IN THE SUPREME COURT OF FLORIDA

MILTON GIDDEN,

Petitioner/Appellant,

versus

STATE OF FLORIDA,

Respondent.

S.CT. CASE NO. 79,387

ON DISCRETIONARY REVIEW FROM
THE FIFTH DIBTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner, MILTON GIDDEN, was charged by information number CR88-3214 in Orange County, Florida, with one count of resisting an officer with violence. (R310) Petitioner failed to appear for arraignment on June 7, 1988. (R299) Trial was subsequently held on October 9, and October 10, 1990, before the Honorable George A. Sprinkel, IV, Circuit Judge, Orange County, Florida. (R1-305) The jury returned a verdict finding Appellant guilty as charged in the information. (R289) Petitioner's scoresheet totaled 91 points for a guidelines sentence of any non-state prison sanction. (R343) Petitioner was sentenced to 364 days. (R348) Petitioner was also found guilty of indirect criminal contempt and sentenced to 90 days, consecutive to any other active sentence. (R303,351) Notice of appeal was timely filed. (R356)

On appeal, the Fifth District Court of Appeal affirmed Appellant's conviction for indirect criminal contempt, but indicated the subject merited discussion and certified conflict with Hofeling v. Hofeling, 546 So.2d 1176 (Fla. 2d DCA 1989). Judge Dauksch dissented without opinion and Judge Sharp dissented with an opinion.

STATEMENT OF THE FACTS

The trial court made a determination that there was no good cause why Petitioner should not be held in contempt for failure to appear. The court found Petitioner to be in contempt. (R303)

The order finding Petitioner to be in contempt did not contain the required recital of those facts upon which the adjudication of guilt was based. (R351) See Florida Rules of Criminal Procedure 3.840(6).

SUMMARY OF THE ARGUMENT

The Rule is clear and mandatory. Rule 3.840(a)(6)(Indirect Criminal Contempt) provides: "There should be included in a judgment of guilty a recital of facts constituting the contempt of which the defendant has been found and adjudicated guilty."

In the case sub judice, there was no such "recital of facts."

ARGUMENT

THE TRIAL COURT ERRED IN ITS ORDER FINDING PETITIONER TO BE IN CONTEMPT OF COURT AND THE APPELLATE COURT ERRED IN AFFIRMING SAME.

Florida Rule of Criminal Procedure 3.840(6), reads:

> At the conclusion of the hearing the judge shall sign and enter of record a judgment of guilty or not guilty. There should be included in a judgment of guilty a recital of **the facts** constituting the contempt of which the Appellant has been found and adjudicated guilty.

Herein, the trial court's order failed to include the required "recital of facts constituting **the** contempt of which the defendant has been found **guilty."** (R351)

As Judge Sharp wrote in her dissenting opinion:

> I respectfully dissent. In my view, the rules of criminal procedure for both direct and indirect criminal contempt embody the minimal standards for due process' and they should be strictly interpreted and scrupulously followed. The power to punish for affronting the dignity of the court or the judicial system is so undefined and potentially absolute, it requires careful, meticulous restraint on judges lest we allow our courts to slip into the mode of "star chambers."
>
> For both direct and indirect criminal contempt, the rules are clear and mandatory. Judges must include in the written judgment the factual basis for holding a person in contempt of court. Rule 3.830 (Direct Criminal Contempt) provides: **"The** judgment of guilt of contempt shall include a recital of those facts upon which the adjudication of guilt is based." Rule 3.840(a)***(6)*** (Indirect Criminal Contempt) provides: "There should be included in a judgment of guilty a recital

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[1] (Citations omitted)

> of facts constituting the contempt of which the defendant has been found and adjudicated guilty." I think both rules mandate such fact finding be placed in writing in the judgment.

Without the minimal safeguards provided by Florida Rule of Criminal Procedure 3.840 due process may be short-circuited. See Thurner v. Thurner, 584 So.2d 150 (Fla. 2d DCA 1991), where no order to show cause was issued, no show cause hearing was held and no sentencing pronouncement was made. The judge on his own motion [just] issued a bench warrant.

The Second District court of Appeal ruled in Thurner that: Procedural due process of law requires that the proceedings be conducted in conformity with Rule 3.840. Also citing Pugliese v. Pugliese, 347 So.2d 422 (Fla. 1977). (Emphasis added)

In Hofelinq v. Hofelinq, 546 So.2d 1176 (Fla. 2d DCA 1989), which was cited as conflicting with the case at bar, the Second District Court of Appeal reversed an adjudication of indirect criminal contempt in part because the order did not recite the facts constituting the contempt as required by Rule 3.840(a)(7), citing White v. Buck, 505 So.2d 36 (Fla. 5th DCA 1987).

Petitioner respectfully requests this Court to rule in accord with Hofeling v. Hofeling, susra. In support thereof we would cite Judge Sharp's dissenting opinion in the case at bar, to-wit:

> The Fifth District Court of Appeal decision to recede from White v. Buck, 505 So.2d 36 (Fla. 5th DCA 1987), is bad public policy. The requirement of written findings in criminal contempt cases is analogous to the requirement of written reasons for departure in

sentencing guidelines cases.[2] Both rules insure a criminal defendant has at least one clear shot at review by an appellate court. In guidelines cases, it eliminates the problem that could have existed otherwise: Why (in fact) did the trial judge "depart" in this case?

In criminal contempt cases, these rules[3] similarly require the trial judge to pinpoint the exact basis for imposing criminal sanctions. Because criminal contempt is an open-ended, undefined "crime", it is even more important, in my view, that its identity be stated precisely in writing in the judgment. This requires the trial judge, who may be angry and pressed to the limits of his or her self-control at the time of the hearing or trial, to calm down, reflect, and articulate the factual underpinnings of the contempt. This in turn facilitates the contemnor's right to appeal and insures that at least one additional dispassionate tribunal will look at the cause before criminal sanctions are imposed.

Anything that weakens a criminal contemnor's right to appeal and broadens a judge's power to hold persons in criminal contempt, I view as contrary to good public policy for the reasons stated above. I would adhere to White v. Buck, supra, and Hofeling v. Hofeling, 546 So.2d 1176 (Fla. 2d DCA 1989).

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[2] See Ree v. State, 565 So.2d 1329 (Fla. 1990).

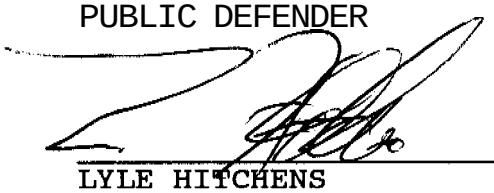
[3] Florida Rule of Criminal Procedure 3.830; Florida Rule of Criminal Procedure 3.840(a)(6).

CONCLUSION

Based on the argument contained herein, and the authorities cited in support thereof, Petitioner **requests** that this Honorable Court rule that the trial court judge should be required to recite in the **order** of contempt the facts constituting the contempt of which the defendant has been found **and** adjudicated guilty, as required by Florida Rule of Criminal Procedure **3.840(a)(6);** and rule that Hofeling v. Hofeling, supra, is controlling.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Fla. 32114, in his basket at the Fifth District Court of Appeal; and mailed to Milton Gidden, 1009 Ivey Lane, Orlando, Florida 32811, on this 13th day of April, 1992.

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

MILTON GIDDEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	S.CT. CASE NO. 79,387
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

MILTON GIDDEN,

Appellant,

V.

STATE OF FLORIDA,

Appellee.
_____/

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

Case No. 90-2309

Opinion filed January 24, 1992

Appeal from the Circuit Court
for Orange County,
George A. Sprinkel, IV, Judge.

James B. Gibson, Public Defender, and
Lyle Hitchens, Assistant Public
Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and James N. Charles,
Assistant Attorney General, Daytona Beach,
for Appellee.

EN BANC

GOSHORN, C.J.

Eidden appeals his conviction for resisting an officer with violence. He also appeals his conviction for indirect criminal contempt. We affirm both convictions, finding that only Gidden's argument concerning his conviction for criminal contempt merits discussion. We have voted to consider this case en banc in order to reconsider our decisions in Alexander v. State, 576 So. 2d 350 (Fla. 5th DCA 1991) and White v. Buck, 505 So. 2d 36 (Fla. 5th DCA 1987).

The offense of indirect criminal contempt is governed by Rule 3.840, Florida Rules of Criminal Procedure. Rule 3.840(a)(6) provides in pertinent part:

> There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty. [Emphasis added].[1]

In White v. Buck, supra, this court held that a trial court is required to set forth the facts upon which its order of indirect criminal contempt is based in order "to advise the accused and to permit meaningful appellate review." 505 So. 2d at 37. See also Alexander v. State, supra. In the instant case, both purposes were accomplished by the trial court's recitation of its findings on the record. This was the rationale for the First District's affirmance of a similar contempt order in Barnhill v. State, 438 So.2d 175 (Fla. 1st DCA 1983). As promulgated by the supreme court, Rule 3.840(a)(6) provides only that a court "should" include a finding of facts in its order. Where, as here, sufficient oral findings are made on the record, the purpose of the rule is fulfilled and written findings are discretionary, not mandatory.

Neither White v. Buck nor Alexander v. State considered oral findings on the record and therefore are distinguishable from the case at bar. However, we recede from the language of those decisions to the extent they may be read to require written findings in a judgment of indirect criminal contempt where the judge's findings on the record serve to advise the defendant of the basis for the judgment and permit meaningful appellate review.

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[1] In contrast, Florida Rule of Criminal Procedure 3.830 gaverning direct criminal contempt provides "The judgment of guilt of contempt shall include a recital of those facts upon which the adjudication of guilt is based." (Emphasis added). See Wells v. State, 487 So. 2d 1101 (Fla. 5th DCA), cause dismissed, 491 So. 2d 281 (Fla. 1986).

We certify conflict with Hofeling v. Hofeling, 546 So. 2d 1176 (Fla. 2d DCA 1989).

AFFIRMED.

COBB, COWARJ, HARRIS, PETERSON, GRIFFIN and DIAMANTIS, JJ., concur,
DAUKSCH, J., dissents without opinion.
SHARP, W., J., dissents with opinion.

SHARP, W., J., dissenting.

I respectfully dissent. In my view, the rules of criminal procedure for both direct and indirect criminal contempt embody the minimal standards for due process[1] and they should be strictly interpreted and scrupulously followed; The power to punish for affronting the dignity of the court or the judicial system is so undefined and potentially absolute, it requires careful, meticulous restraint on judges lest we allow our courts to slip into the mode of "star chambers."

For both direct and indirect criminal contempt, the rules are clear and mandatory. Judges must include in the written judgment the factual basis for holding a person in contempt of court. Rule 3.830 (Direct Criminal Contempt) provides: "The judgment of guilt of contempt shall include a recital of those facts upon which the adjudication of guilt is based." Rule 3.840(a)(6) (Indirect Criminal Contempt) provides: "There should be included in a judgment of guilty a recital of facts constituting the contempt of which the defendant has been found and adjudicated guilty." I think both rules mandate such fact finding be placed in writing in the judgment.

Although in some cases, the judge may articulate neatly in the transcript at the end of a hearing a summary of findings, in others, the "findings" may be scattered throughout a lengthy record. The "findings" may

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[1] *See* White v. Buck, 505 So.2d 36 (Fla. 5th DCA 1987); Wells v. State, 487 So.2d 1101 (Fla. 5th DCA), *appeal dismissed,* 491 So.2d 281 (Fla. 1986); Kahn v. State, 447 So.2d 1048 (Fla. 4th DCA 1984); Holden v. State, 380 So.2d 548 (Fla. 2d DCA 1980); Keezel v. State, 358 So.2d 247 (Fla. 4th DCA 1978); Vines v. Vines, 357 So.2d 243 (Fla. 2d DCA 1978); Ray v. State, 352 So.2d 110 (Fla. 1st DCA 1977), *cert. denied,* 360 So.2d 1250 (Fla. 1978); Simkovitz v. State, 340 So.2d 959 (Fla. 3d DCA 1976).

be contradictory or ambiguous or even garbled as sometimes spoken words appear when transcribed into written words, stripped of the body language and inflection which once supplied their true meaning.

In my view, this court's decision to recede from White *v. Buck*, **505** So.2d **36** (Fla. 5th **DCA** 1987), is bad public policy. The requirement of written findings in criminal contempt cases is analogous to the requirement of written reasons for departure in sentencing guidelines **cases.**[2] Both rules insure a criminal defendant has at least one clear shot at review by an appellate court. In guidelines cases, it eliminates the problem that could have existed otherwise: Why (in fact) did the trial judge "depart" in this case?

In criminal contempt cases, these rules[3] similarly require the trial judge to pinpoint the exact basis for imposing criminal sanctions. Because criminal contempt is an open-ended, undefined "crime", it is even more important, in my view, that its identity be stated precisely in writing in the judgment. This requires the trial judge, who may be angry and pressed to the limits of his or her self-control at the time of the hearing or trial, *to* calm down, re'flect, and articulate the factual underpinnings of the contempt. This in turn facilitates the contemnor's right to appeal and insures that at least one additional dispassionate tribunal will look at the cause before criminal sanctions are imposed.

Anything that weakens a criminal contemnor's right to appeal and broadens a judge's power to hold persons in criminal contempt, I view **as**

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2 ***See*** **Ree v.** State, 565 So.2d 1329 (Fla. 1990).

3 Fla.R.Crim.P. **3.830;** Fla.R.Crim.P. **3.840(a)(6).**

contrary to **good public policy** for the reasons stated above. I **would** adhere to ***White v. Buck*** and ***Hofeling v. Hofeling,*** **546** So.2d 1176 (Fla. **2d DCA** 1989).