

1 4. In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court held that the
2 Eighth Amendment’s prohibition against Cruel and Unusual Punishment applies to the States via
3 the Fourteenth Amendment.

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

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

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

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

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

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

26 11. The proportionality test applicable to a cruel or unusual punishment challenge to a
27 sentence is whether the punishment is in excess of any that would be suitable to fit the crime; the
28 decency test applicable to a cruel or unusual punishment challenge to a sentence looks to

1 comparative law for guidelines in determining what penalties are widely regarded as proper for
2 the offense in question. *People v Stevens*, 128 Mich App 354, 340 NW2d 852 (1983).

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

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

12 14. The Michigan Supreme Court:

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

28 15. Per the Michigan Supreme Court being one penny short, or one second late,
regardless of intent, is a felony punishable by up to 4 years imprisonment and/or a \$2,000.00 fine
per each incident. Twelve months of payments either one second late or one penny short results
in criminal liability with up to 48 years in jail (12 shortages x 4 years); even if at the end of the
year the Obligor/Defendant has paid his \$0.12 arrearage on a private debt.

16. A temporary lay-off, a check lost in the mail, a bounced deposit that results in a
nonpayment for insufficient funds, an internet interruption that prevents a money transfer going

1 through, or any other number of life's unpredictable events can result in a criminal charge under
2 MCL § 750.165.

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

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

16 19. By comparative analysis Ohio's felony nonsupport statute, § 2919.21 et seq. is
17 similar to Indiana's. In pertinent part; § 2919.21(A) "No person shall abandon, or fail to provide
18 adequate support . . . (B) No person shall abandon, or fail to provide support as established by a
19 court order, to another person whom, by court order or decree, the person is legally obligated to
20 support." Under § (D) the inability to pay is an affirmative defense. Under § (G) (1) the first
21 offense is a first degree misdemeanor (6 months / \$1,000.00). If the offender has a prior
22 conviction or "has failed to provide support . . . for a total accumulated period of twenty-six
23 weeks out of one hundred four consecutive weeks . . ." then it is a felony in the fifth degree (12
24 months / \$2,500.00) or may be held to a felony of the fourth degree (18 months / \$5,000.00)
25 under further violations of the Section. This, as opposed to MCL § 750.165's one penny short,
26 one second late 4 year felony.

27 20. Upon cursory review of Illinois and the remaining 46 states, Michigan is the only
28 one penny short, one second late felony wherein the focus is on time and payment verses actual

1 support of one's children. And, where there is no defense as to intent, ability to pay, or actual
2 support in the form of food, clothing, shelter, or medical care.

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

7 **V - PRAYER FOR RELIEF**

8 WHEREFORE, Petitions Prays this Honorable Court to:

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

11 2. Grant other such Relief the Court deems appropriate and/or necessary for the
12 protection of Petitioner's Rights under the United States & Michigan Constitutions.