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IN THE
SUPREME COURT OF FLORIDA

CASE NUMBER**: SC14-1625**

THE STATE OF FLORIDA,
Petitioner,

vs.

ALEX DIAZ DE LA PORTILLA,
Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW OF
A DECISION FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT

****

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND THE FACTS[1]

A. **Procedural Background**

The underlying trial court litigation involved an acrimonious dissolution of marriage lawsuit and was conducted exclusively in civil court. The material facts needed to address the legal issue before this Court are very simple to explain and easy to understand. However, before addressing only the facts material to that legal issue, a terse understanding of how this case came before this Court is warranted.

The procedural history of this case was tortuous, both in the trial court and in the lower district court of appeal, and lasted over a four-and-one-half-year period with the case going back and forth between the trial court and lower district appellate court.[2] The details of that procedural morass are accurately stated in then- appellant

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[1] The symbol "R" will refer to the record on appeal. The symbol "SR" will reference a supplemental record on appeal.

[2] The trial court docket establishes that the petition for dissolution of marriage was filed on December 11, 2009. The dissolution of this marriage occurred on February 9, 2011 with the trial court entering an order granting dissolution of that marriage, but retaining jurisdiction to dispose of the marital assets, among other things. A final settlement agreement was filed in the trial court on December 14, 2011. On May 4, 2012, the trial court entered an order adopting the marital settlement agreement. On that same date, the trial court entered an order denying a motion to vacate the criminal contempt judgment.

The district court had before it orders of civil contempt and criminal contempt. Those appeals were in case numbers 1D11-4461, 1D11-4780, and 1D11-5126. This

Alex De La Portilla's initial brief that was filed in the District Court of Appeal of Florida, First District and that has been sent to this Court by the First District as part of the record. The procedural background is accurately summarized in the lower appellate court opinion, De La Portilla v. State, 142 So.3d 928 (Fla. 1st DCA 2014) and is summarized in this sub-section of this brief. Some of this procedural history at the trial level is also accurately summarized by the trial court order adjudicating Alex De La Portilla guilty of direct criminal contempt. (R. 2-6).

The respondent, Alex De La Portilla, and his wife, Claudia Davant, were in the process of divorcing. Early in this litigation, the trial court granted a dissolution of this marriage, but reserved jurisdiction to resolve all other property issues. At that time, the initial trial judge entered an interim order of distribution of property and

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total litigation in the lower appellate court began on August 23, 2011. The appellate court entered stays of all appealed orders. The final settlement rendered the appellate review of the **civil** contempt orders moot [both dogs were given to the ex-husband in the final settlement order and that meant that there was a merger into that final settlement order of the prior interlocutory order giving one of the dogs to the ex-wife,, Duss v. Duss, 111 So. 382 (Fla. 1926)] and those proceedings were voluntarily dismissed. The criminal appeal proceeded. Initially, the parties in the appellate court were only the ex-husband and the ex-wife. After appellant De La Portilla filed his initial brief in the criminal appeal on December 17, 2012, the lower district court ordered that the Office of the Attorney General [i.e., the State of Florida] be the appellee, who was to file an answer brief. The lower appellate court's opinion was filed on July 14, 2014.

awarded one of two dogs to the husband and the other of that pair of canines to the wife,[3] with final ownership of both dogs to be determined at the conclusion of the case. When De La Portilla did not relinquish custody of one of the two dogs, the now ex-wife sought a contempt remedy. An evidentiary hearing was held on August 23, 2011. The trial entered a judgment of civil contempt, allowing Alex De La Portilla to leave a jail as soon as this ex-husband gave his ex-wife one of the two dogs. Because the trial judge had entered an order for Alex De La Portilla to appear at the August 23, 2011 hearing and because Alex De La Portilla did not appear at that hearing, the trial judge summarily adjudicated Alex De La Portilla guilty of criminal contempt and sentenced him to serve five months and twenty-nine days in jail.[4]

By the time that this case was decided on appeal, the only issue was the validity

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[3] In dissolution of marriage litigation, dogs are considered personal property subject to equitable distribution. Bennett v. Bennett, 655 So.2d 109 (Fla. 1st DCA 1995). A trial judge has authority to grant an interim distribution of property before the final hearing, if certain statutorily-stated circumstances are met. §67.075(5), Fla. Stat. (2014).

[4] The trial judge knew that by sentencing the defendant to less than six months, that judge was eliminating any constitutional requirement that the ex-husband was entitled to a jury trial. Bloom v. Illinois, 391 U.S. 194 (1968). Bloom expressly cited the opinion of Duncan v. Louisiana, 391 U.S. 145 (1968), which was decided the same day. Bloom, 391 U.S. at 210. Duncan, itself, held that a jury trial was not required in any criminal case in which the defendant was sentenced to "up to six months." Duncan, 391 U.S. at 159.

of the criminal contempt conviction.[5] In the appellate court, the ex-husband challenged the sufficiency of the evidence to convict him of the crime of criminal contempt. The ex-husband asserted that no fact finder could find the evidence legally sufficient to convict, because there was no evidence before the trial judge to establish that the ex-husband had actual knowledge of the court order directing the ex-husband to appear at that hearing. Without actual knowledge of the order to show cause, it is **impossible** for the husband to have **intentionally** disobeyed an order to appear in person, even if the husband would have decided to not appear had the husband known of that order.[6] (Initial Brief of Appellant De La Portilla filed in the First District at pages 35-36). The State conceded that the evidence to convict was legally insufficient to establish that the ex-husband had actual notice of the order directing the ex-husband to appear at the August 23, 2011 hearing. (Answer Brief of State of

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[5] *See* footnote 1. The civil contempt litigation became moot prior to briefing.

[6] In his brief, the ex-husband also argued that the evidence was totally lacking to establish that the failure of the ex-husband to appear was the result of intent or willfulness on the part of the ex-husband to disobey the order to appear, even if the ex-husband had actual notice of the order directing him to appear at the hearing on August 23, 2011. (Initial Brief of Appellant De La Portilla filed in the First District at page 36). The State did not address that alternative insufficiency-of-the-evidence argument and need not have done so, because it conceded insufficiency for the other reason argued by the ex-husband. The appellate court never addressed this alternative basis for finding the evidence legally insufficient to allow a criminal conviction. De La Portilla v. State, 142 So.3d 928 (Fla. 1st DCA 2014).

Florida filed in the First District at pages 2, 16-17). The lower appellate court held that the evidence was legally insufficient to prove that this ex-husband had actual notice that he was to appear at this hearing -- as conceded by the State. De La Portilla v. State, 142 So.3d 928 (Fla. 1st DCA 2014). The appellate court's holding barred a retrial for the crime of criminal contempt. McDaniel v. Brown, 558 U.S. 120, 131 (2010); McArthur v. Nourse, 369 So.2d 578 (Fla. 1979). The Double Jeopardy Clause applies to criminal contempt convictions. Colombo v. New York, 405 U.S. 9 (1972)(conviction for criminal contempt for refusal to obey judge's order to testify).

B. **Fact Material To The Legal Issue**

The only facts needed to decide the legal issue before this Court are contained in (1) the factual findings of the trial court's order both finding the ex-husband in direct criminal contempt of court and imposing sentence upon him, R. 2-10, and (2) the transcript of the hearing held on August 23, 2011, 1SR. 187-238.

The August 25, 2011 order of the trial court accurately explains the circumstances upon which the trial judge adjudicated Alex De La Portilla guilty of direct criminal contempt and immediately sentenced that ex-husband to imprisonment. (R. 2-10). In that August 25th order, the judge made the following

factual findings:

The trial court previously issued an order to show cause which expressly directed Alex De La Portilla to appear for a hearing on August 23, 2011. In that show-cause order, the trial judge identified the time for that hearing, identified the location for that hearing, and identified the reason for that hearing as being to determine whether the defendant should be found in contempt.[7] Because the trial judge did not know where Alex De La Portilla was either living or located at that time, **a copy of that show-cause order was served only on the attorney for the ex-husband**. The ex-husband's attorney acknowledged by telephone that this attorney had received this written show-cause order. That same attorney informed the trial judge that this attorney would appear at the scheduled hearing on behalf of his client. On August 23, 2011, the ex-husband's attorney appeared in court; but Alex De La Portilla did not appear. During that hearing, the attorney for the ex-husband never offered an explanation for why Alex De La Portilla was not present at this hearing. That attorney for the ex-husband never provided either a legal reason or a factual reason for the non-appearance of Alex De La Portilla at that hearing. Because Alex

[7] The trial court docket establishes that this order was entered on August 4, 2011, as was stated later in this same order.

De La Portilla was not present in the courtroom, the trial judge had no ability to inquire of Alex De La Portilla as to any issue that arose during that hearing. (R. 6-7).

The trial judge found Alex De La Portilla's non-appearance at this August 23rd hearing to be willful. The trial judge also found that this trial judge, himself, personally knew that Alex De La Portilla was not at this August 23, 2011 hearing over which this trial judge presided. Because Alex De La Portilla was not physically present at this hearing, the trial judge was unable to ask this ex-husband why this ex-husband should not be held in direct criminal contempt. The actions of the husband "were willful contempt that occurred beyond a reasonable doubt directly in the presence of the" trial judge and warranted appropriate punishment. The trial judge "complied with Rule [of Criminal Procedure] 3.830 in this finding and process, and failure to appear can be Direct Criminal Contempt." The trial judge cited three decisions in support of his finding that direct criminal contempt was lawful, namely Bouie v. State, 784 So.2d 521 (Fla. 4th DCA 2001), Speer v. State, 742 So.2d 373 (Fla. 1st DCA 1999) and Porter v. Williams, 392 So.2d 59 (Fla. 5th DCA 1981). The trial judge adjudged the ex-husband "guilty of Direct Criminal Contempt of this Court for his failure to appear at the hearing ... as directed by the Order To Show Cause **served on his counsel** on August 4, 2011 (**served on counsel** due to the Court having

no knowledge as to the current whereabouts of Respondent/Husband)." The ex-husband was sentenced to served "5 months 29 days for contempt of Court" consecutive to and independently of the civil contempt order. That civil contempt order was both orally imposed on August 23, 2011 and contained in a separate written order for civil contempt entered on August 24, 2011. The Sheriff of Leon County and all Sheriffs of the State of Florida were ordered to arrest Alex De La Portilla, based on this adjudication of direct criminal contempt. (R. 7, 9).

The transcript of August 23, 2011 established that Alex De La Portilla was represented by counsel at this hearing and that the ex-husband was not present.[8] The ex-wife testified at this hearing that her ex-husband was previously ordered to give the ex-wife one of the two dogs, that the ex-wife never was given one of those dogs, and that the ex-wife had no knowledge where either of the two dogs was located. (1SR at page 190-191). The ex-wife was cross-examined by the attorney for the ex-husband. (1SR 192-195). **At no time during this entire August 23, 2011 hearing**

[8] Alex De La Portilla was represented by attorney Miguel Diaz De La Portilla, who is the defendant's brother. The statements attributed to Diaz De La Portilla in this transcript were made by the attorney. (1SR. at 190). At this hearing, no oral statement was made and no testimony was given by Alex De La Portilla. The ex-husband's attorney expressly noted upon inquiry from the trial court that the ex-husband was not present at this August 23, 2011 hearing. (1SR. at 190).

was counsel for the ex-husband ever asked by the trial judge why Alex De La Portilla, his client, was not present at this hearing. (1SR 190-238). Near the very end of this hearing, the attorney for the ex-wife requested that the court find the ex-husband in **direct** criminal contempt, because the ex-husband did not appear at this hearing, in spite of the order of the trial court that the ex-husband appear.[9] (1SR 224). At the conclusion of all testimony and argument of counsel, the trial judge found Alex De La Portilla in civil contempt for not giving one dog to his ex-wife pursuant to a prior court order with the right to purge himself of that civil contempt. Almost immediately thereafter and also at the conclusion of this hearing, the trial judge found Alex De La Portilla in direct criminal contempt, because Alex De La Portilla did not appear at this hearing, as ordered to do so by the trial judge. The trial judge immediately sentenced Alex De La Portilla to a term of incarceration for five months and twenty-nine days. (1SR 235-236).

The docket of the trial court establishes several negative facts that, because they do not exist in the record on appeal, cannot be given a page citation in the record

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[9] Neither the attorney for the ex-wife nor the trial judge has any reason to know prior to the day of this hearing, nor did either of those two persons actually know prior to this hearing, that the ex-husband would not appear at this August 23, 2011 hearing.

on appeal. The trial court docket for this civil case establishes that the wife **never issued**– let alone served– **either a summons or a subpoena for the husband, himself, to appear at the August 23rd hearing**. The trial court docket for this civil case shows that **the trial judge never issued** – let alone served – **a subpoena for the husband, himself, to appear at the August 23rd hearing**. The trial court docket for this civil case reveals that **the trial judge never issued an order of arrest for the husband, himself**, **to appear at the August 23rd hearing,** which would be the one to use for a proceeding for indirect criminal contempt pursuant to Fla R. Crim. P. 3.840. Finally, the trial docket for this civil case reveals that **the trial judge never issued a writ of bodily attachment to secure the husband's presence at the August 23rd hearing**, which writ would be used for civil contempt pursuant to Fla. Fam. L. R. 12.570 and Fla. R. Civ. P. 1.570.

The direct criminal contempt rule, Fla. R. Crim. P. 3.830 contains no provision for issuance in advance of an order to bring the potential contempt defendant to a hearing to be held pursuant to that summary procedure. Obviously, that is so because the nature of direct criminal contempts is that noone could know in advance that a contemptuous act of the kind warranting a summary proceeding for direct criminal contempt would occur. Here, neither the trial judge, nor the ex-wife's attorney knew

in advance that Alex De La Portilla would not attend. For that reason, there is nothing to be found on the trial court docket pertaining to either an arrest warrant, summons, or subpoena to bring the defendant's body to the August 23rd hearing for a hearing on direct criminal contempt.

SUMMARY OF THE ARGUMENT

Florida Rule of Criminal Procedure 3.830 (direct or summary criminal contempt) cannot be used to convict a person, who does not appear for a court trial or hearing after the trial court issues an order directing that person to appear, when the only evidence before that judge is that the judge sees that this person is not present. This single fact does not establish beyond a reasonable doubt all of the elements of a violation of Section 38.22, Florida Statutes (2014). Because the trial judge does not have personal knowledge of all of the elements of that crime in this particular situation, use of Florida Rule of Criminal Procedure 3.830 means that numerous constitutional rights of that defendant will be violated – making the use of Florida Rule of Criminal Procedure 3.830 a waste of time. Because Florida Rule of Criminal Procedure 3.830 cannot be lawfully used to convict a person, who fails to appear at a trial or hearing after the court issues an order to appear, any prosecution for criminal contempt for failure to appear must be conducted pursuant to Florida Rule of Criminal Procedure 3.840.

ARGUMENT

WHETHER IT IS ILLEGAL TO PROCEED UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.830 [I.E., DIRECT OR SUMMARY CRIMINAL CONTEMPT OF COURT] FOR FAILURE OF A TRIAL LAWYER, PARTY, JUROR, OR WITNESS TO APPEAR AT A HEARING OR TRIAL AFTER THAT PARTICIPANT WAS ORDERED BY THE COURT TO ATTEND THAT HEARING OR TRIAL?

The question posed by the lower district court must be reworded in order to give a definitive, clear and absolutely-legally-correct answer to the question posed by the lower appellate court. Indeed, by rewording the question, the answer actually becomes self-evident when legal analysis is applied to that question. A criminal contempt of court consists of any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice, or which is calculated to lessen its authority or its dignity. Ex parte Crews, 173 So. 275, 279 (Fla. 1937). **The issue before this Court involves a limited category of criminal contempt, namely a type of disobedience of a court order**.

This legal matter is very important, because the failure of any participant to attend a trial or hearing has an affect on the ability of the courts to function. The

issue is the same whether it is an attorney, who disobeys a court order to appear;[10] or it is a party, who disobeys an court order to appear;[11] or it is a juror, who disobeys a court order to appear,[12] or it is a witness who disobeys a court order to appear.[13] By

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[10] Attorneys are served by any method provided in Florida Rule of Judicial Administration 2.516.

[11] Service upon a party represented by an attorney must be made upon the attorney, unless service upon the party is ordered by the court, unless served formally or unless required to be served in the manner provided for service of formal notice. Fla. R. Jud. Admin. 2.516(a) and (b).

[12] Jurors are summoned by the clerk of the court by mail. Failure to attend is a contempt of court punishable only by a fine. §40.23, Fla. Stat. (2014).

[13] Witnesses are subpoenaed to come to court. A subpoena is a court order. Ulloa v. CMI, Inc., 133 So.3d 914, 923 (Fla. 2013). In civil cases, subpoenas for trial or deposition are issued by the clerk of court **or** directly by an attorney. Fla. R. Civ. P. 1.410(a). It is no longer clear whether a witness subpoena for trial is to be considered a court order, if that subpoena is issued pursuant to the court's rules of procedure, but not by the clerk of the court under the court's seal. In that regard, an attorney is an officer of the court and, like the clerk, is subject to control by the judiciary. However, that same rule does provide that "failure of person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court from which the subpoena issued." Fla. R. Civ. P. 1.410(d).

That rule applies to Family Court cases. In re Family Law Rules of Procedure, 663 So.2d 1047 (Fla. 1995)(creating Rule 12.410 that directed that subpoenas shall be governed by Florida Rule of Civil Procedure 1.410).

This is the law in criminal cases. Fla. R. Crim. P. 3.361 (a) and (d).

This is the law in juvenile court. Fla. R. Juv. P. 8.041.

This is the law in probate cases. Fla. Prob. R. 5.080.

Only the rules of civil procedure require that the service of a subpoena must be proved by an affidavit. Fla. R. Civ. P. 1.410. None of these rules of procedure direct that the witness subpoena must be filed with the court. Thus, the court file may or may not contain evidence that the subpoena was served on the witness.

rewording this question, the conflict of legal decisions in Florida on this limited legal issue need only be answered once in a manner binding on all of the lower courts in both civil and criminal litigation at the trial court level for every type of situation involving a failure to appear following a court order to appear.

There is a second reason for rewording the question posed by the lower district court. There are only two applicable criminal rules of procedure. Florida Rule of Criminal Procedure 3.830 is for direct (also known as summary) criminal contempt. Florida Rule of Criminal Procedure 3.840 is for indirect criminal contempt. The procedure that applies to the first rule differs markedly from the procedure that is required by the second rule. If the first rule of procedure, Fla. R. Crim. P. 3.830, cannot lawfully be used in this factual situation – failure to appear after having been ordered by the court to appear, it follows logically that the second rule, Fla. R. Crim. P. 3.840, is the only rule of procedure that can be used and, therefore, is the rule of procedure that **must** be used in this factual situation.

This case demonstrates again the confusing nature of the unique, illusive and chameleonlike law of contempt. "Few legal concepts have bedeviled courts, judges, lawyers and legal commentators more than contempt of court." Parisi v. Broward

County, 769 So.2d 359 at 364 n.5 (Fla. 2000).

In the year 1954, Lee v. Bauer, 73 So.3d 792 (Fla. 1954) held that failure of an attorney to appear at a hearing in a civil case pursuant to a court order must be treated as indirect criminal contempt. "It is not such a case as warrants summary discipline and punishment."

In 1972, the Third District decided Aron v. Huttoe, 258 So.2d 272 (Fla. 3d DCA 1972), which emanated out of civil court litigation. The Third District stated that "the summary procedure followed by the trial judge" was proper under the then-numbered Florida Rule of Criminal Procedure 1.830. The only reasoning used by that lower appellate court was that "the trial judge saw that [the witness] was not present in court and heard from counsel that the witness subpoenas of plaintiff and defendant had been served upon [the witness] ...." For those reasons, the Third District opinion concluded that "[t]he contemptuous acts were committed in the actual presence of the court ...." The Third District certified the issue as one of great public importance, because there was a strong argument that the contempt was not committed in the actual presence of the trial court. Nowhere in that Third District opinion did that lower appellate court mention, let alone discuss, the Supreme Court's precedent in

Lee, *supra*. The Supreme Court answered that certified question in Aron v. Huttoe, 265 So.2d 699 (Fla. 1972). The Supreme Court, itself, never gave its reasons for its decision, but simply ruled that "[w]e hold that the District Court of Appeal has correctly decided the cause and its decision is adopted as the ruling of this Court." Nowhere in this Supreme Court opinion is there any mention of the Supreme Court precedent contained in the 1954 decision in Lee, *supra*.

Finally, in Gidden v. State, 613 So.2d 457 (Fla. 1993), the Supreme Court addressed a criminal case in which the defendant failed to appear for arraignment and was charged with indirect criminal contempt when that defendant did not appear upon notice to appear mailed by the clerk of the court to his home address. The Supreme Court discussed both the direct criminal contempt rule, Fla. R. Crim. P. 3.830, and the indirect criminal contempt rule, Fla. R. Crim. P. 3.840. However, the Supreme Court never mentioned either of its two prior precedents of Lee, *supra*, or Aron, *supra*.

The Supreme Court has created its own confusion, which is important enough that the conflict among Florida Supreme Court opinions must be resolved. In addition, the lower appellate court's precedent, Speer v. State, 742 So.2d 373 (Fla. 1st DCA 1999), requires that a failure to obey an order to appear is to be resolved as

direct criminal contempt under Florida Rule of Criminal Procedure 3.830. However the lower appellate courts are also in conflict. Smith v. State, 144 So.3d 651 (Fla. 2nd DCA 2014).

A. **The Common Law Origin Of Direct Criminal Contempt of Court**.

Direct criminal contempt of court was a creature of common law in England, before the United States came into existence. William Blackstone's four-volume Commentaries on the Laws of England was initially published about the year 1770. This treatise played a role in the development of the law in the United States. The volume dealing with criminal law is Book 4. Commentaries on the Laws of England, http://en.wikipedia.org/wiki/Commentaries_on_the_Laws_of_England (last viewed 10/21/14). In Book 4 Chapter 20, this treatise discusses "Summary Convictions." In pertinent part, the author writes: "The process of these summary convictions, it must be owned, is extremely speedy." "Though the courts of common law have thrown in one check upon them, by making it necessary to summon the party accused before he is condemned. This is now held to be an indispensable requisite." Part III of Chapter 20 addresses summary proceedings by courts of justice. That sub-section reads in pertinent part: "The contempts, that are punished, are either **direct**, which openly insult or resist the powers of the courts, or the persons of the judges who preside

there; or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority." Later in Chapter 20, the treatise discusses procedural aspects of contempt of court, stating: "If the contempt be committed **in the face of the court**, the offender may be **instantly** apprehended and imprisoned at the discretion of the judges, without any farther proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance; .... This process of attachment is merely intended to bring the party into court: .... ***" William Blackstone, Commentaries on the Laws of England Book 4 *Public Wrongs* Ch. 20 *Summary Convictions* 277-285 (Oxford Clarendon Press 1770).

B. **The Elements Of Criminal Contempt In Florida For This Particular Crime Determine That Florida Rule of Criminal 3.830 Cannot Be Used To Prosecute This Particular Crime.**

The Florida legislature granted Florida the power to punish contempts starting

in the year 1828 in what is now Section 38.22, Florida Statutes (2014). Starting in the year 1829 in what is now Section 775.01, Florida Statutes (2014), the Florida legislature established that the common law of England in relation to crimes is the law of this State when there is no other criminal statute on the subject.

In this case, there is a statute that governs this issue. Section 38.23, Florida Statutes (2014) provides: "A **refusal** to obey any legal order, mandate, decree, made or given by any judge relative to any of the business of the court, **after due notice thereof**, is a contempt, punishable accordingly."

Criminal contempt is a crime in Florida. Aaron v. State, 284 So.2d 673 at 676 (Fla. 1973). Criminal contempt for failure to obey a court order must be proved beyond a reasonable doubt. Gompers v. Bucks Store & Range Co., 221 U.S. 418, 444 (1911). The main purpose of criminal contempt under state law is to afford the court a means to enforce decorum and punish **willful** disregard of orderly judicial administration. Pennekamp v. State, 22 So.2d 875, 886 (Fla. 1945); *see* State ex rel. Hoffman v. Vocelle, 31 So.2d 52, 54 (Fla. 1947)(willful nonattendance of witness is contempt of court). An element of criminal contempt is intent to disobey the order of the court. Florida Ventilated Awning Co. v. Dickson, 67 So.2d 218 (Fla.

1953)(case involves criminal contempt because trial court imposed a fine). Every crime has elements needed to convict. Here, the two critical elements are (1) actual notice of the order to appear and (2) willful refusal to appear. These elements of this crime are the same, regardless of which rule of procedure should be used.

In the year 1967, Florida promulgated the two rules of criminal procedure that were to be used to prosecute a crime of criminal contempt. The first was Florida Rule of Criminal Procedure 1.830 [now, 3.830] and Florida Rule of Criminal Procedure 1.840 [now, 3.840]. The committee notes to these new rules of procedure state that these rules are patterned after Federal Rule of Criminal Procedure 42. In re Florida Rules of Criminal Procedure, 196 So.2d 124, 173-177 (1967). These are rules of **procedure**, not the elements of the crime of criminal contempt.

A summary procedure is appropriate, when the judge, himself, sees and hears **all of the elements of a crime beyond a reasonable doubt**. In the case of failure to appear, a judge will **never** be able to see and hear all of the elements of that particular crime, because the only thing that the judge sees or hears is the failure of the person to appear. Failure to appear is not the element of this particular crime, merely a predicate fact to commission of this particular crime, if a crime was committed at all.

Failure to appear is only of significance, because that was the substance of the judicial order. Although the judge knows that the person did not appear, the judge **does not know** whether the person had actual notice of the order to appear. If the person lacked actual knowledge of the order, his failure to comply is not a refusal. There cannot be a willful refusal to appear without actual notice by the person.[14] Although the judge knows that the person did not appear, the judge **does not know** if it was due to a willful refusal to obey the order. There are numerous reasons why

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[14] There is a constitutional procedural due process right to reasonable notice and a reasonable opportunity **to be heard**. Citizens v. Florida Pub. Ser. Comm'n, 2014 Fla. LEXIS 2581 (Fla. August 28, 2014). In this case, the ex-husband had an opportunity to be heard at the August 23, 2011 hearing on the issue of civil contempt. That procedural due process right was satisfied by the court giving notice of the date, time, and place of the civil contempt hearing. For that constitutional due process purpose, notice to the ex-husband's attorney was notice to the ex-husband. Fla. R. Jud. Admin. 2.505(h). Satisfying that constitutional requirement for a hearing says **nothing** about refusal to obey an order. In a civil case, a party need not appear at a hearing or trial, but can appear through counsel. In a civil case, a trial can commence and proceed in the absence of a party who fails to appear at the trial, as long at the party was given an opportunity to appear. Pierce v. McMullen, 328 P.3d 445 (Idaho 2014);16B Am. Jur. 2d *Constitutional Law* § 955 (1998 ed.); 75 Am. Jur. 2d *Trial* § 162 (2007 ed.). Thus, mere non appearance at a civil proceeding by a party is not, in itself, a criminal contempt of court. Any intent to commit a contempt does not make an act contempt, unless the act done actually tends to obstruct the administration of justice. Baumgartner v. Joughin, 141 So. 185 (1932). Therefore, mere nonappearance of the ex-husband here did not constitute criminal contempt for his nonappearance at the civil contempt hearing, because this hearing not only was fully conducted but also resulted in a written order of civil contempt. *See* Johnson v. State, 697 So.2d 995 (Fla. 5th DCA 1997)(testimony of subpoenaed witness was not necessary, although witness failed to appear).

a person does not attend a hearing or trial. For example, the person could be physical unable to travel, ill or hospitalized. The person could have been told by his attorney that he need not attend. *Eg*., J.D.L. v. State, 120 So.3d 229 (Fla. 4th DCA 2013). A car accident on the way to the courthouse could prevent attendance. Negligence in failure to set an alarm clock or mis-advice from another source eliminates intentional willful refusal to obey.

Because there never can be a lawful conviction for criminal contempt, **merely** based upon fact that a person failed to appear in court as ordered by the court, no valid criminal conviction can ever result from a prosecution using the summary procedure contained in Florida Rule of Criminal Procedure 3.830.

The perfect example of the lawful use of direct (summary) contempt procedure to prosecute a person for intentional refusal to obey an order of the court is United States v. Wilson, 421 U.S. 309 (1975). The trial judge lawfully ordered a witness to testify. In a "**face-to-face** encounter," the witness refused to obey the judge. The witness had actual knowledge of the court order and willfully refused to obey **all in the presence of the judge**. The judge knew on the spot in the courtroom **every** element of that crime. *Id*., 421 U.S. at 314-315. Consequently, disobedience of a

court order can be prosecuted using Florida Rule of Criminal Procedure 3.830, **but not for the mere fact that a person did not appear following issuance of an order to appear**.

The lawful use of summary contempt procedure for disobedience of a direct order from the judge is also clear from Pounders v. Watson, 521 U.S. 982 (1997), which reviewed a state court criminal contempt conviction as a due process issue. During the state trial, the state court judge ordered the attorney not to discuss with the jury the topic of punishment for the crime that was being tried. The trial judge found that the attorney was aware of that order, because that attorney was present in open court when that order was given. The judge found that disobedience of his orders was willful. The Supreme Court stated:

> *** We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, 'includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the courts' business, **where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court,** and where the immediate punishment is essential to prevent "demoralization of the court's authority before the public."
>
> Pounders v. Wilson, 521 U.S. at 988.

C. **The Summary Procedure Contained In Florida Rule of Criminal 3.830 Cannot Be Used To Address The Failure Of A Person To Appear At Trial Or Hearing, Because The End Result Of Instant Conviction And Sentencing Will Violate That Persons Federal And Florida Constitutional Rights, Making Any Judgment And Sentence Illegal.**

As just discussed in the above subsection, the trial judge will not have personally observed all of the essential elements of this particular crime of criminal contempt – failure to obey an order of the court to appear at a hearing or proceeding. The Supreme Court has held: "If some essential elements of the offense are not personally observed by the trial judge, so that he must depend upon statements made by others for his knowledge about those essential elements, due process requires, according to the Cooke case [Cooke v. United States, 267 U.S. 517, 537 (1925)] that the accused be accorded notice and a fair hearing as set out above." In re Oliver, 333 U.S. 257, 275 (1948).[15] It also follows that the other constitutional rights excepted in Cooke, supra, when summary judgment procedure is lawfully utilized, would also still be available to a criminal contempt defendant. Those rights are the right to

[15] When summary (direct) contempt procedure is lawfully applicable, the defendant does not possess the constitutional rights as a matter of due process that the accused should be advised of the charges and should have a reasonable opportunity to meet them by way of defense or explanation. Additionally, the criminal contempt defendant does not have a right to the assistance of counsel and does not have the right to call witnesses in his defense. Cooke v. United States, 267 U.S. 517, 537 (1925).

assistance of counsel, and the right to call witnesses. *See* Cooke v. United States, 267 U.S. 517, 537 (1925)

The Supreme Court has not expanded the scope of the 1925 statements in Cooke, *supra*, to cover all other constitutional rights now available to a criminal defendant, when a contempt criminal defendant is subject to summary contempt procedure. Consequently, even in summary criminal contempt proceedings the following constitutional rights apply to a criminal contempt defendant.

That person is presumed to be innocent, he must be proved guilty beyond a reasonable doubt, and he cannot be compelled to testify against himself.[16] Gompers v. Bucks Store & Range Co., 221 U.S. 418, 444 (1911). The privilege of self-incrimination applies to sentencing proceedings. Mitchell v. United States, 526 U.S.

[16] Florida Rule of Criminal Procedure 3.830 expressly provides that a defendant "shall be given the opportunity to present evidence of excusing or mitigating circumstances." This does not mean that the burden is on the defendant to prove his innocence. The burden of proof in a criminal case remains on the Government (here the trial judge). An "excuse" is an affirmative defense. The due process clause does not require the State to prove an affirmative defense. Smith v. United States, 133 S. Ct. 714 (2013); Martin v. Ohio, 480 U.S. 228 (1987). Mitigation concerns punishment, not guilt. Thus, there is no constitutional violation for denying a criminal contempt defendant the rule requirement that he be permitted to present evidence of excusing circumstances.

314 (1999).

The defendant has a constitutional right to a jury trial, if the court intends to, and does, sentence him for contempt to a sentence of six months or more. Bloom v. Illinois, 391 U.S. 194 (1968).

A criminal defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. Stincer v. Kentucky, 482 U.S. 730, 745 (1987). A criminal defendant cannot be tried, adjudicated guilty and sentenced **in absentia**, if fundamental fairness is thwarted, if the defendant was not present at the beginning of the trial, and if the defendant did not voluntarily flee. Dunbar v. State, 89 So.3d 901 at 907 (Fla. 2012)(denial of due process if defendant is not personally present at this sentencing); *see* Crosby v. United States, 506 U.S. 255 (1993)(not reaching claim that trial in absentia is prohibited by Constitution because rule of criminal procedure is dispositive).

The Double Jeopardy Clause applies to criminal contempt convictions. Colombo v. New York, 405 U.S. 9 (1972)(conviction for criminal contempt for

refusal to obey judge's order to testify).

A criminal contempt defendant retains the due process protection that a conviction cannot stand if no rational finder of fact could find the essential elements of the crime beyond a reasonable doubt. Fiore v. White, 531 U.S. 225 (2001); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

In is clear that the use of Florida Rule of Criminal Procedure 3.830 for this limited type of disobedience of a court order, namely, failure to appear at a trial or hearing following issuance of a court order to appear, will violate numerous federal [and Florida] constitutional rights of a criminal contempt defendant, when the defendant is adjudicated and sentenced on the spot.

To put it bluntly, in this limited category of types of contempts that are before this Court, it is a total waste of court time to use Florida Rule of Criminal Procedure 3.830 to immediately adjudicate and sentence a person, who is not face to face with the trial judge at that moment, merely on the basis that the trial judge saw that this person was not present before him at that moment, after the court previously ordered that person to appear at a hearing or trial. Any adjudication and sentence will be in

violation of that person's constitutional rights.

CONCLUSION

Based on the above arguments, this Court should hold that only Florida Rule of Criminal Procedure 3.840 (indirect criminal contempt) can be used to prosecute a person who does not appear for a trial or hearing after the trial court issues an order for that person to appear.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of this answer brief was served by e-mail upon Assistant Attorney General TRISHA MEGGS PATE in compliance with Florida Rule of Appellate Procedure 9.420(c) and Florida Rule of Judicial Administration 2.516(b)(1) by means of the e-filing Portal on October 24, 2014.

CERTIFICATE OF COMPLIANCE

I CERTIFY THAT THIS BRIEF USED A TYPEFACE OF 14 POINT TIMES NEW ROMAN.

/s/ *Arthur Joel Berger*