THIS DOCUMENT IS BEING SHARED AS PART OF OUR RESEARCH AND NOT AS A LEGAL DOCUMENT. EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE A SUBSTITUTE FOR AN ATTORNEY. IF YOU ARE PRO SE, YOU ARE ENCOURAGED TO TAKE THIS TO AN ATTORNEY AND HAVE THEM REVIEW IT BEFORE YOU FILE USING ANY OF THIS IN YOUR CASE. ANYTHING YOU USE FROM THIS DOCUMENT IS AT YOUR OWN RISK AND YOU ARE RESPONSIBLE TO MAKE SURE THAT IT IS ACCURATE, UP-TO-DATE, AND APPLIES TO YOUR CASE. THIS RESEARCH WAS DONE BY NON-ATTORNEYS AND IS TO SERVE AN IMPORTANT PUBLIC INTEREST. THERE IS A PROBLEM WITH PARENTS BEING PUT IN DEBTOR'S PRISONS AND THE COURTS DO NOT HAVE ANY STANDARD FOR WHAT ABILITY TO PAY MEANS. AS FAR AS THE JUDGES ARE CONCERNED IF YOU HAVE 1 DOLLAR IN YOUR POCKET YOU HAVE THE ABILITY TO PAY. EVEN WITH ATTORNEYS PARENTS ARE BEING SENT TO THESE DEBTOR'S PRISONS. IT HAS BECOME NECESSARY TO EDUCATE THE PUBLIC SO THAT THEY KNOW THERE IS SOMETHING THEY CAN DO WHEN EVEN THEIR COUNSEL FAILS THEM. REMOVE THIS TEXT IF YOU DECIDE TO USE THIS DOCUMENT AS YOUR TEMPLATE.

STATE OF ILLINOIS)

) SS

COUNTY OF _____)

IN THE CIRCUIT COURT OF THE NINETEENTH

JUDICIAL CIRCUIT, _____ COUNTY, ILLINOIS

NAME	)	
Petitioner,	)	
	)	
Vs.	)	**No.**
	)	
NAME	)	

Respondent)

MOTION TO VACATE CONTEMPT ORDER

NOW COMES, the Petitioner, YOUR NAME, pro se, request that this court Vacate the Contempt Order issued on _____, and in support of my Motion to Vacate Contempt Order and Other Relief states as follows:

Petitioner brings this motion to request the court vacate the Judgement Order rendered on _____ according to rules 735 ILCS 5/13-217 and section 2-1401. and/or under 735 ILCS 5/2-1301(e). Under section 2-1301(e), a litigant can move to vacate a non-final order or judgment at any time before that order or judgment becomes final.

(735 ILCS 5/2-1301) (from Ch. 110, par. 2-1301)

Sec. 2-1301. Judgments - Default - Confession. (a) The court shall determine the rights of the parties and grant to any party any affirmative relief to which the party may be entitled on the pleadings and proofs. Judgments shall be in the form required by the nature of the case and by the recovery or relief awarded. More than one judgment may be rendered in the same cause. If relief is granted against a party who upon satisfying the same in whole or in part will be entitled by operation of law to be reimbursed by another party to the action, the court may determine the rights of the parties as between themselves, and may thereafter upon motion and notice in the cause, and upon a showing that satisfaction has been made, render a final judgment against the other party accordingly.

(e) The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.

The Court entered an Order of Contempt on _____.

The Court made a finding without having a fair and equitable ability to pay hearing before entering the order of contempt.

This motion is filed timely and Petitioner has been diligent.

Petitioner has an inability to pay which was reflected in the record in Petitioner's request for modification. Petitioner's income has dropped from _____ per month to _____ per month.

Additionally, Petitioner is unable to obtain employment at the level that Petitioner earned prior to _____ or since the time of the original ordered amount for child support.

Petitioner would show that there are "equitable considerations" that are appropriate for this court to review.

Petitioner also intends to raise the question of a purely legal issue as allowed under 2-1401. Petitioner intends to appeal any attempt of this court to issue contempt on child support amount that exceeds Petitioner's current ability to pay and that exceeds the state's statutory maximum of 28% of income.

Whether this Court has the authority to enforce the child support amount through contempt?

Whether the Court is required to hold a fair and equitable ability to pay hearing?

Whether jailing Petitioner with an inability to pay constitutes a Debtor's Prison?

Petitioner is requesting that this court apply extraordinary circumstances regarding the diligence of Petitioner and grant this petition in the interest of preventing an unjust entry of a judgment and in order that substantial justice between the parties may be done.

Petitioner has not been given opportunity to vacate this judgment.

Petitioner did not receive a full and fair evidentiary hearing – See Turner v. Rogers (SCOTUS 2011). Petitioner is being jailed in a Debtor's Prison – See Patterson's Publication and McBride v. McBride (N.C. 1993).

> "Incarceration of indigent obligors for nonpayment of child support represents a serious failure of the system. It is a social failure because it does little to generate child support payments, and it increases the economic marginalization of the persons whose economic success is critical to achieving the goals of the program. Use of contempt in these situations also drives wedges between family members whose cooperation could significantly contribute to the child's well being. Furthermore, for the large number of indigent fathers who flee to the "underground economy" to avoid their inevitable return to prison, contempt sanctions permanently remove them—usually both socially and economically—from the child's life. The legal failure represented by incarceration of indigent parents for contempt is—if possible—even greater than the social and economic failure. Criminal contempt is supposed to be a punishment for willful misbehavior, not for an absence of funds.3 Civil contempt is supposed to be used to coerce a person to do something that he is able, but unwilling, to do.4 In either case, if the contemnor's failure to pay the sums ordered by the court is simply a result of inability to pay, his incarceration can only be characterized as imprisonment for being poor.5" ~

"Patterson, Civil **Contempt** and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison, 18 Cornell J. L. & Pub. Pol'y 95, 117 (2008)."

See also, *e.g.*, *McBride v. McBride*, 334 N.C. 124, 131, n. 4, 431 S.E.2d 14, 19, n. 4 (1993) (surveying North Carolina **contempt** orders and finding that the "failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent"). ~ cited in **Turner v. Rogers, 131 S. Ct. 2507 - Supreme Court 2011"**

Petitioner is pro se, cannot afford counsel, and therefore has to learn this process on my own. Due to the emotional demands to deal with these court issues, it has taken Petitioner some time to be able to figure out what needs to be done to file for this relief. Petitioner's capabilities are limited due to limited funds.

Respondent is represented by counsel, making the proceedings fundamentally imbalanced.

Petitioner has made every attempt to be in compliance with all legal technical issues and requests leave of this Court to be notified and be provided with fair time to correct any technical issues that the Court finds.

Petitioner is indigent.

Petitioner is unable to comply with the support order.

Petitioner is already being garnished to the maximum amount.

This request is not to delay justice but so that justice can be done.

Petitioner has also attached an affidavit to further support my position.

PRAYER

—

Petitioner Prays that this Court Vacate its Order of Contempt.

Petitioner Prays that this Court grant this relief and all other relief allowed under law.

Petitioner Prays that if the Court does not Vacate the Order of Contempt that the Court place a stay on issuing any writ of execution regarding incarceration so that Petitioner can complete appeal on the denial to Vacate the Order.

_____

NAME

Pro Se

AFFIDAVIT AND CERTIFICATE OF SERVICE BY MAIL

I, YOUR NAME, a non-attorney, on oath state that I served the foregoing MOTION TO VACATE CONTEMPT ORDER upon the counsel and each party listed below by enclosing copies thereof in envelopes, addressed as shown with postage prepaid via United

States Postal Service and mailing directly at the United States Postal Service location in _____, Illinois on _____, 2017 at or before 5:30 p.m.

NAME

Attorney for Respondent

address

city, state, zip

Phone: _____ Fax: ____

ARDC No. _____

NAME

Guardian ad Litem

Attorney at Law

address

city, state, zip

_____

name

Pro Se

address

city, state, zip

Phone: _____

Signed and sworn before me

On this ____ day of _____, _____.

_____

Notary Public

STATE OF ILLINOIS)

) SS

COUNTY OF _____)

IN THE CIRCUIT COURT OF THE NINETEENTH

JUDICIAL CIRCUIT, _____ COUNTY, ILLINOIS

NAME)

Petitioner,)

)

Vs.) **No. _____**

)

NAME)

Respondent)

NOTICE OF FILING

TO: NAME, Attorney for Respondent, STREET, CITY, STATE ZIP

NAME, Guardian at Litem, Attorney at Law, STREET, CITY, STATE ZIP

PLEASE TAKE NOTICE that on _____ was filed with the Clerk of the Circuit Court of _____ County, this certain **NOTICE OF FILILNG of MOTION TO VACATE CONTEMPT ORDER** a copy of which is attached hereto and served upon you.

_____

NAME

Pro Se

AFFIDAVIT AND CERTIFICATE OF SERVICE BY MAIL

I, NAME, a non-attorney, on oath state that I served the foregoing NOTICE OF FILING of MOTION TO VACATE CONTEMPT ORDER upon the counsel and each party listed below by enclosing copies thereof in envelopes, addressed as shown with postage prepaid via United States Postal Service and mailing directly at the United States Postal Service location in _____, Illinois on _____, 2017 at or before 5:30 p.m.

NAME

Attorney for Respondent

address

city, state, zip

Phone: _____ Fax: ____

ARDC No. _____

NAME

Guardian ad Litem

Attorney at Law

address

city, state, zip

_____

NAME

Pro Se

address

city, state, zip

Phone: _____

Signed and sworn before me

On this ____ day of _____, _____.

_____

Notary Public

STATE OF ILLINOIS)

) SS

COUNTY OF ____)

IN THE CIRCUIT COURT OF THE NINETEENTH

JUDICIAL CIRCUIT, _____ COUNTY, ILLINOIS

NAME)

Petitioner,)

)

Vs.) **No. _____**

)

NAME)

Respondent)

NOTICE OF MOTION

TO: NAME, Attorney for Respondent, STREET, CITY, STATE ZIP

NAME, Guardian at Litem, Attorney at Law, STREET, CITY, STATE ZIP

ON _____, 2017 at _____ a.m./p.m. or as soon thereafter as Petitioner may be heard, I shall appar before the Honorable Judge _____ in the Courtroom, ____ at the ____ County Courthouse, ____ Street, _____, IL ____, then and there present the attached **NOTICE OF MOTION of MOTION TO VACATE CONTEMPT ORDER** and ask for an inability to pay hearing instanter.

_____

BENJAMIN WINDERWEEDLE

Pro Se

AFFIDAVIT AND CERTIFICATE OF SERVICE BY MAIL

I, NAME, a non-attorney, on oath state that I served the foregoing NOTICE OF FILING of MOTION TO VACATE CONTEMPT ORDER upon the counsel and each party listed below by enclosing copies thereof in envelopes, addressed as shown with postage prepaid via United States Postal Service and mailing directly at the United States Postal Service location in _____, Illinois on _____, 2017 at or before 5:30 p.m.

NAME

Attorney for Respondent

address

city, state, zip

Phone: _____ Fax: ____

ARDC No. _____

NAME

Guardian ad Litem

Attorney at Law

address

city, state, zip

_____

NAME

Pro Se

Pro Se

address

city, state, zip

Phone: _____

Signed and sworn before me

On this ____ day of _____, _____.

_____

Notary Public

STATE OF ILLINOIS)

) SS

COUNTY OF LAKE)

IN THE CIRCUIT COURT OF THE NINETEENTH

JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

NAME	)	
Petitioner,	)	
	)	
Vs.	)	**No. _____**
	)	
NAME	)	
Respondent	)	

AFFIDAVIT

I, _____(NAME), am over the age of 21 and reside in the State of Illinois for over 6 months. I submit this Affidavit under penalty of perjury and certify that everything in this affidavit is of my personal knowledge.

I am Petitioner in this case.

I have an issue of law that I believe needs to be addressed before this Court should order any orders regarding child support arrears.

My wages are being garnished to the maximum amount allowed by law. I am living in poverty as the result. I therefore am not failing to pay. I am unable to comply with the amount of child support this court is ordering. I am unable to comply with the support order.

I believe that this Court did not provide me with a fair and equitable hearing regarding my ability to pay child support at the current ordered amount. Therefore, the Court did not do an ability to pay review adequate for holding me in contempt.

I believe that the order that the Court is enforcing through contempt actually if enforceable is only enforceable through a judgment and not contempt.

The Court has placed me at an unfair disadvantage denying my Motion to Modify and striking it without giving me opportunity to cure any technical issues.

Even without my motion to modify, I believe that it is the Court's duty to evaluate whether the amount of child support is appropriate for the amount of income currently. My income was 6000 a month and now is only 1500. I have other child support obligations prior to this child support obligation and that needs to be taken into ability to pay consideration as well.

Before the Court can incarcerate me I believe the Court must determine actual ability to pay givin circumstances in the moment and must do so in a way that does not leave me without ability to prove for my own minimum basic needs particularly when the mother makes over _____ per year and the children are not going without anything, and when the order that the court is enforcing states on its face that both parties are able to support themselves according to the level of the marriage.

I do not have the ability to obtain gainful employment at the level that I was earning when in the military.

I believe that the Court has ordered a child support amount that exceeds statute.

I believe that the Court is required to have an ability to pay hearing and that I need to be present for this hearing in order for this to be a FAIR and EQUITABLE hearing.

I am indigent and have filed my application to have court fees waived.

I am unable to pay the child support amounts as ordered. I am not willfully not paying, I have an inability to pay.

I have no property and nothing that I can borrow.

I have no one to borrow from.

I have no reliable income source to which I could even think of being able to maintain the amount being required for child support.

The order for child support currently in place from 2015 I am not able to pay.

I am unable to provide my ex-wife with medical support.

I am unable to provide my children with money for extra-curricular activities.

I am unable to pay for anything over the 28% minus my prior child support amount obligation from my 1500 dollars per month retirement.

I believe that this Court’s order is counterproductive to me being able to provide for my children and in fact is against

the recommendations of the Department of Justice. The Department of Justice letter is attached.

I believe that it has been discouraged by the Department of Justice for courts to use incarceration as a coercive means for payment of child support or child support arrears.

I believe that incarcerating me over an inability to pay would be equivalent to jailing me in a debtor's prison according to Turner v. Rogers (SCOTUS 2011) and McBride v. McBride from North Carolina.

I believe that I have not received a fair hearing and that due process has been violated.

I believe that being held to standards of technical legal procedure that prevents me from being properly heard are preventing proper just results.

_____

NAME

Pro Se

address

city, state, zip

Phone: _____

Signed and sworn before me

On this ____ day of _____, _____.

_____

Notary Public

SECTION 2-1401 RELIEF FROM JUDGMENTS

(735 ILCS 5/2-1401) (from Ch. 110, par. 2-1401)

Sec. 2-1401. Relief from judgments.

(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. Except as provided in the Illinois Parentage Act of 2015, there shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(b-5) A movant may present a meritorious claim under this Section if the allegations in the petition establish each of the following by a preponderance of the evidence:

(1) the movant was convicted of a forcible felony;

(2) the movant's participation in the offense was related to him or her previously having been a victim of domestic violence as perpetrated by an intimate partner;

(3) no evidence of domestic violence against the movant was presented at the movant's sentencing hearing;

(4) the movant was unaware of the mitigating nature of the evidence of the domestic violence at the time of sentencing and could not have learned of its significance sooner through diligence; and

(5) the new evidence of domestic violence against the movant is material and noncumulative to other evidence offered at the sentencing hearing, and is of such a conclusive character that it would likely change the sentence imposed by the original trial court.

Nothing in this subsection (b-5) shall prevent a movant from applying for any other relief under this Section or any other law otherwise available to him or her.

As used in this subsection (b-5):

"Domestic violence" means abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986.

"Forcible felony" has the meaning ascribed to the term in Section 2-8 of the Criminal Code of 2012.

"Intimate partner" means a spouse or former spouse, persons who have or allegedly have had a child in common, or persons who have or have had a dating or engagement relationship.

(c) Except as provided in Section 20b of the Adoption Act and Section 2-32 of the Juvenile Court Act of 1987 or in a petition based upon Section 116-3 of the Code of Criminal Procedure of 1963, the petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.
(Source: P.A. 99-85, eff. 1-1-16; 99-384, eff. 1-1-16; 99-642, eff. 7-28-16.)

ATTACH THE CASE TURNER v. ROGERS from SCOTUS 2011 (controlling) for inability to pay case law and McBride v. McBride (1993 from North Carolina as advisory.)

"Patterson, Civil **Contempt** and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison, 18 Cornell J. L. & Pub. Pol'y 95, 117 (2008). See also, *e.g., McBride v. McBride*, 334 N.C. 124, 131, n. 4, 431 S.E.2d 14, 19, n. 4 (1993) (surveying North Carolina **contempt** orders and finding that the "failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent")." ~ cited in **Turner v. Rogers, 131 S. Ct. 2507 - Supreme Court 2011**

Attach the DOJ "Dear Colleague" letter