2009-CP-00470-R+

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REPLY TO BLIVEN'S BRIEF

I am Pro Se because I can't afford an attorney. I understand that this is a civil matter but my liberty was taken away in this "quasi-criminal" case. I am trying to do my best to comply with all of your rules. Your court has said to give me leeway and review the record for any "self-evident" errors, *Goodin v. DHS*, 772 So2d 1051 (Miss. 2000). Please do this in my case.

I. Bliven/ Smallwood did not comply with MRAP

A. Rule 25

The Certification of Service attached to Bliven's Brief states that she served a copy of the brief on me on January 19, 2010, by mail. Smallwood's letter to the Clerk of Court for filing the Brief is dated January 18, 2010. This could not have been mailed that day because it was a federal holiday - Martin Luther King day. The envelope containing both of these was actually not mailed to me until January 20, 2010 (see copy of front of envelope attached as Exhibit A). MRAP Rule 25(b) - (d) says that Bliven's service of her brief was made on me on January 20, "on mailing". This makes my reply brief due on February 3, 2010. This is not what is suggested by Bliven's letter to the Clerk of Court and her Certificate and is not in compliance with MRAP Rule 25. It is also a misrepresentation to this honorable court.

As pointed out by the Clerk of Court in its January 20, 2010, letter to Sheila Havard Smallwood, Bliven's Record Excerpts did not include a Certification of Service. In Smallwood's January 22, 2010 letter to the Clerk of Court, she enclosed a Certification of Service but did not give me a copy. I do not know what date she put on it because she

did not give me a copy. I would like an opportunity to view it to know if this too was a misrepresentation to this honorable court.

B. Rule 30

MRAP Rule 30(b) says that the Bliven may "add to the mandatory record excerpts brief extracts from the pleadings, instructions, transcript, or exhibits **if they are essential to an understanding of the issues raised."** Bliven/ Smallwood has tried to get your court to look at things that were not part of the April 21, 2008, hearing and were not designated as part of the appeal record. I have met my duty to "supply a reviewing court with an adequate record for the issues under consideration". I paid for the designated entire record and timely filed two Statements of Evidence. (Record Excerpts B(2-3) and Record at 0345 - 0391). The Bliven/ Smallwood was given the required notice and did not object to either Statement of Evidence. MRAP Rule 10© says that these have to be considered as facts of what happened in the Chambers conferences before the April 21, 2008 hearing and on February 25, 2009. The designated record, the transcript of the April 21, 2008 hearing, and my Statements of Evidence are the only facts that should be reviewed. "In reviewing a chancellor's decision, the appellate court will only consider facts found within the trial record." *Kelley v. Day*, 965 So2d 749 (Miss. Ct. App. 2007), *McClee v. Simmons*, 834 So2d 61, 64 (Miss. Ct. App. 2002). "Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise, **we cannot know them."** *Thompson v. Mississippi Department of Human Services*, 856 So2d 739 (Miss. App. 2003) citing to *Mason v. State*, 440 So2d 318 (Miss. 1983). For these reasons, I object to Bliven's Record of Excerpts being considered in this appeal and ask that they be stricken.

C. Bliven/ Smallwood should be sanctioned

Bliven/ Smallwood failed to comply with MRAP Rule 30(b) by including documents that are not part of the record on appeal and are not "essential to an understanding of the issues raised" including her own Restated Issues on Appeal. As the Comments section of the MRAP Rule 30(b) states:

> All parties are **cautioned** that Rule 30(b) allows optional record excerpts that are **essential** to an understanding of the **issues raised**. If **non-essential** materials are included in the record excerpts, its usefulness to the court as a convenient adjunct to study of the briefs will be **diminished**."

I believe Bliven/ Smallwood did this to try to get your court to review documents that are not a part of the designated record and are not needed to understand the stated issues on appeal to try to make me look bad. All I am trying to do is get my arrest record expunged and get her attorneys fees reversed so she can't put me in jail again. It was Bliven/ Smallwood who insisted that the entire record be designated even though it was not needed. (See Bliven's Response to Motion to Clarify filed with the Supreme Court on August 13, 2008). She has done everything she can to try to take away my right to appeal the wrong contempt finding and jailing that she specifically asked for on April 21, 2008. (See Transcript at page 19, lines 6-10). I think it was deliberate. It was not something a licensed attorney should do by mistake. All of her record excerpts should be stricken from the appeal record. And Bliven/ Smallwood should be sanctioned per MRAP Rule 2(b) for failing to "comply with these rules" and per MRAP Rule 46(d) for "conduct unbecoming a member of the bar, or for failure to comply with these rules . . ."

II. Reply Brief

A. Prima facie evidence of contempt was not established by Bliven

I had already talked about the keeper of the record not testifying at the hearing in my original brief. (See my original Brief at pages 21, 27, and 44). In looking up Bliven's cases, I saw that the *Davison v. MS DHS* case talked about the Mississippi Rules of Evidence 803(6) and Rule 902(11)(c)(i-iii) in not letting Mr. Davison introduce evidence, calling it "hearsay'". "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Miss. R. Evid.* 801©, *Davison* (already cited). When I looked at these rules, I noticed that Bliven did not follow these and so the Chancellor should not have received the DHS Affidavit as evidence because it was hearsay. In the Bench Ruling of April 21, 2008, the Chancellor stated that he had:

> . . . received the statement in evidence in **proper form and duly affirmed** by an officer of the Department of Human Services which indicates that as of **April 21, 2008**, Robert S. Parker is delinquent and in arrears in the amount of $1,047.08 with respect to child support assessments accrued under judgment of this Court, which was entered on April 21st, of 2007 and which has been **administered by the Department of Human Services by payments through the CRDU.**

(See Record Excerpt 4 and Record at pages 0258 - 0259). Sakalarios could not do this because she was not the one who needed to testify. This means that the only evidence of child support arrears considered by the Chancellor, the DHS Affidavit of Accounting, was hearsay.

According to the MRE 803(6), the DHS Affidavit of Accounting was hearsay and should not have been allowed to be introduced as evidence of child support arrears against me because the keeper of the record, Francis Pearce, or the Declarant, Sandra Fitch, did not testify. Sakalarios could not "authenticate" the DHS Affidavit. Sakalarios

testified "I am not the keeper of this record. The proper person to testify as to the contents of the record keeping of the money would be possibly a supervisor. Francis Pearce, the supervisor for Forrest County, is available to testify . . . " (Transcript at page 14). Sandra Fitch, the DHS person who did the Affidavit of Accounting, would have had to testify to the Affidavit per the rules of evidence if Ms. Pearce did not testify as the supervisor, overall custodian of record. Without doing this, I could not question her about the details of the Affidavit and why the IRS interception money was not on it.

MRE 803(6) says:

> A memorandum, report, record, or data compilation, in any form of acts, events, conditions, opinions, or diagnosis, **made at or near the time** by, or from information transmitted by, a person with **knowledge**, if kept **in the course of a regularly conducted business activity,** and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the **testimony of the custodian or other qualified witness**, or **self-authenticated pursuant to Rule 902(11),** unless the source of information or the method or circumstances of preparation indicate **lack of trustworthiness.**

Davison v. Mississippi Department of Human Services, 938 So2d 912 (Miss. App. 2006), *Ferguson v. Snell*, 905 So2d 516 (Miss. 2004).

Sakalarios testified that she did not have knowledge and was not the proper person to testify. (Transcript at page 14). Without Ms. Pearce or Ms. Fitch testifying, the only other way the Affidavit could have been introduced would have been to comply with MRE Rule 902(11)(c)(i-iii).

MRE Rule 902(11)(c)(i) says:

> Records so certified will be self-authenticating **ONLY** if the proponent gives notice to adverse parties of the intent to offer the records as self-authenticating under this rule and **provides a copy of the records and of the authenticating certificate.** Such notice **MUST** be given **sufficiently in advance of the trial or hearing at which they will be offered to**

provide the adverse party a fair opportunity to consider the offer and state any objections.

MRE Rule 902(11)(c)(ii) gives 15 days for written objections to be made and allows for hearings on objections before the trial or hearing where the document is to be introduced. This says to me that I should have had at least 15 days notice before the hearing for Bliven to be able to introduce the Affidavit of Accounting as a "self-authenticated" document. MRE Rule 902(c)(iii) says: ". . . If the court cannot rule on the objections before the trial or hearing, the records will not be self-authenticating."

The Affidavit of Accounting was not given to me at any time prior to the hearing, much less at least 15 days before it. In fact, it is dated April 21, 2008 (See Transcript Exhibit 3). Since the hearing began at 9:00 a.m. on April 21, 2008, this means that Smallwood got it from Ms. Fitch and it was offered it into evidence on the same day. I had no chance to look at it before the hearing started. In fact, the first time I laid eyes on it was when Smallwood handed it to me on the witness stand and asked me about it during the April 21, 2008, hearing:

Smallwood: I'm going to hand you another document. This is an affidavit of accounting. It reflect an arrearage amount of $1,047. Do you agree with that figure?
Me: No, ma'am, I do not.
Smallwood: Okay. Tell me why you don't agree that's what your arrearage amount is.
Me: Because it's paid and it's moot.

(Transcript at page 10). I also testified:

Me: . . . DHS keeps money in a Jackson account that revolves around until someone pulls it out. The money is paid and it's in there. I have the records showing it.

(Transcript at page 11).

By disagreeing with the document, I objected.

By your rules of evidence, this Affidavit should not have been accepted as evidence because it was not authenticated. And this was the only reason the Chancellor gave for his finding of contempt:

> Based upon the evidence before the Court, the Court finds that it is **clear and convincing** that this petitioner is not before the Court with clean hands. He is in **arrearage and noncompliance** with the prior orders of this Court with respect to child support under the existing case law in the State of Mississippi. . . . I find him in contempt of court, order the sheriff to take him into custody, and place him in the common jail or other appropriate place of confinement there to remain until he purges himself of contempt by the **payment of that which is due and owing of his child support.**

(Record Excerpt 4, Record at page 0259). The Chancellor accepted the Affidavit as evidence of child support arrears without the Bliven doing what MRE 803(6) and 902(11)(c)(i-iii) said had to be done. (See Transcript at pages 14-15). He was "manifestly wrong, clearly erroneous, or [he applied] an erroneous legal standard " and he should be reversed. *R.K. v. J.K.*, 946 So2d 764 (Miss. 2007), *Perkins v. Perkins*, 787 So2d 1256 (Miss. 2001), *Mizell v. Mizell*, 708 So2d 55 (Miss. 1998), and *Purvis v. Purvis*, 657 So2d 794 (Miss. 1994).

"In civil contempt cases the weight and sufficiency of the evidence must be **clear and convincing.**" *Masonite Corporation v. International Woodworkers of America*, 206 So2d 171, 180 (Miss. 1967). "To find a party in contempt of court there must be evidence. . . . Since there was no evidence before the court the order must be reversed." *Moore ex rel., Benton County v. Renick*, 626 So2d 148 (Miss. 1993). The "evidence" accepted during the April 21, 2008 hearing was not proper, so no evidence, no contempt.

I also looked up Bliven's *Hunt v. Asanov,* 975 So2d 899 (Miss. Ct. App. 2008) case and it says: "In a contempt action for failure to pay child support, the party seeking

the support makes a prima facie case by introducing evidence that the party required to **pay** the support has **failed to do so."** Your court has said that I have to pay my child support or show, "with particularity" why I couldn't pay it. *Varner v. Varner*, 666 So2d 493 (Miss. 1995). None of the cases I read say anything about the Bliven having to receive the money. The free online dictionary says that to pay is to "discharge a debt or obligation". To receive is defined as to "come in possession of." http://www.merriam-webster.com/dictionary. Smallwood asked me about this at the hearing: "Do you have any proof with you today that your . . . . child's mother has **received** all the money she's entitled to?" (Transcript at page 10). The money had been taken from my joint tax refund so it was not there for me to pay bills. The IRS notice to me said it was taken in payment of my child support to DHS. But there was no way for me to control when Bliven received the money because DHS was involved by law. MS Code Annotated 43-19-31. The IRS interception receipt was filed in my paperwork with the court a full month before the hearing. (Record at pages 0152 - 0153, and 0475-0476). It was also given to the Chancellor in chambers on the morning of April 21, 2008. (See Record Excerpt B(2) and Record at pages 0345-0354). The IRS Notice (Record at page 0352) said that they had "applied all or part of your Federal **payment to a debt you owe . . . Mississippi Dept of Human Services . . . . Purpose: child support. . . . Amount this creditor: $897.00"**. This meant to me that I paid the amount from my refund. Your court has accepted IRS income tax interceptions as a form of payment. *Chasez v. Chasez*, Court of Appeals of MS No. 2004-CP-01956-COA consolidated with No. 2003-CA-01828, February 13, 2007, from http://ms.findacase.com, at page 6: "He claims the following payments: . . . and the Department of Human Services 'intercepted' his 1998

tax refund, for a total of $21,066. The record verifies those amounts." I immediately asked for the money to be put into Bliven's account (Record Excerpt B(2) and Record at page 0354) and me and my wife both signed the papers to do this as soon as DHS gave them to us. (Record Excerpt B(2) and Record at pages 0349-0350). I had also filed for reductions with copies of my tax returns showing my true adjusted gross income with the Court and DHS (Record at pages 0053 - 0056, 0115, 0118, 0120, 0123, 0125-0126, 0152, 0162-0163, 0180, 0190, 0208, 0216-0221 0471, 0474-0479). I don't know what more I could have done to pay or show why I couldn't pay it, but in the end, there were no arrears on April 21, 2008.

More than just following the rules of evidence, it was important for the rules to be followed because DHS was collecting child support in this case. MS Code 43-19-31 says CRDU is to collect child support in cases where the "custodial parent" is getting welfare. Subsection (h) of that code provides for interception of IRS tax refunds. This is not a "dangerous precedent", this is the law. This is so that private attorneys don't have to be hired by people without the money to do it. I tried for mediation and reduction with DHS and they collected child support in this case. It was not right for the Chancellor to do a contempt hearing by the Bliven without DHS being a party to the matter. If DHS had been, the contempt never would have happened because they had already collected the money. They would not have started a contempt case because they were using their legal authority to collect any past due support from my tax refund.

B. I did not willfully or deliberately ignore the order of the Court

"Contempt can only be willful. . . A contempt citation is proper only when the contemnor has willfully and deliberately ignored the order of the court. It is a defense to

a contempt proceeding that the person was not guilty of willful or deliberate violations of a prior judgment or decree." *R.K. v. J.K.*, 946 So2d 764 (Miss. 2007), *Mizell v. Mizell*, 708 So2d 55 (Miss. 1998), *Cooper v. Keyes*, 510 So2d 518 (Miss. 1987). "Where a party promptly files for a modification, i.e. reduction, of support based on his inability to pay child support, a finding of contempt is not proper." *Setser v. Piazza*, 644 So2d 1211 (Miss. 1994). I tried to pay the child support to the best of my ability, I paid what I could on the advice of my attorney instead of paying nothing because I could not pay the entire amount, at all times I informed my attorney, DHS, and the court that I could not pay showing income on tax returns that proved I needed a reduction and asking for it from the court and DHS. When I could not pay all of it and got into arrears, I asked DHS to get the IRS interception money into Bliven's account as quickly as possible, my wife waived her right to object to the IRS interception, and all of this was in my paperwork filed with the court a month before the hearing on April 21, 2008. What more could I have done to show to the court on April 21, 2008, that I was not willfully disobeying the child support order?

C. **Bliven/ Smallwood's misrepresentations**

Bliven/ Smallwood has misrepresented what I filed after she answered. The "seventeen subpoenas" were actually 14 (see Record Excerpt A1) and these were only issued to 6 persons/ agencies for records I need to defend against her claims. The number went from 6 to 14 because the DHS subpoenas had to be issued several times because I did not send it to the right people or serve them on time. (See Record Excerpt No. 1 at pages 006-8). I believed I needed the documents to prove what I was saying in my paperwork to the Chancellor. On April 21, 2008, Sakalarios was only in the

courtroom because of my DHS subpoena which she had not answered. (See Record Excerpt No. 1 at page 008, Transcript at pages 16-17). It didn't matter anyway because as the Chancellor stated at the hearing, "I can tell you we're not going to go into the entirety of the records of the Department of Human Services . . ." (Transcript at page 17).

My wife borrowed the money from my grandmother to get me out of jail "immediately" but it did not happen immediately and I definitely did not get out "immediately". The Chancellor had not done this in a while and was unsure of how to get me out once the Clerk of Court for Lamar County was paid. There was a delay while he had the Clerk of Court call the Sheriff and try to find out what to do. DHS was supposed to get the payments and they had already taken the money from my income tax return, so my wife also had to go to DHS and show them the receipt from the Clerk of Court so they could release the IRS interception money back to me to pay my grandmother back.

And then Smallwood created the February 25, 2009 Judgment which the Chancellor signed giving her $2,500.00 in attorneys fees to be paid within 30 days. She is now asking for $7,612.50 in attorneys fees for causing all of this in the first place by misleading the Chancellor into thinking "the document speaks for itself". (Transcript at page 15, lines 27-29). I was not in contempt on April 21, 2008, she put me in jail, and now she wants me to pay her! She is now complaining of the amount awarded but she has not said the Chancellor was wrong by only awarding her the $2,500.00 she asked for in her Answer. Without any cases saying she can do this, she is asking your court to increase the lower court's award, and I object.

I object to Bliven/ Smallwood bringing up a "violation of section 73-3-55 of the MS Code Annotated" by my wife. This is not relevant and is not on appeal, and more than this, the harassing investigation she started was resolved in our favor. (See Bliven Brief at page 4). This is continuing harassment by Bliven/ Smallwood, I object, and I ask again that they be sanctioned like I said in the beginning of this Reply Brief.

Finally, Bliven says that even though I was thrown in jail for being in arrears when I was not, I have no right to raise due process violations because it was "never raised in the lower court and thus not preserved for appeal, . . ." I did raise this with the lower court in my paperwork filed in the record (See Record at pages 0128). "The lower court is limited to those issues raised in the pleadings and to the proof in the record." *Setser v. Piazza*, 644 So2d 1211 (Miss. 1994). But on the day of the April 21, 2008, hearing, the Chancellor told me he was not going to read any of my paperwork and was going to put me in jail and was going to show me how law works. (Record Excerpt B(2) and Record at page 0346). I raised the issue but because he refused to read my paperwork its not in the transcript. That is why I did the Statement of Evidence.

Stuart v. Stuart, 956 So2d 295 (Miss. 2006) says "The guarantee of procedural due process includes the right to a fair and impartial trial. A due process violation occurs where a party is not allowed a full and complete hearing before being deprived of life, **liberty**, or property." Bliven did not give me a copy of the Affidavit of Accounting and allow me my 15 days to review it and obtain something from Pearce to counter it or subpoena her to testify at the hearing. The Chancellor did not ask Smallwood or me if I had been allowed my MRE 902(11)(ii) time to review and object to the evidence. The Chancellor then intimidated me when I tried to question Sakalarios about the keeper of

INDEX TO EXHIBITS

DATE: 04-21-08

CIVIL ACTION NUMBER: 2006-0028-GN-1

COUNTY: Lamar

STYLE OF CASE:

Tessecca Bliven

VS.

Robert S. Parker

ATTORNEYS:

Shelia Smallwood

Pro Se

EXHIBIT NO.	BEHALF OF	BRIEF DESCRIPTION	Doc. PAGES
✓1	P	Financial Declaration (Entered in Error/in file)	
✓2	P	Letter to Robert Parker	1
✓3	P	Affidavit of Accounting	2

the record and the pending IRS interception. (See Transcript at page 16). How in the world could I ask for anything from him at the hearing about my rights - in his court room on that date I had no rights! How could this be a fair and impartial, full hearing? It was not and all of these are procedural due process violations.

D. My Appeal Notice is proper

Bliven says that because I only listed the February 25, 2009, final Judgment on my second Notice of Appeal that your court can't review anything but the award of attorney's fees. She does not list the issues that she feels are not properly before the court based on the notice of appeal but all I am asking for is for my arrest record to be expunged and her award of attorney's fees to be reversed at her cost. I guess she is asking for you to not consider these but I strongly disagree.

1. The 5/8/08 Order was not an appealable Judgment

On September 16, 2008, your court ruled in favor of Bliven and dismissed my first appeal of the May 8, 2008, Order based on Bliven's argument that it was "not taken from a final judgment". (Record at page 0374). This meant to me that the May 8, 2008, Order was only one part of the case, and before I could appeal, the whole case had to be finished with a final judgment. This happened on February 25, 2009, when the Chancellor told me that his signing of the Judgment prepared by Smallwood made this a "final judgment". (Record Excerpt B(3), Record at page 0390). There are many problems with the Judgment Smallwood prepared. (See my Brief at page 32). But that was the only "final judgment" that I could list on my Notice of Appeal.

2. I complied with MRAP Rule 3©

Rule 3© says that the notice "shall designate as a whole or in part the judgment or order appealed from." How could I list on my Notice of Appeal an Order that your court said I could not appeal from, an Order that was signed 10 months before. The only proper, "final judgment" to be listed on the Notice was the February 25, 2009, Judgment.

Bliven cites the *Conservator v. Elridge* case. I read *Elridge*. It does not apply to my case. In that case, there were two final judgments on two separate issues: appointing a conservator which was immediately appealed, and then sending the elderly lady to the nursing home a few weeks later which was not appealed. If the first Judgment had not been final and the second Judgment had to be entered before the appeal was proper, the same thing that happened with my first appeal would have happened there. I can understand how the court in Elridge would say that they could not address both. In my case, there was the May 8, 2008 Order that your court said I couldn't appeal from (Record at page 0374), and then a final Judgment almost a year later in the same case awarding attorney's fees based on the finding of contempt made in the first Order. I appealed timely from both of these but I could not list the first Order on the second Notice because it was not a final judgment. My case is different from Elridge because there could not have been the award of attorney's fees in the final Judgment without the finding of contempt made in the first Order.

The final Judgment was based upon the finding of contempt during the April 21, 2008, hearing. There would be nothing to consider during this appeal if the April 21, 2008 hearing Order was not reviewed. Everything I filed per the MRAP rules after my timely filed Notice of Appeal included the May 8, 2008 Order. These included the Declaration of the Issues on Appeal (Record at page 0392), the Statement of Issues in my

Brief (original Brief at page 6), and my Record Excerpts ("A.2. Orders and Judgments appealed from, a. Order - May 8, 2008, b. Judgment of the Court - February 25, 2009"). Bliven says that the proof presented at the hearing on April 21, 2008 was sufficient to find me in contempt for failure to pay child support and the incarceration was appropriate based on the contempt finding. How can your court determine if her statement is true without reviewing the April 21, 2008 Order and hearing?

"Our supreme court has held that pro se parties should be held to the same rules of procedure and substantive law as represented parties. However, we may credit a poorly crafted appeal so that a meritorious claim may not be lost due to poor drafting." *Asanov v. Asanov*, 914 So2d 769 (Miss. App. 2005). I am Pro Se. I have tried to follow the MRAP and your Orders. I filed my Notice of Appeal timely. If you decide that the May 8, 2008 Order should have been listed on my Notice of Appeal to reverse my contempt, expunge my arrest record, and reverse the award of attorney's fees, please consider this a request for you to suspend Rule 3© in the interest of justice:

> In the interest of expediting decision, or for other good cause shown, the Supreme Court or the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction; provided, however, in civil cases the time for taking an appeal as provided in Rules 4 or 5 may not be extended.

DeLoach v. State of Mississippi, 890 So2d 852 (MS 2004).

E. No contempt, no attorney's fees

In the Chamber's conference on February 25, 2009, the Chancellor said that his award of attorney's fees was based on his finding of contempt on April 21, 2008, and that by signing the Judgment he was making his finding of contempt a final judgment.

(Record Excerpt B(3), Record at page 0389). Bliven does not contest this. In fact, she also states in her brief and cites cases to support that it is the basis for her attorney's fees. (See Bliven Brief at page 10). The cases she cites all involved affirmed findings of contempt. The opposite is also true. "When the court denies a spouse's petition for contempt, no award of attorney fees is warranted." *Setser* (cited above). As I have already said, there was no contempt because there was no evidence and there was no willful contempt because I tried to pay. If there was no contempt, there should be no attorney's fees. *Riddick v. Riddick*, 906 So2d 813 (MS Ct. App. 2004), *Cumberland v. Cumberland*, 564 So2d 839 (MS 1990).

Bliven also asks for more attorney's fees in her brief for the appeal. Per *Riddick* (cited above), this would not be right. And more than all of this is that it would be plain wrong to reward Bliven for asking for contempt and incarceration when she knew the arrears had already been paid by the IRS interception and collected by DHS (Transcript at page 11). She deliberately misled the court by asking for my incarceration based on the incomplete Affidavit. (Transcript at page 19). "It would be unconsciousable to require defendant to pay for the services of plaintiff's attorney who improperly instituted contempt proceedings resulting in defendant's incarceration." *Brown v. Brown*, January 2, 2007, from http://nc.findacase.com.

F. Throwing me in jail was not right

In the April 21, 2008, hearing Smallwood asked that I be thrown in jail. (Transcript at page 19). I was not in contempt so throwing me in jail was not right. But it was her request that caused the Chancellor to order me thrown in jail. In support of her case in her appeal brief, the Bliven cites *Moulds v. Bradley*, 791 So2d 220 (Miss. 2001).

In that case, the father was a million dollar a year football player who only had an order to pay $200.00 per month and still got in arrears. This is very different from me. I'm not sure why Bliven cited this case, though, because this was a criminal contempt case and the Chancellor's jail order was reversed. The case does say that "civil contempt is "to coerce action". It was wrong to thrown me in jail to "coerce action" because I had already asked that the IRS interception be put into Bliven's account. I was already complying! There was nothing to coerce! I am also not sure why Bliven cited *Newell v. Hinton*, 556 So2d 1037 (Miss. 1990). This case also reversed the jail order, saying:

> Even if the defendant cannot successfully raise a defense, the court's power to commit a person to jail until he complies with the terms of a decree depends upon his present ability to pay. . . If the person has already been committed to jail, he is entitled to be discharged on proof of inability to pay. . . .This Court is fully aware of the constitutional problems implicated in the chancellor's ruling. If for some reason Newell is unable to come up with the amount owed during her life time would that also mean imprisonment for life? This may well be the case. . . . when one has been imprisoned for failure to comply with an order . . . and where [the] defendant is able to show that he has not the actual ability to pay for any one of a number of valid reasons, then [the] defendant is entitled to be discharged. . . . a defendant cannot be imprisoned indefinitely because of failure to pay support money where it is shown that he does not have an ability to make such payments and cites such a practice as being unconstitutional on the grounds of cruel and unusual punishment.

Not even considering that I was not in contempt, the record on appeal, including the transcript of the April 21, 2008, hearing does not have any evidence in it that I was able to pay. (Transcript at pages 12-13). How did the Chancellor know I would be able to pay to get out? Bliven knew that the IRS money would be put into the account but she did not know how long it would take. Neither did my wife and family. If my grandmother had not loaned me the money, I would have stayed in jail indefinitely until the IRS money went into Bliven's account. Also, if I was in jail there was no way for me

to earn money to pay the child support that would go into arrears again and then I could be put in jail again. This was unconstitutional and shows that the Chancellor's throwing me in jail was wrong.

The last case cited by Bliven is the *Davison* case (cited already) but I don't see anything in that case about incarceration other than that he was thrown in jail after he did not comply with over 3 contempt orders. This is also the case that said that *Davison*'s evidence was not good because he did not have the "custodian or other qualified witness testify." None of the cases cited by Bliven support her case that the Chancellor was right in doing what she asked to be done - throw me in jail. I wasn't trying to get out of paying my child support. I was doing my best. And I was not in arrears. To throw me in jail was wrong because all it would do is make me get in more arrears and then it would just lead to me being in jail without a chance of getting out, something the Constitution says can't be done.

III. CONCLUSION

The evidence used on April 21, 2008, to find me in contempt did not meet what MRE says it needs to be "prima facie evidence" of child support arrears. Without evidence, there was no contempt, and I should not have been thrown in jail, and Smallwood should not have been given a Judgment for attorneys fees. I ask that this honorable court reverse the Chancellor's April 21, 2008, finding of contempt, order my arrest record expunged, reverse the February 25, 2009, Judgment of attorneys fees, and tax all costs of this appeal to the Bliven per MRAP 36(a).

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