rule 3.840. Andrews recognized explicitly that due process now requires, in addition to the Rule 3.840 protections, appointment of counsel for indigent defendants if imposition of a punitive jail sentence is a possible result of the proceed-

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[10] continued

million dollars toward the support of his children." Brief of the Petitioner at 28. Apart from their obvious error in implying that a criminal contempt order cannot contain a purge provision, see Pedroso v. State, 9 FLW 1214 (Fla. 3 DCA 1984), the attorneys for the petitioner clearly contemplate that a civil contemnor with no present ability to pay will often be "ransomed" by his friends or family (perhaps even with ten million dollars!).

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[11] Indeed, the First District Court of Appeal in 1977 interpreted the main decision relied on by the petitioner herein, to require a present ability to pay the purge in a civil contempt action: "The direction of the court that Ms. Crutchfield pay the remaining balance of $575.00 in attorney's fees or be held in contempt of court, without an express finding that she had the present ability to comply with the order of the trial court, is inconsistent with a recent opinion by the Florida Supreme Court in Faircloth ...." Crutchfield v. Crutchfield, 342 So. 2d 831, 832 (Fla. 1DCA 1977).)

ings. 428 So. 2d at 665.

In addition to prescribing the criminal process necessary for a punitive jail sentence, the Supreme Court in Pugliese also set out the fundamental requirement of a civil order of incarceration: An "order may not be sustained as being for civil contempt [if] no opportunity to purge was afforded." 347 So. 2d at 426 (emphasis added).

In Pugliese, the trial judge had sentenced the defendant to 13 days in jail with no provision for purging the contempt. In the present case, the trial judge issued a sentence of 5 months, 29 days and added as a formality a purge that was almost five times greater than the defendant's ability to pay. The Second District simply applied Pugliese's "opportunity to purge" requirement to mean that the defendant must have a real opportunity to purge; i.e., that the defendant is able, within his present ability, to accomplish the purge.

After deciding that the purge requirement in the trial court's order was the functional equivalent of no purge order at all, the Bowen court correctly concluded that the order was a criminal contempt order under Pugliese. The court therefore applied the proper standard under Andrews to determine that appointed counsel and Rule 3.840 protections should have been available to the defendant. Any other result "flirts with procedural due process flaws." Pugliese, 347 So. 2d at 426.

The petitioner's argument that Faircloth sought to establish a different rule, allowing "preemptive coercion", ignores the Supreme Court's own treatment of that decision. If the Faircloth Court had intended to establish a rule that permitted a defendant to be incarcerated for civil contempt when he had no present ability to pay the purge amount (setting aside for the moment the obvious constitutional deficiency of such a rul-

ing), the same Court would not have reiterated the very next year in Pugliese the requirement that civil incarceration requires an opportunity to purge out of jail. See 347 So. 2d at 426. Similarly, a unanimous Court in 1983 summarized the holding in Faircloth as follows:

> In that case, we held that, to satisfy due process, a person could not be adjudicated guilty of failing to pay alimony or child support and sentenced to imprisonment conditional upon payment unless the trial court finds that the person (1) has the ability to make the payments; and (2) willfully refuses to pay. Consequently, if the requirements of Faircloth are met, an indigent parent cannot be imprisoned for failure to pay child support because, upon a showing of indigency, the trial court cannot make the essential finding that the indigent parent has the ability to pay. ...[T]he parent who is unable to acquire the funds necessary to purge himself will not be subject to imprisonment in non-support civil contempt proceedings ...." Andrews v. Walton, 428 So. 2d 663, 666 (Fla. 1983)(emphasis added).

This clear statement by the unanimous Court can leave no doubt that the Second District in Bowen reached the right result for the right reasons. The decision should be affirmed.

> AN EXPLICIT FINDING OF PRESENT ABILITY TO COMPLY WITH THE PURGE PROVISION, SUPPORTED BY COMPETENT EVIDENCE IN THE RECORD, IS CONSTITUTIONALLY REQUIRED TO SUPPORT A JAIL SENTENCE IN A CIVIL CONTEMPT PROCEEDING.

Even though courts use the phrase "ability to pay" throughout all phases of civil contempt proceedings, there is a critical distinction between a trial court's finding of ability to pay at the adjudicatory phase,

and the required finding of such ability at the sentencing phase. For example, the court could consider the defendant's potential wage earning ability, even if the ability were not fully realized, in determining that he had the past or present "ability" to pay the support award. Compare Scanlon v. Scanlon, 154 So. 2d 899, 903 (Fla. 1 DCA 1963)(affirming a support award of 78% of husband's income apparently based on earning potential). The court would then consider whether the defendant was failing to realize this ability for the purpose of avoiding his support obligations. If so, a finding of civil contempt would be proper. Probably every trial judge in Florida has held a defendant in contempt on similar findings, and Bowen would not alter this result as to future defendants.

But this version of "ability" is totally irrelevant to the issue of setting a purge amount after the finding of contempt. The finding of "ability" in the adjudicatory phase only addresses the defendant's ability to accrue and pay relatively small increments of money each week or month. Many defendants have failed to pay on orders of $10 or $15 per week even when they are working, and these failures have continued for months and years. Such defendants properly may be held in civil contempt after these small weekly obligations have accrued into much larger arrearages of $961, $2,000 or more.

Yet very few of these defendants who have failed to pay at all will have saved up their money for the day of reckoning. Unless trial courts carefully make an additional finding, based on affirmative evidence in the record, of an additional "ability" to actually comply with the purge, defendants will continue to be jailed illegally.

Only if "ability to pay" means present, liquid ability to pay does the contemnor "hold the key to his cell." Cf. Andrews, 428 So. 2d at 666.

If the defendant's brother owes him $300, the defendant must be given a chance to collect it. If the brother will not pay, the defendant cannot be held "hostage" until the brother does pay. Cf. Maggio, 333 U.S. 56, 64 (1948). If the defendant owns a truck, he can be ordered to sign it over to the petitioner or he can be ordered to sell it, but its cash value cannot form the basis of the finding of ability to pay; the defendant simply does not have the money that the court is attributing to him.

This finding of real, present ability to pay is constitutionally required in civil contempts because the defendant can only be jailed for not doing what he can do. He cannot be jailed for not doing what he should have done. He must have the key to his cell, and cannot be punished for having lost the key along the way.

Some persons who have failed in their support obligations obviously deserve to be punished--jail might well be an appropriate place for those defendants described above who have never paid support, for example. But the Constitution requires that those who are found to deserve such punishment--incarceration--be selected in a way that meets the requirements of due process. This applies to accused murderers, accused shoplifters and accused contemnors with equal force. See Aaron v. State, 284 So. 2d 673 (Fla. 1973).

A judge who jails a civil contemnor who does not have the present ability to pay the purge has deprived the defendant of due process. Therefore, part of the process that is "due" or required before jailing in the civil context is an explicit finding based on clear evidence in the record that the defendant can really pay the purge established by the court. Doubt in this regard must be resolved in favor of the accused, and his transgressions must be referred to the criminal system where they can

be punished without the need to consider his ability to pay a purge. The finding of ability to comply with the purge should recite the facts upon which it is based. In the alternative, the court must determine an effective, coercive alternative to jail in order to enforce the support obligation in the civil proceeding.

THE BOWEN DECISION DOES NOT ALTER THE BURDEN OF PROOF IN CIVIL CONTEMPT CASES AND DOES NOT ADVERSELY AFFECT THE ABILITY OF THE TRIAL COURTS TO ENFORCE SUPPORT ORDERS.

Because HRS misses the important distinction between the adjudicatory and sentencing phases of a civil contempt proceeding, its brief somewhat hysterically prophesies the end of child support enforcement as we know it. Parts II, IV, V, VI, VII, and X of the brief are all dedicated to various formulations of this erroneous prophesy.

Each and every reported Florida case on the subject has agreed that the defendant has the burden of proof at the adjudicatory phase of the civil contempt proceeding. The Third District Court of Appeal, whose decision in Robbins v. Robbins, 429 So. 2d 424 (Fla. 3 DCA 1983), clearly applied the "present ability to pay" standard to the sentencing phase, held in Waskin v. Waskin, 9 FLW 1381 (Fla. 3 DCA 1984), that the defendant still has the burden of proof at the adjudicatory phase. Indeed, in Waskin, the Court of Appeal dealt directly with the issue of the "silent defendant" raised at page 17 of HRS' brief. Assertion of the Fifth Amendment right to silence in a civil proceeding does not leave the court helpless, the court notes. All testimony of the defendant can be stricken, as can any written defenses filed by the defendant. As a result of the absence of defenses

the defendant had failed to meet his burden of proof and was properly held in civil contempt. Id.

The very decision that HRS attacks in the present petition for certiorari explicitly holds that the defendant has the burden of proof in the adjudicatory phase of a civil contempt case: "Also, we believe that petitioner failed to carry the burden of proof which is required by the above quotation from Faircloth. Thus, the trial court's [adjudication of contempt was] consistent with the first two of the foregoing three propositions from Faircloth." 9 FLW at 295.

In summary, it is clear that Bowen does not in any way lessen the ability of trial courts and support recipients to coerce payment through civil contempt. The defendant still has the burden of establishing his lack of fault in his failure to pay, whether that failure is a present one or one from the past. Any coercive sentence then becomes appropriate and legal upon a finding of civil contempt. The only restriction is that the sentence must indeed be coercive; it cannot be a punitive wolf in civil sheep's clothing.

The Bowen decision is not the source of this restriction on punitive sentences. Rather the restriction, as discussed above, can be traced directly back to constitutional due process requirements. See Pugliese, 347 So. 2d at 426.

Given the constitutional foundation for this restriction, it is shocking that HRS seriously proposes at page 29 of its brief that the Court carve out an "exception" from due process standards for child support proceedings. The Constitution does not permit exceptions from due process in murder cases, see Gideon, supra, which certainly entail more serious societal consequences than support enforcement cases do. It does

not permit exceptions in prosecutions for petty offenses, see Argersinger, supra, which often result in shorter jail sentences than do support proceedings. The Constitution does not contain an exception for prosecution of child support violations. The petitioners's proposal that the Court find such an exception should be firmly rejected.

CONCLUSION

The decision of the Second District Court of Appeal does not conflict with any previous decision of this Court. Rather, it follows the explicit holdings of all Supreme Court decisions concerning civil contempt sanctions beginning in at least 1936 and continuing through Andrews in 1983.

The Constitution prohibits courts from jailing civil contemnors unless they have the present ability to pay the purge established by the court. Due process requires that this ability be a real and present ability, and that the sentencing judge explicitly find such ability based on competent evidence in the record.

All questions concerning the adjudication of civil contempt are separate from questions concerning imposition of incarceration as a sanction for such contempt. This case in no way involves the issue of burden of proof in adjudicating civil contempt actions.

The Bowen decision, if affirmed, will not cripple the child support enforcement system. It does not even change the law applicable to the system. However, to the extent HRS thinks it changes the system and to the extent this HRS opinion is based on its experience in trial courts, the Bowen decision will restore due process where there is now none; it will

free prisoners who, without the "keys to their cells", are being held illegally.

The decision of the Second District in this case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to JOSEPH R. BOYD, ESQ. and SUSAN S. THOMPSON, ESQ, Boyd, Thompson & Williams, P.A., 2441 Monticello Drive, Tallahassee, Florida 32303, CHRISS WALKER, ESQ., Department of Health and Rehabilitative Services, 1317 Winewood Boulevard, Tallahassee, Florida, N. DAVID KORONES, ESQ., Member Executive Council, Family Law Section of The Florida Bar, Suite 1401, 1100 Cleveland Street, Clearwater, Florida 33515, and MIRIAM MASON, ESQ., Secretary-Treasurer, Family Law Section of The Florida Bar, 215 Verne, Suite D, Tampa, Florida 33606, on this 30th day of July, 1984.

MICHAEL A. CAMPBELL

MAC:dyn