IN THE SUPREME COURT OF FLORIDA

JARVIS RAMON HAYNES,

Petitioner,

v. Case No. SC07-123

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The State generally accepts Haynes's statement of the case and facts but restates and adds the following:

Haynes appeared at the jury trial of Taveress Webster on December 8, 2005. (Vol. II, R. 18). The following exchange occurred regarding the subpoenas:

> MR. ALTMAN: Your Honor, I don't know if you want me to offer at this time, I do have the return subpoenas for Jarvis Haynes' testimony in the trial of Taveress Webster and the trial of Charlie Hamilton.
>
> THE COURT: Have you shown it to Mr. Kehoe?
>
> MR. ALTMAN: Yes.
>
> THE COURT: If you'd place it in the court file.
>
> MS. CASHMAN: Judge, could defense counsel be allowed to just view those?
>
> THE COURT: Sure.
>
> MS. CASHMAN: Thank you.
>
> THE COURT: Place them in the court file, not as evidence. Place in the court file.
> State may proceed.

(T 3-4).

Thereafter, the prosecutor requested to make a statement to Haynes. The trial court permitted him to do so and the prosecutor stated the following:

> You're here, having been subpoenaed as a witness in this case. Pursuant to Florida

> Statute, anything you say cannot be used against you. You have what's called use immunity, that whatever you say in this proceeding can never be used against you in any future proceeding except for perjury. But if your case were to come back for appeal and you were to have a new trial, whatever you say here today could not be used in that new trial against you. And I've told your attorney. That's pursuant to statute. And even if it were not pursuant to statute, I am making that statement here in open court, that whatever you say here cannot be used against you.

(Vol. I, T. 4).

The prosecutor further advised Haynes that the State would agree to ask the trial judge to resentence him in consideration of his testimony, leaving the new sentence up to the discretion of the trial court. (Vol. I, T. 5,6).

At that point, defense counsel had the following exchange with the court:

> THE COURT: What's your client's position at this time?
>
> MR. KEHOE: My client will not answer questions -- any questions today. And before I -- I guess, as a preliminary matter, the issue of the subpoena that was just tendered to the Court, you said it was to be placed in the court file and not as evidence. I would submit that that's not sufficient proof in and of itself to show that Mr. Haynes was served with a valid subpoena. I object to the service portion of the subpoena as hearsay and I don't believe it's adequate evidence to show proof of service of that subpoena on Mr. Haynes.

> MR. ALTMAN: Your Honor, as --
>
> MR. KEHOE: Beyond that -- and let -- I=m sorry. But beyond that, it is my understanding that if the Court orders Mr. Haynes to testify here today, pursuant to those two subpoenas, that he will invoke his Fifth Amendment privilege.
>
> THE COURT: As to the subpoena filed in open court here today, I find no defects or imperfections of it [sic] and it=s not, in fact, not hearsay. It=s a court document that=s placed in the court file.

(Vol. I, T. 6-7).

When asked if he understood that his testimony would be subject to immunity and could not be used against him, Haynes nodded and said that he understood. (Vol. I, T. 7-8). Haynes further expressed his understanding that after his appeal was completed, the State would not oppose a motion regarding his sentence. (Vol. I, T. 8).

At that point, the following occurred between the trial judge and Haynes:[1]

> THE COURT: As to testifying here today and responding to the State=s questions, what is your position?
>
> THE WITNESS: I=m going to exercise my Fifth Amendment right.
>
> THE COURT: All right. So if the Court directs that you must respond and orders you

[1] The transcript refers to Haynes as AThe Witness.@ (Vol. I, T. 8-10).

to respond, your answer to that?

THE WITNESS: I'm going to exercise my Fifth Amendment right.

THE COURT: And if I direct, under the powers of the Court for Contempt of Court, that you must respond, you understand that you could be exposed to a maximum 179 days incarceration as part of any sentence or disposition for refusing to respond? Do you understand that?

THE WITNESS: Yes, I do. But I'm going to exercise my Fifth Amendment right also.

THE COURT: So under no terms, even if you're court-ordered by the Court to do so, you will not respond?

THE WITNESS: Under no terms.

THE COURT: I am ordering you to testify truthfully; what is your response?

THE WITNESS: I exercise my Fifth Amendment right.

THE COURT: Refusing to testify; is that right?

THE WITNESS: Yes.

THE COURT: State ask anything?

MR. ALTMAN: I would just ask that Mr. Haynes be held in contempt, Your Honor.

THE COURT: Mr. Haynes, you've been advised by counsel. You've been explained in court as to your obligations to testify truthfully. The Court has ordered and directed you to respond. You have indicated that you will not respond even after court order. I do find that you're in violation of this Court's order, direct violation, and that you be

> sentenced as a direct violation, as a criminal contempt, in court, to 179 days in the Orange County Jail, and that this will be consecutive to any times that you're currently serving on any other offense.

(T 8-10).

The same day, the trial court entered a written order stating, AWitness Jarvis Haynes, DOB 8/18/1977, inmate # 05049672 was found in direct contempt of Court for refusing to testify.@ (Vol. II, R. 18).

On December 16, 2005, Haynes filed a motion for judgment of acquittal, arguing that the State failed to present competent proof that he was served with a valid subpoena. (Vol. II, R. 21-22). The trial court had not ruled on the motion when Haynes filed a notice of appeal on January 9, 2006.

The Fifth District Court of Appeal affirmed Haynes's adjudication of direct criminal contempt but reversed and remanded the case for resentencing. See Haynes v. State, 944 So.2d 417 (Fla. 5th DCA 2006). The final paragraph of the opinion as reported in the Southern Reporter, Second Series, does not contain the following citation, which is contained in the corrected opinion received by Respondent from the district court of appeal on December 20, 2006: ACf. Gooden v. State, 931 So.2d 146 (Fla. 1st DCA 2006).@ See Appendix A. The Thomson West Publication Company had not received the corrected version

from the Fifth District Court of Appeal but, upon notification from Respondent, has amended the case on Westlaw to include the citation to Gooden. See Appendix B. The corrected opinion with the citation to Gooden is found on LEXIS.

SUMMARY OF ARGUMENT

The district court of appeal properly affirmed Haynes's judgment for direct criminal contempt, reversing and remanding this case for resentencing only. Haynes has not preserved any claim of error committed by the trial court as he failed to proffer any evidence in mitigation and steadfastly refused to talk. Moreover, standard rules of statutory construction require that related rules be read in pari materia and usage of the same words or phrases in different parts of the same statute or rule should be construed to have the same meaning. Thus, when read in pari materia with Florida Rule of Criminal Procedure 3.840, a violation of the part of Florida Rule of Criminal Procedure 3.830 that affords a defendant the opportunity to present excusing or mitigating circumstances arises when that defendant is being sentenced for direct criminal contempt. Thus, the remedy for a violation of this

part of rule 3.830 is reversal of the sentence only, not reversal of both the judgment and sentence, as the district court correctly found below.

Also, while Haynes has waived appellate review of the sufficiency of the written order of contempt entered by the trial court, the district court still properly found that the written findings of the trial court comported with rule 3.380. Haynes's claim that the trial court considered improper hearsay has been waived. The merits of the claim fail as the evidence he contests was not relevant, not hearsay, and any error in its consideration by the trial court was harmless. Finally, the district court properly found that Haynes committed direct criminal contempt when, after being repeatedly ordered to so, he failed to testify upon a grant of immunity during the trial of one of his co-defendants.

ARGUMENT

HAYNES WAS PROPERLY ADJUDICATED GUILTY OF DIRECT CRIMINAL CONTENT AND THE DISTRICT COURT OF APPEAL PROPERLY AFFIRMED HAYNES=S CONVICTION AND REVERSED AND REMANDED THIS CASE FOR RESENTENCING ONLY.

Prior to addressing the merits of Haynes= claims, Respondent reiterates the argument made in its brief in opposition of jurisdiction and further asserts the following.

Haynes sought and this Court accepted jurisdiction of this case based upon an express and direct conflict by relying upon McCrimager v. State, 919 So.2d 673 (Fla. 1st DCA 2006); Garrett v. State, 876 So.2d 24 (Fla. 1st DCA 2005); Rhoads v. State, 817 So.2d 1089 (Fla. 2d DCA 2002); Sanjuro v. State, 677 So.2d 965 (Fla. 3d DCA 1996); Bouie v. State, 784 So.2d 521 (Fla. 4th DCA 2001); and Bauder v. State, 923 So.2d 1223 (Fla. 3d DCA 2006). However, a careful reading of these decisions in conjunction with the decision issued by the district court below demonstrates no express and direct factual or legal conflict.

Respondent has never disputed that the trial court failed to give Haynes the opportunity to present excusing or mitigating circumstances prior to being sentenced on a judgment of direct criminal contempt. See Florida Rule of Criminal Procedure 3.830. With that, the district court below affirmed the judgment of direct criminal contempt and reversed and remanded

the matter for resentencing only. Haynes v. State, 944 So.2d 417, 420 (Fla. 5th DCA 2006). None of the cases cited as a basis for conflict jurisdiction expressly and directly address the remedy fashioned by the district court below. All of them summarily reverse the judgment and sentence in their entirety without any discussion. Moreover, the district court did not cite to or even refer to these cases in the opinion below when reaching its conclusion regarding the appropriate remedy. Id.

This Court has repeatedly held that conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Until another district court of appeal is faced with the facts presented in this case and holds differently from the district court below, expressly and directly finding that reversal of both the judgment and sentence is required with this type of violation of rule 3.830, there is no express and direct conflict upon which this Court can exercise its jurisdiction. In light of the foregoing, Respondent urges this Court to discharge its jurisdiction in this case.

Notwithstanding the jurisdictional bar precluding review by this Court, Haynes contends that the trial court violated rule 3.830 by not allowing him to show cause, or present evidence of excusing or mitigating circumstances during the contempt

proceeding.

Rule 3.830 provides:

> A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt of contempt shall include a recital of those facts on which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against the defendant and inquire as to whether the defendant has any cause to show why he or she should not be adjudged guilty of contempt by the court and sentenced therefor. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court.

(Emphasis added).

In making this argument, Haynes commingles two different aspects of this rule. First, the inquiry of a defendant of whether he or she has any cause to show why he or she should not be adjudged guilty and Asentenced therefor@, and second, that the defendant be given the opportunity to present evidence of excusing or mitigating circumstances. See rule 3.830. As the district court examined below and as the Third District Court of Appeal set forth in Hibbert v. State, 929 So.2d 622 (Fla. 3d DCA 2006), this is a two step process. First, the rule provides the defendant the opportunity to show cause why he should not be held in contempt and then sentenced. Next, the trial judge is required Ato give the defendant the opportunity to present

evidence of excusing or mitigating circumstances before the sentencing.@ Hibbert, 929 So.2d at 622.

Ths basis for Haynes=s direct criminal contempt occurred when Haynes appeared at the jury trial of Taveress Webster on December 8, 2005. After the State and the trial court explained to Haynes that his testimony at the trial that day was subject to immunity, could not be used against him in the event his appeal was successful, and that the State would not file a motion in opposition to Haynes=s motion to mitigate sentence, the following exchange occurred:

> THE COURT: As to testifying here today and responding to the State=s questions, what is your position?
>
> THE WITNESS: I=m going to exercise my Fifth Amendment right.
>
> THE COURT: All right. So if the Court directs that you must respond and orders you to respond, your answer to that?
>
> THE WITNESS: I=m going to exercise my Fifth Amendment right.
>
> THE COURT: And if I direct, under the powers of the Court for Contempt of Court, that you must respond, you understand that you could be exposed to a maximum 179 days incarceration as part of any sentence or disposition for refusing to respond? Do you understand that?
>
> THE WITNESS: Yes, I do. But I=m going to exercise my Fifth Amendment right also.
>
> THE COURT: So under no terms, even if you=re

> court-ordered by the Court to do so, you will not respond?
>
> THE WITNESS: Under no terms.
>
> THE COURT: I am ordering you to testify truthfully; what is your response?
>
> THE WITNESS: I exercise my Fifth Amendment right.
>
> THE COURT: Refusing to testify; is that right?
>
> THE WITNESS: Yes.
>
> THE COURT: State ask anything?
>
> MR. ALTMAN: I would just ask that Mr. Haynes be held in contempt, Your Honor.
>
> THE COURT: Mr. Haynes, you've been advised by counsel. You've been explained in court as to your obligations to testify truthfully. The Court has ordered and directed you to respond. You have indicated that you will not respond even after court order. I do find that you're in violation of this Court's order, direct violation, and that you be sentenced as a direct violation, as a criminal contempt, in court, to 179 days in the Orange County Jail, and that this will be consecutive to any times that you're currently serving on any other offense.

(T 8-10).

As the district court found below, the record plainly shows that Haynes was twice given the opportunity to show cause why he should not have been held in contempt. The court first asked Haynes for an answer as to why he refused to follow the court's order to testify, and then asked essentially the same question

again. Haynes, 944 So.2d at 420. This exchange provided Haynes with an opportunity to present a defense to the charge and he refused. These inquiries by the trial court, while not using the technical words Ashow cause,@ more than sufficiently complied with this first portion of rule 3.830 that Haynes was afforded an opportunity to show cause why he should not have been adjudged guilty of contempt. See id. He refused to do so.

The second aspect of the rule and the central issue before this Court is the remedy for a person properly held in criminal contempt but not afforded the opportunity to present evidence of excusing or mitigating circumstances. Essentially, Haynes argues that the inquiry under this part of the rule must occur contemporaneously with the show cause requirement necessary for a trial court to make a finding of contempt. Respondent submits otherwise.

Initially, Respondent notes that while Haynes argues that he is entitled to relief because he was not afforded the opportunity to present any evidence in mitigation for his conduct, Haynes did not proffer anything in mitigation. Instead, the record plainly reflects that Haynes stated that Aunder no terms@ would he talk. (Vol. I, T. 11). Without a proffer, there is no basis for Haynes to claim any error. See Finney v. State, 660 So. 2d 674, 684 (Fla. 1995), cert. denied,

516 U.S. 1096 (1996)("Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result."). See also Trease v. State, 768 So.2d 1050, 1054 (Fla. 2000)(having failed to demonstrate the relevancy of the sought-after testimony by way of proffer, appellant cannot now claim error) and Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990) (holding that a party's failure to proffer what a witness would have said on cross-examination renders an alleged trial court error in the exclusion thereof unpreserved). It is disingenuous of Haynes to claim an appellate error regarding the failure of the trial court to consider mitigating circumstances when Haynes outwardly refused to talk and offered nothing by way of an explanation or offer of proof for his actions. Without some showing of prejudice resulting from the failure of the trial court to comport with this part of rule 3.830, Haynes is not entitled to appellate relief. See section 924.051, Fla. Stat. (2006)(A>Prejudicial error: means an error in the trial court that harmfully affected the judgment or sentence.@). Accordingly, his entire claim has been waived.

Waiver notwithstanding, the remedy fashioned by the district court was legally correct. The failure of the trial court to afford Haynes the opportunity to respond under this part of the

rule, which is set forth after the provision of the rule that affords him an opportunity to show cause why he should not be held in contempt, applies not to his adjudication of the crime but to his sentence. Thus, the district court correctly determined that the appropriate remedy was reversal of Haynes=s sentence only. Haynes, 944 So.2d at 420.

Application of standard rules of statutory construction routinely applied by this Court dictate this result and support the ruling of the district court. The same principles of construction apply to court rules as apply to statutes. Mitchell v. State, 911 So.2d 1211, 1214 (Fla. 2005)(quotations omitted); Brown v. State, 715 So.2d 241, 243 (Fla. 1998). See e.g. Burk v. Washington, 713 So.2d 988 (Fla. 1998)(reading speedy trial rule and criminal contempt procedure rules together to conclude that speedy trial rule did not apply to contempt proceedings initiated by the courts).

It is a basic rule of statutory construction that statutes which relate to the same or to a closely related subject or object are regarded as in pari materia and should be construed together and compared with each other. State v. Fuchs, 769 So.2d 1006, 1009 (Fla. 2000); Ferguson v. State, 377 So.2d 709, 710 (Fla. 1979). The courts should view the entire statutory scheme to determine legislative intent. Ferguson, 377 So.2d at

710. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another. T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996)(quoting Forsythe v. Longboat Key Beach Erosion Control, 604 So. 2d 452, 455 (Fla. 1992))(citations omitted)(emphasis in original). Moreover, when different statutes employ exactly the same words or phrases, the legislature is assumed to have intended the same meaning. Schorb v. Schorb, 547 So.2d 985, 987 (Fla. 2d DCA 1989)(citing Goldstein v. Acme Concrete Corp., 103 So.2d 202, 204 (Fla. 1958)).

The phrase at issue regarding the presentation of Amitigating circumstances@ is contained in both rule 3.830 and Florida Rule of Criminal Procedure 3.840, the counterpart for rule 3.830 addressing indirect criminal contempt. Reading rule 3.840 in pari materia with rule 3.830 supports the ruling of the district court that Haynes should be subject to resentencing only and is not entitled to reversal of the judgment. Haynes, 944 So.2d at 920.

Rule 3.840, while more lengthy than rule 3.830 given the factual differences which underlay direct and indirect criminal contempt cases, still contains the same procedural steps. The first section of rule 3.840 provides that upon an order to show cause issued by the trial judge, a defendant is required to

appear in court and show cause why he or she should not be held in contempt of court. See Fla. R. Crim. P. 3.840(a) and compare Fla. R. Crim. P. 3.830 (APrior to the adjudication of guilt that judge shall inform the defendant of the accusation against the defendant and inquire as to whether the defendant has any cause to show why he or she should not be adjudged guilty of contempt by the court and sentenced therefor@). Thereafter, the rule sets forth sections for motions, answers, order of arrest, bail, arraignment, hearing, disqualification of the judge, and then notably, verdict and judgment. See Fla. R. Crim. P. 3.840(b),(c), (d),(e), and (f). After the section that addresses adjudication and judgment, rule 3.840 (g) reads as follows:

> Sentence; Indirect Contempt. --Prior to the pronouncement of sentence, the judge shall inform the defendant of the accusation and judgment against the defendant and inquire as to whether the defendant has any cause to show why sentence should not be pronounced. The defendant shall be afforded the opportunity to present evidence of mitigating circumstances. The sentence shall be pronounced in open court and in the presence of the defendant.

Thus, in the sentencing section of this rule, this Court included the almost identical phrase as that contained in rule 3.830, which gives the defendant an opportunity to present evidence in mitigation of his or her sentence.

An example of the bifurcation in the rule between guilt and

sentencing is set forth in Patz v. State, 691 So.2d 66, 66-67 (Fla. 3d DCA 1997). There, the trial court gave the defendant an opportunity to show cause why he should not be held in direct criminal contempt for providing misrepresentations during voir dire, and the defendant responded that he was sick. With that, the trial court found the defendant in direct criminal contempt and sentenced him. The district court noted that the trial court erred because Aprior to sentencing, the court failed to afford the Appellant an opportunity to present evidence to mitigate his sentence.@ Id. at 67 (emphasis added). There, the district court properly construed the rule to mean that Aexcusing or mitigating circumstances@ related to sentencing not to the adjudication of guilt of the charge.[2] Thus, if a trial court fails to afford a defendant the opportunity to present excusing or mitigating circumstances, the conviction should be affirmed and only the sentence reversed. See Gooden v. State, 931 So.2d 146, 147 (Fla. 1st DCA 2006)(on finding that trial court failed to comply with rule 3.840(g), district court affirmed defendant=s

[2] Respondent acknowledges that the district court in Patz reversed both the judgment and sentence without consideration of the issue presented here regarding whether only the sentence should have been subject to reversal. As with all of the cases Haynes= relies upon to establish conflict jurisdiction and as set forth supra, the remedy afforded for a violation of the sentencing portion of rule 3.830 has not been squarely addressed by any other district court of appeal.

conviction for indirect criminal contempt but reversed his sentence and remanded for resentencing only). See also Villate v. State, 663 So.2d 672, 673 (Fla. 4th DCA 1995)(judgment and sentence for indirect criminal contempt affirmed as trial court allowed defendant Ato present evidence concerning his qualms about complying with the subpoena at the sentencing hearing, which according to Florida Rule of Criminal Procedure 3.840(g), is the appropriate time and place for consideration of ›mitigating circumstances.:").

The district court below correctly applied this distinction and a plain reading of the phrase in rule 3.830 in pari materia with its placement and usage in rule 3.840 demonstrates that it applies to a defendant:s sentence for contempt, not the judgment.[3] See Gooden, 931 So.2d at 147. Compare Cook v. State, 636 So.2d 895, 896 (Fla. 3d DCA 1995)(the trial court erred by not giving Cook Athe opportunity to present evidence of excuse or

[3] Haynes asserts that the district court affirmatively Adropped@ its citation to Gooden because, according to Haynes, its previous reliance upon Gooden Awas misplaced.@ See Petitioner:s Merits Br. at 6,12. This assertion is unfounded and incorrect as the district court never excluded this citation from the corrected opinion. Instead, the Thomson West Publication Company was never in receipt of the corrected opinion, and has now since correctly posted the opinion on Westlaw. Haynes:s attempt to attach legal significance to a clerical error, which was promptly remedied by the Thomson West Corporation when notified, is baseless and should be flatly rejected by this Court.

mitigating circumstances before it imposed sentence pursuant to rule 3.830") with Hutcheson v. State, 903 So.2d 1060, 1062 (Fla. 5th DCA 2005)(AWhere a claim of false or perjured testimony is involved, the accused must, prior to the adjudication of guilt, be given an opportunity to present evidence of excusing or mitigating circumstances@) and State ex rel. Garlovsky v. Eastmore, 393 So.2d 567, 573 (Fla. 5th DCA 1981)(AThe opportunity to present evidence of excusing circumstances must precede the adjudication of guilt; the opportunity to present evidence of mitigating circumstances may be afforded at the same time but, at least, must precede the imposition of sentence.@). To construe the provision in rule 3.830 in isolation and find that it applies to both a judgment and sentence, whereas in rule 3.840, the rule for a corresponding crime, it most certainly applies only to a sentence, is illogical and contrary to well-established rules of statutory construction that these inherently intertwined rules be read in pari materia. See Grant v. State, 832 So.2d 770, 773 (Fla. 5th DCA), rev. denied, 835 So.2d 266 (Fla. 2002), cert. denied, 538 U.S. 980 (2003)(AThe doctrine of in pari materia requires courts to construe related statutes together so that they will illuminate each other and are harmonized.@)

Also, without any citation to authority, Haynes claims the

remedy formulated below is in error because the word Aexcusing@ in rule 3.830, the only word absent from the corresponding sentencing provision in 3.840(g), is Atypically offered as a defense to a charge.@ Petitioner=s Merits Br. at 11. However, the purpose of criminal contempt is to punish. Criminal contempt proceedings are utilized to vindicate the authority of the court or to punish for an intentional violation of an order of the court. Bowen v. Bowen, 471 So.2d 1274, 1277 (Fla. 1985). The placement of the word Aexcusing@ in conjunction with its placement to Aor mitigating circumstances@ again has to be in reference to sentencing.

This language is contained in the fourth sentence of rule 3.830. The third sentence affords a defendant an opportunity to show cause why he or she is not in contempt, which as Respondent argues, is the adjudicatory portion of the rule. The next sentence uses the word Amitigating.@ In that context, use of excusing and mitigating has to allude to sentencing given that, under Florida law, the term mitigating or mitigation is routinely utilized in the context of sentencing, particularly in chapter 921, entitled ASentence.@ See section 921.0016, Fla. Stat. (2006)(setting forth mitigating circumstances for downward departure sentence under sentencing guidelines); section 921.0026, Fla. Stat. (2006)(setting forth mitigating

circumstances for downward departure sentence under Criminal Punishment Code); sections 921.141 and 921.142, Fla. Stat. (2006)(trial court must consider sufficiency of mitigating circumstances prior to imposition of death penalty); and section 921.185, Fla. Stat. (2006)(degree of restitution may be consideration in mitigation of a sentence). See also Florida Rule of Criminal Procedure 3.800(c)(motion to modify or reduce sentence referred to as a motion to mitigate sentence).

Furthermore, a basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in an absurd consequence. Thompson v. State, 695 So. 2d 691, 693 (Fla. 1997); State v. Iacovone, 660 So. 2d 1371, 1373 (Fla. 1995). When the record plainly shows that a defendant has committed direct criminal contempt and that judgment has withstood appellate review, it is judicially uneconomical to reverse and remand both the judgment and sentence for the reinstitution of contempt proceedings when only the sentence was imposed in error. This Court has noted that the Florida Rules of Criminal Procedure are designed to promote justice and equity while also allowing for the efficient operation of the judicial system. Abreu v. State, 660 So.2d 703, 704 (Fla. 1995). The whole spirit and intent of the rules is to move cases through the courts with the least amount of

delay and unnecessary motion. State ex rel. Evans v. Chappel, 308 So.2d 1, 3 (Fla. 1975). In that vein, a direct criminal contempt proceeding is one that is summarily handled as a result of conduct committed in the actual presence of a judge as in the instant case. See e.g, Gidden v. State, 613 So.2d 457, 460 (Fla. 1993)(comparing rules 3.830 and 3.840).

The conclusion of the district court below gives the trial court the most efficient way to remedy its failure to hear evidence in mitigation of a sentence in violation of the rule by simply holding a resentencing hearing. This precludes the trial court from having to reinstitute the contempt proceeding in its entirety when the proof of the direct criminal contempt has withstood appellate review as in the instant case. A violation of this single provision should not require the trial court to replay the entire contempt proceeding from start to finish. This Court could not have intended such an absurd result. See Thompson, 695 So. 2d at 693; Iacovone, 660 So. 2d at 1373. Accordingly, Respondent urges this Court to uphold the ruling of the district court of appeal, and find that the appropriate remedy for a violation of this specific provision of rule 3.830 should be the reversal of the sentence only, not the reversal of both the judgment and sentence.

Next, Haynes contends that his conviction must be reversed

because the trial court failed to make the required findings of fact pursuant to rule 3.830. See rule 3.830 (AThe judgment of guilt of contempt shall include recital of those facts on which the adjudication of guilt is based.@).[4]

The trial court entered a signed, written order stating, AWitness Jarvis Haynes, DOB 8/18/1977, inmate # 05049672 was found in direct contempt of Court for refusing to testify.@ (R 18). As the district court found below, and unlike Cutwright v. State, 934 So.2d 667 (Fla. 2d DCA 2006), these findings succinctly specify the conduct upon which Haynes=s adjudication of guilt was based.[5] Haynes, 944 So.2d at 420. There is no

[4] However, Haynes never pointed out any deficiency in the written findings of the trial court in his post-hearing motion for judgment of acquittal. (Vol. II, R. 21-22). This claim goes hand in hand with the argument made in the motion that the State failed to prove this crime. The purported insufficiency of the written findings could have, and should have, been brought to the attention of the trial court at that time so the trial court could have been put on notice of a potential error and have it corrected. The purpose of the preservation rule is to "place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings." Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(quoting Castor v. State, 365 So. 2d 701, 703 (Fla. 1978)). Accordingly, Respondent submits that any purported error in the written findings has been waived.

[5] Moreover, this recital of facts conforms with the trial court=s oral pronouncement:

> ...You=ve been explained in court as to your obligations to testify truthfully. The Court has ordered and directed you to respond. You

basis in the record for Haynes to argue that this aspect of the rule was violated and this

claim should be rejected.

Next, Haynes contends that the district court erred in rejecting his claim that the trial court erred in admitting hearsay testimony contained within the witness subpoena. He claimed for the first time on appeal that admission of the subpoena violated his right of confrontation under Crawford v. Washington, 541 U.S. 36 (2004). This argument fails for several reasons.

> have indicated that you will not respond even after court order. I do find that you're in violation of this Court's order, direct violation, and that you be sentenced as a direct violation, as a criminal contempt...

(Vol. I, T. 9-10).

While Haynes did argue that the subpoena was hearsay to the trial court, the record plainly shows that he never made any argument under Crawford or the Confrontation Clause. Notably, defense counsel did not even argue that the subpoena contained testimonial evidence as he does now. This argument cannot be made for the first time on appeal, the claim under Crawford was not preserved, and has been waived.[6] See Schoenwetter v. State, 931 So.2d 857, 872 (Fla. 2006)(because there was no specific objection by defense counsel based on a confrontation violation, claim that evidence introduced was testimonial hearsay was not preserved for appellate review); and compare Rodgers v. State, 948 So.2d 655, 662-663 (Fla. 2006)(pretrial motion seeking exclusion of hearsay during penalty phase based upon violation of rights under Confrontation Clause sufficiently preserved hearsay claim for appellate review). See also section 924.051, Fla. Stat. (2006); Archer v. State, 613 So.2d 446, 448 (Fla. 1993)(to preserve an issue for appellate review, a party must object in the court below and the objection must be on the same

[6] Given the fact that Haynes raised the Crawford claim in his brief, the district court must have inferred that counsel objected to the return of services Aon hearsay grounds, citing Crawford . . ..@ Haynes, 944 So.2d at 419 n.2. However, the record demonstrates that Haynes only argued, AI object to the service portion of the subpoena as hearsay and I don=t believe it=s adequate evidence to show proof of service of that subpoena on Mr. Haynes.@ (Vol. I, T. 7). There was no objection based

grounds asserted in the appeal).

Second, Respondent contends that the return of service provided within the subpoena was not hearsay as it was not offered or introduced into evidence, and even if offered, it was not offered for the truth of the matter asserted. Section 90.801(1)(c) of the Florida Statutes (2006) defines hearsay as 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. The record demonstrates that the subpoena, while placed in the court file, was not relied upon by the trial court once the contempt proceedings were instituted.[7] (Vol. I, T. 4, 6-7). Thus, the return of service within the subpoena was never Aoffered@ under the hearsay rule as the question of whether Haynes was ever served was not an issue since he appeared to testify.

Moreover, the return of service was no longer relevant once Haynes was ordered by the trial court to testify based upon the State=s representation that immunity had been provided. See Haynes, 944 So.2d at 419 n.2. The district court determined:

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upon Crawford or the Confrontation Clause.

[7] Respondent acknowledges that hearsay cannot be considered merely because it is contained in a court file. Even judicially noticed documents within a court file are subject to the rules of evidence. Burgess v. State, 831 So.2d 137, 141 (Fla. 2002).

> It was only after Appellant refused to comply with the trial court=s order that contempt proceedings were initiated. Significantly, Appellant was held in contempt for refusing to obey the court=s order, not for failure to appear in compliance with the subpoena.

Id. Thus, even if offered, the return of service on the subpoena was not offered for the truth of the matter asserted which was whether Haynes was ordered to testify.

The record shows that Haynes actually appeared for the subpoena at the appropriate time but then informed the court that he would not testify, that he would stand on his right to remain silent, and that he would refuse to answer any questions. (Vol. I, T. 8-9). His attestations came after the prosecutor and the trial court[8] explained to Haynes that he had immunity and was required by law to answer. (Vol. I, T. 4-6,7-8). It was Haynes=s refusal to answer questions after being ordered to do so by the Court which constituted the direct criminal contempt, which had nothing to do with any failure to comply with the subpoena. Thus, there is no basis for relief of this unpreserved claim as there was no hearsay violation with respect to the subpoena because the return of service on the subpoena was not hearsay and was not relevant to the actual facts

[8]Defense counsel also indicated to the court that he had discussed these matters with Haynes. (Vol. I, T. 6).

underlying Haynes=s commission of direct criminal contempt. Alternatively, given the irrelevance of the return of service, even if this Court were to find that the return of service had some constitutional implication under Crawford, any error in this case in its Aadmission@ into evidence was harmless beyond a reasonable doubt. See Rodgers v. State, 948 So.2d at 665 (admission of hearsay testimony in violation of Crawford can be harmless error); Diaz v. State, 945 So.2d 1136, 1153-1154 (Fla. 2006)(same); and Somervell v. State, 883 So.2d 836 (Fla. 5th DCA 2004)(same).

Finally, Haynes contends that the evidence was insufficient to find him guilty of direct criminal contempt. Respondent counters that this claim has been waived. Haynes did file a written motion for judgment of acquittal pursuant to Florida Rule of Criminal Procedure 3.380. (Vol. II, R. 21-22). However, prior to obtaining a ruling on his motion, he filed his notice of appeal and thereby abandoned said motion which challenged the verdict of the trial court. See Florida Rule of Appellate Procedure 9.020(h)(if a motion to challenge the verdict has been filed and a notice of appeal has been filed before the filing of a signed, written order disposing of such a motion, all motions filed by the appealing party Ashall be deemed abandoned. . .@); Rivera v. State, 913 So.2d 769, 770 (Fla. 5th

DCA 2005).

Notwithstanding Haynes=s waiver, the record plainly shows that the district court properly affirmed the finding that he committed direct criminal contempt.

When an appellate court undertakes review of an order of direct criminal contempt it must be mindful that the controlling standard of review is the abuse of discretion standard, and because the trial court has witnessed the conduct at issue, the trial court therefore is in the best position to determine whether it is necessary to summarily punish a defendant for contemptuous conduct. Thomas v. State, 752 So. 2d 679, 685 (Fla. 1st DCA), rev. dismissed, 763 So.2d 1046 (Fla. 2000); Michaels v. State, 773 So. 2d 1230 (Fla. 3d DCA 2000); Pompey v. Cochran, 685 So. 2d 1007 (Fla. 4th DCA 1997). Thus, appellate courts give great deference to a trial judge=s explicit determination that summary procedures are necessary. Thomas, 752 So.2d at 685.

The failure to testify upon a grant of immunity can constitute direct criminal contempt. See United States v. Wilson, 421 U.S. 309 (1975); Pendley v. State, 392 So. 2d 321 (Fla. 1st DCA 1980); and McDonald v. State, 321 So. 2d 453, 457 (Fla. 3d DCA 1975). In Wilson, the Court held that an immunized witness=s refusal to testify at trial, even though not delivered disrespectfully, constituted direct criminal contempt punishable

summarily because such refusals were intentional obstructions of the orderly administration of justice. Id. at 314.

Likewise, Haynes=s refusals to answer questions at his co-defendant=s trial were all made in the presence of the trial court coming after extensive advice and warnings by the trial court and the prosecutor. (Vol. I, T. 4-10). His refusal to testify with the grant of immunity placed him in contempt of the trial court. See id.; Pendley, 392 So. 2d at 323 (when a defendant=s refusal to testify occurs during an ongoing trial, the refusal disrupts and frustrates an ongoing proceeding and summary contempt must be available to vindicate the authority of the court) and McDonald, 321 So. 2d at 457 (concluding that the trial court acted properly in dealing summarily with appellant=s improper refusal to testify) and compare Landenberger v. State, 519 So.2d 712 (Fla. 1st DCA 1988)(defendant could not be found in direct criminal contempt for not testifying upon invocation of privilege of self-incrimination when defendant was not given promise of immunity). Accordingly, the district court properly found no error in adjudicating Haynes guilty of direct criminal contempt. Haynes, 944 So.2d at 419-420.

Haynes was found in direct criminal contempt for refusing to answer when so ordered by the court. Yet, Haynes claims that Aone essential element of a direct contempt conviction for

failure of a witness to testify is proof by the state that the witness was served with a valid subpoena requiring such testimony.@ Petitioner=s Merits Br. at 16. However, Haynes cites no authority to support his contention that there are specified elements to the crime of direct criminal contempt based upon the failure to comply with a court order. Rule 3.830 creates no such requirement. Haynes cannot add elements to a crime which by this Court=s rule specifically provides Amay be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court.@ See Fla. R. Crim. P. 3.830.

Respondent reiterates that Haynes was not found in contempt for failing to honor the subpoena by failing to appear; Haynes actually appeared at the time required. As the rule provides, direct criminal contempt is summary proceeding which can be handled by the trial court for conduct it views as an eyewitness. Haynes appeared pursuant to the subpoena; this is an undisputed fact. The notion that the State was somehow required to prove return of service on a subpoena upon which Haynes appeared, an undisputed and irrelevant fact, given that he was not found in contempt based upon the subpoena, should be rejected. Instead, the record overwhelmingly demonstrates that Haynes committed direct criminal contempt when he refused to

testify. The district court properly affirmed that finding.

In all, Respondent urges this Court to discharge jurisdiction in this case, or alternatively, affirm the decision of the district court below in all respects.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court discharge its jurisdiction in this case or alternatively, affirm the decision of Haynes v. State, 944 So.2d 417 (Fla. 5th DCA 2006) in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing merits brief has been furnished by United States Mail to Terrence Kehoe, Esq., counsel for Haynes, Tinker Building, 18 West Pine Street, Orlando, Florida 32801, this _____ day of May, 2007.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

_____
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