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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ALEX DIAZ DE LA PORTILLA,

Respondent.

CASE NO. SC14-1625

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Alex Diaz De La Portilla, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of one volumes, which will be referenced by the symbol "I" and the two volumes of Supplemental record by the symbols "SI" and "SII". Each volume will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Although the criminal contempt charge is the only charge at issue in this appeal, a brief overview of the facts involved in the civil proceeding is necessary to understand how the charges arose. Respondent and his former wife were involved in a highly contested dissolution of marriage proceeding. One of the contested issues involved the ownership of the parties' dogs. In an earlier proceeding, Judge Mark Walker ordered the Respondent to return one of the dogs to the wife by a specific date, which the Respondent

failed to do. Subsequent to that order, Judge Sheffield then took over the case and found Respondent in indirect civil contempt for his failure to return the dog. He issued an order for Respondent to be arrested, but allowed Respondent to purge himself from the jail sentence by returning the dogs. Respondent was not present at the hearing when that order was issued, and the civil contempt order(s) are not at issue in this appeal. Various other motions and hearings were also held which are not at issue in this appeal.

At issue in this case is that on July 29, 2011, the former wife filed a verified second motion for order to show cause and motion to compel deposition of Respondent. (SII.63-66). In the motion, the wife alleged that petitioner had failed to return the dog and had failed to make himself available for deposition. (SII.65). In the motion, the wife asked for the Court to set a date for and require Respondent's attendance for a deposition. The wife also asked that the court compel the Respondent to produce the dog or be held in indirect criminal contempt. (SII.65). The former wife filed an amended Notice of hearing "on Former Wife's Second Verified Motion for Order to Show Cause and Motion to Set Husband's Deposition" setting the hearing for August 23, 2011. (SII.74). The trial court then issued an order to show cause and notice of hearing, and after reciting some of the case history, the trial court stated:

> 5. Former Wife has filed a Verified Second Motion for Order to Show Cause based upon the Former Husband's failure to deliver one of the dogs as Court Ordered on two occasions and to date, the Former Husband has not returned either dog to her possession.

> The Court having considered the foregoing, it is
>
> ORDERED AND ADJUDGED that the Respond/Former Husband, Alex Diaz De La Portilla, is hereby ordered to appear at hearing on AUGUST 23, 2011 AT 8:30 AM, ROOM 365 ... to show why he should not be held in contempt of this Court's orders relative to surrender of the dog.

(SII.76).

Respondent was not present at the August 23, 2011, hearing. His attorney was present. The court heard testimony as to whether the dog was returned and Respondent's attorney questioned the validity of the original order requiring the return of the dog. (R.27-32,33-44). The wife's attorney did argue that Respondent had intentionally veiled his location from the court, (R.38), but no testimony was presented to that fact. The wife's attorney also stated that the Respondent's failure to appear was direct criminal contempt. (R.60). The trial court then issued its ruling explaining that civil contempt powers are to coerce compliance with an order, but because the court still did not have Respondent's compliance, the trial court ruled:

> At this juncture in this case it is my opinion that it is no longer practical, no longer possible for me to coerce compliance because your client is not going to do it. He is going to absent himself; his is going to continue to vilify his wife; he is going to continue to thumb his nose at this Court and to challenge my authority to enforce not only my Orders but the Orders of Judge Walker.
>
> So that being said, I am denying the stay on the stay on the Order that is already entered. Based upon the sworn Motion and the sworn testimony today I find him to be in civil contempt for not appearing today and not giving the dog to her as per Judge Walker's Order. He is hereby sentenced to serve five months and 29 days for that contempt.

> In addition, based upon the fact that I have ordered him to appear and he has not appeared here today I find him in direct criminal contempt. He is also ordered to spend five months and 29 days for direct criminal contempt.

(I.71-72). The trial court issued a written order finding that Respondent's counsel had notice of the hearing. The trial court further found:

> WHEREAS, this Court held a hearing on said Order to Show Cause on August 23, 2011, with counsel for Petitioner/Wife and Petitioner/Wife appearing; Counsel for Respondent/Husband appearing but without his client and offering no explanation or reason as to why his client was not present as directed, and presenting no legal or factual basis for present as directed, and
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> WHEREAS, this Court having no ability to inquire of the Respondent/Husband as to any issues due to his wilful non-appearance, and having personal knowledge of his failure to appear, and
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> WHEREAS, the Court was unable to inquire of the Respondent/Husband as to why he should not be adjudged guilty of Direct Criminal Contempt; and
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> WHEREAS, to Court finds that it is no longer possible or practicable to coerce compliance with its Orders and the Respondent/Husband should be punished for his offensive conduct against the Court, its judgment, orders or process; and
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> ***
>
> WHEREAS, the Court found that the actions of Respondent/Husband were willful contempt that occurred beyond a reasonable doubt directly in the presence of the Court and warranted appropriate sanctions; and
>
> WHEREAS the Court has complied with Rule 3.830 in this finding and process, and failure to appear can be Direct Criminal Contempt Bouie v. State, 784 So.2d 521 (Fla. 4th DCA 2001); Speer v. State, 742 So.2d 373 (Fla. 1st DCA 1999); Porter v. Williams, 392 So.2d 59 (Fla. 5th DCA 1981);
>
> NOW, THEREFORE, in consideration thereof, it is

> ORDERED AND ADJUDGED that Respondent/ Husband, ALEX DIAZ DE LE PORTILLA, is guilty of Direct Criminal Contempt of this Court for his failure to appear at hearing herein on the Order to Show Cause, 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)...

(I.7-9).

Respondent appealed the criminal contempt conviction to the First District Court of Appeals. On appeal, Respondent claimed "it was fundamental error to hold him in direct criminal contempt without his presence or a finding that his non-appearance was intentional. He also argues that the record evidence is insufficient to establish a basis for direct criminal contempt arising from his non-appearance, and that he did nothing to obstruct the trial court's ability to hold the hearing because, in fact, the hearing was held." Diaz de la Portilla v. State, 142 So.3d 928, 931 (Fla. 1st DCA 2014). The First District relied on its prior decision in Speer v. State, 742 So.2d 373, 373 (Fla. 1st DCA 1999) and this Court's decision in Aron v. Huttoe, 265 So.2d 699 (Fla.1972), and held that the failure to appear in court pursuant to a court order can constitute direct criminal contempt. However, while noting that the trial court was exceptionally thorough in his detailed orders explaining the basis for direct criminal contempt, the First District found that the evidence was lacking as to whether the respondent was notified that he was required to attend and reversed the conviction. Id. at 933.

The First District did noted that:

> Although some courts, including this Court in Speer, have cited Aron for the broad proposition that a failure to appear is a basis for direct criminal contempt, others have distinguished it or deemed it in tension with, or disavowed by, subsequent supreme court cases. See, e.g., Kelley v. Rice, 800 So.2d 247, 253 (Fla. 2d DCA 2001) (interpreting decision in Pugliese v. Pugliese, 347 So.2d 422 (Fla.1977) as a partial repudiation of Aron by concluding that "to the extent the supreme court had adopted that dicta [in Aron], the court has since disavowed it."); Martinez v. State, 799 So.2d 313, 315 (Fla. 2d DCA 2001) (noting the district court conflict and the tension of Aron with the supreme court's decision in Gidden v. State, 613 So.2d 457 (Fla.1993)).

Diaz de la Portilla, at 932 -933. Therefore, the First District certified as question of great public importance:

> Whether a party who is ordered by a trial court to appear at a scheduled hearing, but fails to do so, may be found in direct criminal contempt under Florida Rules of Criminal Procedure 3.830; or whether such conduct should be addressed as indirect criminal contempt under Florida Rules of Criminal Procedure 3.840?

Id. at 935. The First District also stated that "Should the supreme court choose to accept jurisdiction, we recommend that it also consider the State's suggestion that criminal contempt hearings be held separately from the civil proceedings." Id.

SUMMARY OF ARGUMENT

The trial judge found Respondent to be in direct criminal contempt for his failure to appear at the August 23, 2011 hearing involving his dissolution of marriage. In a direct contempt proceeding, the contemptuous act must occur in the immediate presence of the court, while in an indirect criminal contempt proceeding the act is committed out of the presence of the court. Although there is conflicting case law, the trial court relied on existing case law which held that the failure to appear when ordered to do so could be considered direct criminal contempt.

The issue before this Court is whether the failure to appear should be treated as direct or indirect contempt. The State would advocate that the better practice would be to follow the Second District and find that the failure to appear in court be treated as a indirect criminal contempt rather than a direct criminal contempt. Although a defendant's absence from the court proceeding is apparent to all, whether or not the person had knowledge that he or she was required to be present in court is not apparent, as it was in this case. Furthermore, even if defendant had been properly subpoenaed or personally advised to appear in court, the defendant's reason for not being in court may not be readily apparent. Lastly, because Rule 3.830 specifically requires that the judge inform the defendant of the accusation and inquire as to whether the defendant has any cause to show why he or she should not be held in of contempt the court, it is difficult to conduct such an inquiry, if the defendant is not present in the courtroom.

In addition, the State would also ask this Court to emphasize to trial judges that the better practice would be to treat the criminal contempt proceedings totally separate from the civil proceeding to ensure that the criminal contempt proceeding is handled as a criminal matter as required by Rule 3.840. Treating it as a separate proceeding would be helpful in cases like this where parties are relying on documents and evidence which may be part of the civil proceeding, but are not offered as separate pieces of evidence in the criminal proceeding. Moreover, that practice would ensure that the criminal contempt procedure is handled under the Rules of Criminal Procedures rather than Rules of Civil Procedure. Treating the proceedings separate would also aid in making sure that standards, such as the burden of proof and other due process concerns, are met under the criminal law standards rather than civil standards.

ARGUMENT

ISSUE I

WHETHER A PARTY WHO IS ORDERED BY A TRIAL COURT TO APPEAR AT A SCHEDULED HEARING, BUT FAILS TO DO SO, MAY BE FOUND IN DIRECT CRIMINAL CONTEMPT UNDER FLORIDA RULES OF CRIMINAL PROCEDURE 3.830; OR WHETHER SUCH CONDUCT SHOULD BE ADDRESSED AS INDIRECT CRIMINAL CONTEMPT UNDER FLORIDA RULES OF CRIMINAL PROCEDURE 3.840?

Standard of Review

"Though it is the rule of this jurisdiction that in a contempt proceeding the determination of the facts and inferences to be drawn therefrom will generally be left to the decision of the trial judge, whose conclusion as to the acts done and as to their contemptuous character or effect, will not be lightly disturbed by the district court on habeas corpus, Baumgartner v. Joughin, 105 Fla. 335, 141 So. 185, [Fla. 1932] the rule is subject to the principle, that where the acts constituting the alleged contempt take place out of the presence of the Court and relate to improper proposals to influence the actions of jurors or other court officials in the performance of their official duties, such proposals must be proven in the same manner and to the same degree of certainty as other criminal charges are proven if a valid judgment of contempt is to rest on them. See Stokes v. Scott, 138 Fla. 235, 189 So. 272 [Fla. 1939]; Williams v. Scott, 138 Fla. 239, 189 So. 272 [Fla. 1939]". Marshall v. Clark, 45 So. 2d 667 (Fla. 1950).

Preservation

Respondent did not clearly and succinctly object to the failure to meet the due process requirements in the trial court. However, these issues appear to be structural or fundamental in nature. Hunt v. State, 659 So. 2d 363 (Fla. 1st DCA 1995)(noncompliance with 3.840 constitutes fundamental error where order to show cause is defective).

Argument

The trial court found Respondent in direct criminal contempt for his failure to appear at the August 23, 2011 hearing. Respondent and his former wife were involved in a highly contested dissolution of marriage proceeding. One of the contested issues involved the ownership of the parties' dogs. In an earlier proceeding, Judge Mark Walker ordered the Respondent to return one of the dogs to the wife by a specific date, which the Respondent failed to do. Subsequent to that order, Judge Sheffield then took over the case and found Respondent in indirect civil contempt for his failure to return the dog. The civil contempt orders regarding the ownership of the dog were not at issue in this appeal.

At issue in this case is that on July 29, 2011, the former wife filed a verified second motion for order to show cause and motion to compel deposition of Respondent. (SII.63-66). In the motion, the wife alleged that petitioner had failed to return the dog and had failed to make himself available for deposition. (SII.65). In the motion, the wife asked for the Court to set a date for and require Respondent's attendance for a deposition. The wife also

asked that the court compel the Respondent to produce the dog or be held in indirect criminal contempt. (SII.65). The former wife filed an amended Notice of hearing "on Former Wife's Second Verified Motion for Order to Show Cause and Motion to Set Husband's Deposition" setting the hearing for August 23, 2011. (SII.74). The trial court then issued an order to show cause and notice of hearing, and after reciting some of the case history, the trial court stated:

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an order, but because the court still did not have Respondent's compliance, the trial court ruled:

> At this juncture in this case it is my opinion that it is no longer practical, no longer possible for me to coerce compliance because your client is not going to do it. He is going to absent himself; his is going to continue to vilify his wife; he is going to continue to thumb his nose at this Court and to challenge my authority to enforce not only my Orders but the Orders of Judge Walker.
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(I.71-72). The trial court issued a written order finding that Respondent's counsel had notice of the hearing. The trial court further found:

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> WHEREAS, the Court found that the actions of Respondent/Husband were willful contempt that occurred beyond a reasonable doubt directly in the presence of the Court and warranted appropriate sanctions; and
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(I.7-9).

The issue before this Court is whether the failure to appear at a hearing should be considered direct or indirect criminal contempt of court. Rule 3.830 which governs direct criminal contempt proceedings provides in pertinent part:

> 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 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 the court and sentenced therefor.

Rule 3.840 governs indirect criminal contempt proceedings and provides:

> A criminal contempt, except as provided in rule 3.830 concerning direct contempt, shall be prosecuted in the following manner:
>
> (A) **Order to Show Cause.** The judge, on the judge's own motion or on an affidavit of any person having knowledge of the facts, may issue and sign an order directed to the defendant, stating the essential facts constituting the criminal contempt charged and requiring the defendant to appear before the court to show cause why the defendant should not be held in contempt of court. The order shall specify the time and place of the hearing, with a reasonable time allowed for preparation of the defense after service of the order on the defendant.

(Emphasis in original).

The rule governing direct contempt requires that the defendant be first given notice of the charge of contempt of court and facts on which the charge is based. Martin v. State, 711 So. 2d 1173 (Fla. 4th DCA 1998); Bontrager v. Sessions, 582 So. 2d 766 (Fla. 1st DCA 1991); Peters v. State, 626 So. 2d 1048 (Fla. 4th DCA 1993). Likewise, a defendant cannot be found in indirect criminal contempt where not given specifics as to the acts which constituted the alleged contempt. See e.g. J.M.P.U. v. State, 858 So. 2d 389 (Fla. 2003). See also Micchiche v. State, 626 So. 2d 1028 (Fla. 4th DCA 1993)(witness found in contempt must be properly informed in rule to show cause whether he is being charged with direct or indirect criminal contempt and order must recite facts constituting contempt).

Strict compliance with the rule governing criminal contempt is necessary to safeguard due process. Garret v. State, 876 So. 2d 24

(Fla. 1st DCA 2004). "Because criminal contempt is 'a crime in the ordinary sense,' imposition of criminal contempt sanctions requires that a contemnor be afforded the same constitutional due process protections afforded to criminal defendants." Parisi v. Broward Cnty., 769 So. 2d 359, 364-65 (Fla. 2000). "These rights include the right of criminal defendants to be represented by counsel, the right to have the State prove the offense beyond a reasonable doubt, and the right not to incriminate oneself." Id. "In addition to these constitutional rights, our rules of criminal procedure provide specific procedures for both direct and indirect criminal contempt." Id. at 365.

There is conflicting caselaw on whether the failure to appear should be treated as direct criminal contempt or indirect criminal contempt.. "Indirect criminal contempt occurs where the act constituting the contempt is committed out of the presence of the court. Pugliese v. Pugliese, 347 So.2d 422 (Fla.1977). Where the act is committed in the immediate presence of the court, the proceeding to punish is for direct criminal contempt." Porter v. Williams, 392 So.2d 59, 60 (Fla. 5th DCA 1981). Most Florida courts have held that "[n]on-appearance pursuant to an order of the court is normally considered a direct criminal contempt since it is committed in the immediate view and presence of the court." Id. This line of case law was developed from the Third District's case of Aron v. Huttoe, 258 So.2d 272 (Fla. 3d DCA 1972), adopted 265

So.2d 699 (Fla.1972).[1] In Aron, the court upheld the conviction for direct criminal contempt because "the trial judge obviously saw that Dr. Aron was not present in court and heard from counsel that the witness subpoenas of plaintiff and defendant had been served upon him and that he had not complied with them by attending the trial and bringing his records. The contemptuous acts were committed in the actual presence of the court when the court saw that the doctor was not present at the trial with his records and saw and heard that he had been subpoenaed by each party. In response to the bench warrant the doctor came into court during the trial and offered an inadequate explanation for his absence on the morning of the trial. He admitted he had been to the court on another case earlier the same morning but stated he 'got mixed up about this one' and went back to his office." Id. Other District Courts have followed Aron. Speer v. State, 742 So. 2d 373 (Fla. 1st DCA 1999)("The failure to appear in court pursuant to a court order can constitute direct criminal contempt."); Bouie v. State, 784 So. 2d 521, 522-23 (Fla. 4th DCA 2001)(holding that "Failure to appear in court pursuant to a court order can constitute direct criminal contempt."); Woods v. State, 600 So.2d 27, 29 (Fla. 4th DCA 1992) (Failure to appear is direct contempt, as settled in Aron.).

However, the Fourth District questioned the wisdom of Aron in Hayes v. State, 592 So. 2d 327 (Fla. 4th DCA 1992). The Fourth District stated that "[i]t is difficult, however, for us to

[1] The Florida Supreme Court adopted the Third District's opinion without providing any analysis of the issue.

understand how Hayes's conduct can be considered to have been committed in the 'actual presence of the court', when it was Hayes's absence from the presence of the court that caused the judge to complain." Id. at 329.

The Second District has rejected Aron altogether and found that failure to appear in court should be treated as indirect criminal contempt. In Kelley v. Rice, 800 So.2d 247, 252 (Fla. 2d DCA 2001), the trial court found Kelley in direct criminal contempt of court for her failure to appear in court for a criminal trial after she had been subpoenaed.[2] The Second District found that although the trial judge "knew that Ms. Kelley did not appear in court for the trial, that failure was contemptuous only if Ms. Kelly knew she was required to come to court[,]" for which the judge had no personal knowledge. Id. at 252.

The Kelly Court reasoned that the failure to appear should be considered as indirect contempt in order to meet the due process requirements guaranteed by the Constitution. The court explained that:

> In order to understand and apply this seemingly simple definition and rule, it is necessary to consider its constitutional underpinnings. Due process requires that before a person may be convicted and sentenced to jail, she must be afforded reasonable notice of the charges against her and an opportunity to be heard which includes at a bare minimum the right to examine witnesses against her, the right to offer testimony, and the right to counsel. See In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948). There is, however, an exception

[2] The opinion did note that the subpoena was not directly served to her personally, but on family members at a former residence.

to this rule for a limited category of contempts. See id. at 275, 68 S.Ct. 499.

> The narrow exception ... includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's 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 immediate punishment is essential to prevent 'demoralization of the court's authority before the public.'

Id. at 275, 68 S.Ct. 499 (quoting Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925)). Because the Constitution permits only this narrow category of contempts to be punished summarily in the manner described by rule 3.830, we assume that the direct criminal contempt defined in that rule is intended to encompass only this category.

Id. at 251-252.

The Second District further concluded that "Aron is not controlling because it is distinguishable from the instant case and is of questionable validity in light of more recent Florida Supreme Court decisions." Id. at 252. The Second District distinguished Kelly from other cases in which the trial judges had issued the order to appear to the defendant in person so the judge had personal knowledge that the defendant knew he or she was required to come to court. Id. at 252.

However, the Second District also questioned the current validity of Aron in light of more recent Florida Supreme Court case law. The Second District stated that:

> Since Aron, however, the supreme court has expressly rejected a similar argument. In Pugliese v. Pugliese, 347 So.2d 422 (Fla.1977), the petitioner contended that the other party's conduct could be summarily punished as direct criminal contempt because the alleged contemnor, while in the judge's presence, admitted to contemptuous conduct which had occurred outside the judge's presence. The Pugliese court recognized that this argument would

> obliterate the distinction between indirect and direct criminal contempt because "the judge must always hear some testimony in his presence at a hearing on indirect contempt concerning conduct which took place outside his presence." Id. at 426. The court declined to accept any "notion that would expunge [that] distinction." Id. We interpret this as a repudiation of the suggestion in Aron that the contemptuous acts were considered to have been committed in the actual presence of the trial judge simply because the judge "heard from counsel that the witness subpoenas ... had been served," Aron, 258 So.2d at 274, and we conclude that to the extent the supreme court had adopted that dicta, the court has since disavowed it.

Id. at 253.

The State would advocate that the better practice would be to follow the Second District and find that the failure to appear in court be treated as a indirect criminal contempt rather than a direct criminal contempt. Although the person's absence from the court proceeding does occur in the judge's immediate presence, the judge may not have direct knowledge as to whether or not the person had knowledge that he or she was required to be in court. Furthermore, even if the person had been properly subpoenaed or trial judge had personally ordered the person to appear, the person's reason for not being in court may not be readily apparent. For example, if a person had a medical emergency or was in a traffic crash, the person's failure to appear in court would be due to circumstances beyond his or her control and not for the purpose of disrupting the court proceeding or thwarting the power of the court.

Lastly, Rule 3.830 specifically requires that "[p]rior 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 the court and sentenced therefor." It is difficult to inquire as to whether the defendant has any cause to show why he or she should not be adjudged guilty of contempt the court, if the defendant is not present in the courtroom.

The Fourth District addressed a similar issue in Martin v. State, 711 So.2d 1173, 1174 (Fla. 4th DCA 1998). Although the contemptuous behavior was different, the principle was the same. At a motion hearing, Martin called the court "a kangaroo court," "a judicial circus" and stated that the court had been "bought lock, stock and barrel by Scripps Howard Broadcasting and the law firm of Steel, Hector and Davis." Martin v. State, 711 So.2d 1173, 1174 (Fla. 4th DCA 1998). After Martin remarks, the trial judge stopped Martin found that the remark about being bought was contemptuous and sentenced Martin to 30 days in jail for direct criminal contempt. Id. The Fourth District noted that Rule 3.830 required "that the defendant be first given notice of the charge of contempt of court and the facts on which the charge is based. Then he must be given an opportunity to explain why he should not be adjudicated guilty of contempt before punishment is imposed." Id. The Court stated that **"[p]lainly Martin's comments are criminally contemptuous on their face and require no explanation by the judge as to why they are deemed contemptuous**." Id. at 1174-1175 (emphasis added). However, the court stated that "[o]n the other hand, it is equally clear that the trial judge failed to comply with the portion of rule 3.830 quoted above and give Martin a

chance to show why he should not be found in contempt and to argue for a different sentence. Consequently we have no choice but to reverse for compliance with the rule." Id. at 1175.

Likewise, in the case at bar, Respondent may have no excuse as to why he failed to appear in the court and the State is not indicating that he might have one. Respondent could have been willfully absenting himself from the court proceedings as the trial court found. Nevertheless, Rule 3.830 requires the trial judge to allow Respondent an opportunity to explain why he should not be adjudicated guilty of contempt; however, one who is not present in the courtroom cannot explain his or her absence from the courtroom. Therefore, the better practice would be require that the failure to appear in court be treated as indirect contempt of court rather than direct.

The First District also recognized that this case illustrated the reasons why we have different Rules of Procedure for Criminal and Civil Contempt and in doing so stated that "Should the supreme court choose to accept jurisdiction, we recommend that it also consider the State's suggestion that criminal contempt hearings be held separately from the civil proceedings." Diaz de la Portilla, at 935. While the State is not advocating for a change in the Rules of Procedure as the proper Rules of Procedure are already in place, it is incumbent on both the parties and the trial judges to distinguish between the civil and criminal proceedings. This Court already requires the notice of the contempt charges to distinguish between direct and indirect contempt. See also Micchiche v. State,

626 So. 2d 1028 (Fla. 4th DCA 1993)(witness found in contempt must be properly informed in rule to show cause whether he is being charged with direct or indirect criminal contempt and order must recite facts constituting contempt). Pugliese v. Pugliese, 347 So.2d 422, 426 (Fla. 1977)("Second, even though petitioner, through counsel, received notice of a hearing for contempt order, he had no reason to believe at the time of the hearing that it was for other than civil contempt. He was not appraised that he would be required to stand ready to answer a charge of criminal contempt.").

Holding separate proceedings would help ensure that the criminal contempt proceeding is handled as a criminal matter as required by Rule 3.840. In this case, the First District found that the evidence to support the conviction was insufficient because there was no evidence that the respondent was personal knowledge of the hearing. The State would suggest that many of the deficiencies in the evidence which occurred in this case were due to the fact that the both the court and the parties intermingled the civil and criminal contempt charges addressing them both at the same time although different standards of proof are required. Similarly, in Speer v. State, 742 So.2d 373 (Fla. 1st DCA 1999), the First District found that the failure to appear in court was subject to direct contempt proceeding, but reversed the conviction "because nothing in the record indicates that Speer had been ordered to appear in court. The State has not filed anything to suggest otherwise." Id. at 373-374. See Van Hare v. Van Hare, 870 So. 2d 125 (Fla. 4th DCA 2003)(finding that the evidence was insufficient

to hold the former husband in civil contempt regarding his present financial abilities as to child support and stating that even disbelieving former husband at contempt hearing the former wife did not present any evidence as to his ability to pay).

As often the case when criminal contempt charges arise from civil case, the State was never made a party to the proceeding the trial court, but instead, the contempt proceedings were handled by the civil attorneys for the parties and intermingled with the civil contempt charges. Therefore, parties relied on documents and/or the civil case history which was a part of the civil proceeding, but nothing was offered as separate pieces of evidence in the criminal proceeding. While this Court need not require the State Attorney's Office to participate in every proceeding, nor would a change in the Criminal Rules of Procedure be required, this Court should encourage the trial court to distinguish criminal contempt proceeding from the civil case, and hold parties to the standard of proof necessary to sustain a criminal conviction. The trial court could do something as simple announce that now we will address the criminal contempt charge, and require the parties to bring forth whatever evidence necessary to prove the charge is it is independent of the civil case. However, the proof should not be intermingled in the civil proceedings.

CONCLUSION

Based on the foregoing, the State respectfully submits the should find that the failure to appear in court should be treated as indirect criminal contempt rather than direct criminal contempt.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Arthur Joel Berger, Esq., ajberger@msn.com and Miguel Diaz De La Portilla, Esq., Mdportilla@becker-poliakoff.com by email on October 3d, 2014.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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