IN THE SUPREME COURT OF FLORIDA

CRISELDA LOPEZ,	:	
Petitioner,	:	
vs.	:	Case No. 86, 594
THE HONORABLE E. RANDOLPH BENTLEY, as Circuit Judge Judge of the Tenth Judicial Circuit,	:	Second DCA No. 95-01430
Respondent.	:	

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE FACTS

Petitioner has submitted a unique brief consisting largely of a reproduction of a minority opinion below, which has even been edited in a futile attempt to make that dissent fit the facts of this case. The petitioner all but ignores the events in the case prior to the issuance of the injunction in the trial court. Those events are of consequence to the question whether this case ultimately presents facts upon which the certified questions could be based. The petitioner also simply turns her back on the fact that she has already made concessions below which are fatal to her case.

This cause in actuality presents a case of violation of an injunction against repeat domestic violence, and thus involves Chapter 784, Florida Statutes, rather than Chapter 741. Florida has two entirely different mechanisms for dealing with the sad state of our violent society. One is the statutory scheme found in Section 784.046, Florida Statutes, which deals with repeat violence by any person (whether or not a family member of the victim) against the same victim or a member of that victim's immediate family, Section 784.086(1)(b), Florida Statutes. As amended in 1994, and as contrasted with the provisions of Chapter 741, it contained no specific prohibition against use of indirect criminal contempt sanctions.

The other mechanism is found in Sections 741.28, 741.29, 741.2901, 741.2902, and 741.30, Florida Statutes. This requires no prior act, but does require that the violator and victim be members

of the same family or household, who have resided or are residing in the same dwelling unit. That statute is not alleged to be involved here. As noted, it significantly contained a legislative pronouncement that its provisions are not to be enforced by indirect criminal contempt, Section 741.2901(2), Florida Statutes, Walker v. Bentley, 660 So.2d 313, 316 (Fla. 2d DCA 1995). Instead, this case as shown under point I, argument, infra, presents a matter involving not Chapter 741, but Chapter 784.

In the argument portion of her petition in the Second District Court of Appeal, the petitioner conceded that the injunctions were sought under Chapter 784:

> Courts are not limited to issuance of injunctions pursuant to section 784.046 in instances where a complainant comes before the court alleging repeat acts of domestic violence. Courts presented with such a complaint can exercise their equitable jurisdiction and issue injunctions proscribing whatever conduct the court deems appropriate to prevent further acts of violence. When an injunction of this nature is entered, the court has the inherent power to enforce its injunction by any available legal means, including indirect criminal contempt. (Emphasis supplied). (Petition for Writ of Prohibition, unnumbered fourth page).

Although respondent vigorously pressed this point in his brief, the District Court of Appeal did not comment upon the quoted concession.

SUMMARY OF ARGUMENT

This case does not raise the issues described in the certified questions in Walker v. Bentley, 660 So.2d 313 (Fla. 2d DCA 1995). Petitioner has conceded that the trial court had inherent power to punish indirect criminal conduct, thus rendering the arguments here moot, or, in the alternative, admitting that the pertinent statutes are unconstitutional if construed as petitioner contends. Regardless of that concession, this inherent power is indisputably established by long existing precedent.

Issues Presented

POINT I

THE LEGISLATURE DID NOT PROHIBIT USE OF INDIRECT CRIMINAL CONTEMPT IN REPEAT VIOLENCE CASES.

POINT II

THE FIRST QUESTION CERTIFIED SHOULD CLEARLY BE ANSWERED IN THE NEGATIVE AND THE SECOND IN THE AFFIRMATIVE.

Question No. 1:
The May & Shall Issue

Question No. 2:
The Inherent Power Issue

ARGUMENT

I.

THE LEGISLATURE DID NOT PROHIBIT USE OF INDIRECT CRIMINAL CONTEMPT IN REPEAT VIOLENCE CASES.

The injunction in question was issued under Chapter 784. This being so, and the Legislature not having specified that indirect criminal contempt cannot be utilized under Chapter 784, such use is entirely proper and should be permitted. This renders the certified questions (as rewritten in this case by counsel for the petitioner) moot.

The petitioner in this Court totally ignores the fact that she conceded the inherent power of the respondent to deal with her contempt by use of the power to punish for indirect criminal contempt. She has thus pleaded herself out of court. Nevertheless, she persists in her other arguments by simply ignoring the fatal admission below. This conduct ought not to be permitted.

II.

THE FIRST QUESTION CERTIFIED SHOULD CLEARLY BE ANSWERED IN THE NEGATIVE AND THE SECOND IN THE AFFIRMATIVE.

Question No. 1: The May & Shall Issue

It is quite clear that the word "shall" in the context at hand, when the Legislature has without authority limited the power of the courts, may be interpreted as permissive, and not mandatory. Rich v. Ryals, 212 So.2d 641 (Fla. 1968); State ex rel. Harrington v. Genung, 300 So.2d 271 (Fla. 2d DCA 1974); Simmons v. State, 36

So.2d 207 (Fla. 1948). Therefore, Section 784.06 should be so interpreted. The District Court of Appeal was entirely correct in so ruling in order to avoid the necessity of declaring that section unconstitutional[1]. Question No. 1 (even as rewritten by counsel for the petitioner) should therefore be answered in the negative.

Question No. 2:
The Inherent Power Issue

If Section 784.06 must be construed as being mandatory in nature, it is then manifestly unconstitutional as an unauthorized legislative intrusion into the inherent powers of the judicial branch, and thus a violation of the constitutionally specified separation of powers, Article II, Section 3, Florida Constitution.

Under longstanding Florida decisions, largely ignored by the dissent, and totally ignored by petitioner, the power of contempt is an inherent prerogative of the judicial branch. This Court nearly 75 years ago held that:

> But, as all persons do not at all times appreciate or recognize their obligations of respect for the tribunals that are established by governmental authority, to maintain right and justice in the various relations of human life, the courts and judges have, under constitutional government, inherent power by due course of law to appropriately punish by time or imprisonment or otherwise, any conduct that in law constitutes an offense against the authority and dignity of a court or judicial officer in the performance of judicial functions. And appropriate punishment may be imposed by the court or judge whose authority or dignity has been unlawfully assailed . . .

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[1] See Walker v. Bentley, 660 So.2d 313 at 320, 321 (Fla. 2d DCA 1995).

> An offense against the authority or the dignity of a court or of a judicial officer when acting judicially is called contempt of court, a species of criminal conduct. Contempts may be direct or indirect or constructive, or criminal or civil, according to their essential nature . . . Contempts of court are committed against courts and judicial officers who are vested with a portion of "the judicial power of the state," when judicial functions are interfered with or impugned by the contemptuous acts or conduct . . .
>
> An indirect or constructive contempt is an act done, not in the presence of a court or of a judge acting judicially, but at a distance under circumstances that reasonably tend to degrade the court or the judge as a judicial officer, or to obstruct, interrupt, prevent, or embarrass the administration of justice by the court or judge.

(Emphasis supplied). Ex parte Earman, 85 Fla. 297, 313, 95 So. 755, 760 (1923)(citations omitted).

The authority of the Legislature in this area is limited to "the power to determine how and to what extent the courts may punish, criminal conduct including contempt." A.A. v. Rolle, 604 So.2d 813, 815 (Fla. 1992)(emphasis supplied). Otherwise, from early days, it has been the law of Florida that the power of contempt "is omnipotent and its exercise is not to be enquired into by any other tribunal." Ex parte Edwards, 11 Fla. 174, 186 (1867). This power exists independently of any statutory grant, Ducksworth v. Boyer, 125 So.2d 844, 845 (Fla. 1960), and even if ostensibly granted by statute, it cannot be withdrawn. State ex rel. Franks v. Clark, 46 So.2d 488 (Fla. 1950).

This Court held in In re Hayes, 72 Fla. 558, 73 So.2d 362, 364-365 (1916):

> It is of paramount importance that each department of our government should be protected and preserved against the attempts of designing persons to undermine its authority and destroy its efficiency. The executive branch of our government is charged with the duty of enforcing the law as made by the Legislature and construed by the courts, yet the officers of that branch of the government whose duties are largely, if not entirely, ministerial, are protected by law from interference with the discharge of their duties. The legislative branch, whose acts are subject to the courts' construction, has the power vested in it by constitutional provision to punish by fine or imprisonment any contempt committed in its presence, and so the courts, whose duty it is to construe the law and upon whom there is no check save the sovereign power of the people and the conscience, honor, ability, and mental honesty of the judges, have the inherent power to punish summarily any effort on the part of a citizen to destroy their authority and efficiency. (Emphasis supplied)

Countless additional citations can be set forth supporting this uncontradicted inherent power, see, e.g., R.M.P. v. Jones, 419 So.2d 618 (Fla. 1982); Ducksworth v. Boyer, supra; State ex rel. Franks v. Clark, supra.

Nor are the federal authorities to the contrary. In Young v. United States ex rel. Vuitton, 481 U.S. 787, 796, 95 L.Ed. 2d 740, 751, 107 S.Ct. 2124 (1987), the Supreme Court of the United States in the course of a comprehensive review of the inherent contempt power duty dating back to the twelfth century, said:

> The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate

> its own authority without complete dependence on other branches. "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery." Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450, 55 L.Ed. 797, 31 S.Ct. 492 (1911). As a result, "there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience." Ibid. Courts cannot be at the mercy of another branch in deciding whether such proceedings should be initiated.

(Footnotes omitted).

The law of the great majority of the states is identical. In a comprehensive annotation at 121 A.L.R. 216, 217, the annotator declares:

> . . . the general rule follows that the legislature cannot abridge or destroy the judicial power to punish for contempt, since a power which the legislature does not give, it cannot take away.

This Court very recently recognized that the Legislature, in the situation of Chapter 741, had created a separation of powers issue by purporting to eliminate the judicial power of inherent criminal contempt to punish those who violate judicial orders, and in the process had thereby created "an administrative Frankenstein." In re Report of the Com'n on Family Courts, 646 So.2d 178, 180 (Fla. 1994).

This concern was well placed. The statute in issue, if construed as petitioner desires, would leave a trial court

powerless to restrict the opportunity for future violence, and to punish those who would ignore the authority of the court. The power of civil contempt is utterly beside the point as civil contempt necessarily requires an opportunity to purge by use of the celebrated "key to the jail." This is proven by posing a simple rhetorical question: how does one "purge" a battery that has already occurred?[2]

Nor can passing the buck to a state attorney vindicate the authority of a court. Indeed, to seek to do so is itself invasive of the executive prerogative to prosecute or not. The Legislature created a "Frankenstein" deserving of the fate accorded it by the majority below.

For all of these reasons, as well as petitioner's admissions below, the second question is also to be answered in the affirmative if reached.

CONCLUSION

The case should be dismissed.

Respectfully Submitted,

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[2] The instant case does not remotely involve a situation of failure to attend a drug treatment program or a failure to pay support as suggested by the dissent as presenting hypothetical examples for use of civil contempt. Walker v. Bentley, 660 So.2d 313 at 327, n.13). Such facts are not before this Court. Instead, this case presents issues of possible life and death including battery inflicted on a pregnant woman (App. 1). As such, it can only be remedied by the strong sanction of indirect criminal contempt.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Deborah K. Brueckheimer, Esquire, Public Defender's Office, Polk County Courthouse, Post Office Box 9000, Drawer-PD, Bartow, Florida 33830-9000; and, Margot Osborne, Esquire, Assistant State Attorney, State Attorney's Office, Bartow, Florida 33830; this 17th day of April, 1996.

Attorney

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