Filing # 13541121 Electronically Filed 05/12/2014 01:25:00 PM

RECEIVED, 5/12/2014 13:28:38, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

NOEL PLANK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. SC14-414
L.T. NO. 1D13-4458

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

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

COLLEEN D. MULLEN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-1000

ATTORNEY FOR APPELLANT
FLA. BAR NO. 100327

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

STATUTES

RULES

CONSTITUTIONS

IN THE SUPREME COURT OF FLORIDA

NOEL PLANK,

Petitioner,

v.

CASE NO. SC14-414
L.T. NO. 1D13-4458

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Mr. Plank was the Appellant and Defendant in the First District Court of Appeal and in the Circuit Court of the Second Judicial Circuit in and for Leon County. In this Initial Brief, he will be referred to by his proper name or as "petitioner." Respondent, the State of Florida, was both the Appellee and prosecution below, and will be referred to as "the State." The record on appeal consists of one sequentially numbered volume. All references to the record will be by a citation to the Volume Number, followed by the page number, all in parentheses.

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

In the circuit court, Judge Dempsey charged Mr. Plank with direct criminal contempt, pursuant to Rule 3.830, Florida Rules of Criminal Procedure and summarily convicted him following a hearing. (R1-3) The judge sentenced him to thirty (30) days jail. (R1-25) Following an order amending sentence and releasing defendant, Judge Dempsey found Mr. Plank's sentence was mitigated and amended the sentence to time served. (R1-28) He was released on May 2, 2013, after having served fifteen (15) days in jail. Mr. Plank timely appealed his case to the First District Court of Appeal ("First District"). (R1-29)

In the First District, Mr. Plank argued that the trial court erred by not appointing him counsel or giving him an opportunity to seek counsel for the contempt proceeding. *Plank v. State*, 130 So. 3d 289, 290 (Fla. 1st DCA 2014). The First District disagreed, holding that a defendant does not have a right to counsel under the Sixth Amendment or the Florida Rules of Criminal Procedure when charged with direct criminal contempt. *Id.*; *Williams v. State*, 698 So. 2d 1350 (Fla. 1st DCA 1997); *Saunders v. State*, 319 So. 2d 118 (Fla. 1st DCA 1975). The First District certified conflict with *Woods v. State*, 987 So. 2d 669 (Fla. 2d DCA 2007) and *Al-Hakim v. State*, 53 So. 3d 1171 (Fla. 2d DCA 2011).

In his appeal, Mr. Plank also argued that the court erred in seizing him and compelling him to provide a breath sample and that

the court failed to find him guilty beyond a reasonable doubt and failed to find intent on the part of Mr. Plank. The First District did not address these arguments.

STATEMENT OF THE FACTS

On April 15, 2013, Mr. Plank appeared for a jury selection before Judge Dempsey that convened at 1:56 p.m. (R1-34-36) Judge Dempsey called on Mr. Plank after he attempted to get her attention. (R1-36) He stated:

> I work a full day. I work 13 hours on Thursdays, and I have no time or money to sit in court waiting for all of y'all. First of all, I'm going to tell you straight out. I'm antiwar, Vietnam draft card burner, and avoided the Vietnam war. I'm also 4F. That's the military.

(R1-36).

To clarify what 4F means, Mr. Plank stated that he was unqualified for military service. (R1-36) He went on to state that he is antigovernment, not registered to vote, and has not voted since Ronald Reagan was president. (R1-36) He last stated that he is "a drunk." (R1-36) However, Judge Dempsey did not excuse him from jury selection. (R1-36)

In answer to the questionnaire that every prospective juror gets, Mr. Plank stated:

> My name is Noel Plank. I'm a driver. I deliver *Homes & Land, Tallahassee Woman*. You've seen them on magazine racks all over Tallahassee. I have no spouse. I'm divorced. I do have a daughter, but she lives with my ex. Her name is Jessica, Jessica Plank. And she's unemployed. She's a writer at FSU. I've lived here for 23 years. I have nobody that I know as far as No. 5 goes. And yes to No. 6. I can't tell you their names. I know the names but it may incriminate them.
> ...Not me. As far as victim of crime, yes, I have been the victim of several crimes, identity theft, theft of over a thousand dollars worth of professional camera equipment, theft of cell phone, and I've been burglarized a couple of times, nothing serious tooken except a six-

> pack of beer, which I was kind of teed off at, because I was looking forward to having a beer after work, when I got home after work. And the police officer says - the sheriff's asking me, did you check the fridge? I said, I never thought of that. And sure enough, they took, they took my six-pack of beer. Okay. I found that out.
> And I can listen but my mind goes from about here to here (indicating) and I'll forget. You can tell me your name. I will forget it as soon as I walk ten feet. I, I have a bad memory, okay because I also have a plastic plate in this side of my head. That's why I'm 4F from the military. I've had a bad car accident when I was 17, and things have happened and I'm getting older and I'm starting to lose my memory. Okay? And - okay. I know no other jurors in here. I've never served on a jury before.

(R1-36-38).

Apparently Mr. Plank was not asked any further questions, nor did he speak out again during the jury selection. Jury selection ended at approximately 2:55 p.m. (R1-3) It appears that Mr. Plank fell asleep sometime after he answered the questionnaire and was difficult to wake when it was time to take a break. (R1-3) Judge Dempsey held a contempt hearing at 4:02 p.m. against Mr. Plank. (R1-15)

At the contempt hearing, Ceressa Marie Haney, a Leon County Probation Officer, testified as to the breathalyzer that was administered on Mr. Plank after jury selection. (R1-19) She stated that the breathalyzer machine has a straw at the top that the person blows into and that the machine registers what their alcohol level is. (R1-19) She stated she believed that for quality control they send the Intoxilyzer off every six months to determine that it continues to be accurate. (R1-19-20) She then stated that the

Intoxilyzer she used on Mr. Plank had been last sent off in January 2013. (R1-20) Ms. Haney testified that she administers the test approximately 15 times a week. (R1-20)

Turning to Mr. Plank, Ms. Haney testified that she administered the Intoxilyzer on him on April 15, 2013, the day of the jury selection. (R1-20) The breathalyzer test was given around 3:00 p.m. (R1-21) Mr. Plank had a blood alcohol level of .111. (R1-21) That is on the same scale as a DUI where it is illegal to drive with a greater than .08 blood alcohol level. (R1-21) Ms. Haney stated she could smell alcohol when Mr. Plank walked by her and she did not know if it was coming from his breath or his clothes. (R1-21)

Mr. Plank was given the opportunity to ask Ms. Haney questions. (R1-22) He asked how it was possible that his clothes smelled of beer when he never spilt a drop of beer on his clothing. (R1-22) Judge Dempsey then interrupted to verify Ms. Haney's name and Mr. Plank's question was never answered. (R1-22) He then stated he had no questions for Ms. Haney. (R1-22)

Judge Dempsey asked Mr. Plank to move over to a microphone, which he had trouble doing because he has a hard time getting out of chairs and because he was handcuffed. (R1-22) Judge Dempsey asked Mr. Plank what time he arrived at the courthouse for jury duty. (R1-23) Mr. Plank stated he arrived sometime around 11:30 and had been waiting in the hallway. (R1-23) Judge Dempsey asked him if

he had driven to the courthouse and he answered that he had and that his vehicle was in a parking garage somewhere. (R1-23) When asked by Judge Dempsey why he should not be held in contempt, Mr. Plank stated:

> First of all, I was extremely tired. I was up at 1:00 this morning, and I start work at 5:00 in the morning. I had to walk in and out, in and out, in and out of the vehicle every other door, like, from here to your back door there, that distance, and it's very tiring. And I only had -

(R1-23-24)

Judge Dempsey interrupted Mr. Plank to verify that he did that while delivering magazines, which he confirmed. (R1-24) He then stated that he "only had a couple of beers after work." (R1-24) He went on to say, in reply to Judge Dempsey asking if there was anything else he wanted to tell her about:

> Other than I can't afford to be - if you got me coming in here to court and all this, that's what I tried telling you before. I don't get paid for coming to court. Okay? I don't get paid for taking time off. Also, I'm about- in the process of losing my house, which I own here in Leon County for, let's see, 13 years. My mortgage company has been giving me a chance to catch up because I missed one month. And my hours have been dropped. I used to make 400 a week. Now I'm making 200 a week. I'm barely making it. That's, that's why I want to get out of court duty, because Thursday is my busiest day. But if you insist, I'll lose my house and everything. I'll be living out on the street with everybody else.

(R1-24)

Judge Dempsey stated that although she did not want Mr. Plank to lose his house, she wanted him to come to jury duty without being drunk. She then stated:

> All right. I'm going to find that you're in direct criminal contempt for not only coming to the courthouse drunk but it was also - in doing that, you disrupted the jury selection here this afternoon and distracted other jurors. Other jurors obviously noticed that you smelled of alcohol, were drunk. So I am finding you in contempt.

(R1-25)

Judge Dempsey then gave Mr. Plank an opportunity to tell any mitigating or excusing circumstances before imposing the sentence. (R1-25) He stated that he did not know what else to say. (R1-25) She then sentenced him to 30 days in the Leon County Jail. (R1-25) Mr. Plank then stated he would lose his house and lose everything else. (R1-25) Judge Dempsey stated in reply:

> - I can't, I can't ignore this behavior that, that you're here, your over the legal limit, your acting disruptive during jury selection. You tell me that you're a drunk and that you've refused to follow the law. I mean, that's what you said during the jury selection. And then it turns out that your blood alcohol level is significantly over the legal limit after you've been here for three and a half hours. So certainly your blood alcohol level has come down during that past three and a half hours. And you drove here.
> So, I mean, the driving itself, of course, wasn't in my presence and wasn't part of direct criminal contempt, but I certainly think it's a legitimate factor for me to consider, and I think 30 days is reasonable. So that's my ruling and I'm required to do a written order, so I'll do that, as well.

(R1-26)

Mr. Plank was found indigent for purposes of his appeal. (R1-31)

SUMMARY OF THE ARGUMENT

This appeal involves the conflict certified by the First District, whether a person has a right to counsel under the Florida Rules of Criminal Procedure in direct criminal contempt proceedings. In addition, Mr. Plank had a right to counsel in this proceeding under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 16 of the Florida Constitution. As such, this Court should discharge Mr. Plank's conviction and sentence for contempt and remand with instructions for a new trial. In doing so, this Court should approve the decisions in *Woods v. State*, 987 So. 2d 669 (Fla. 2d DCA 2007) and *Al-Hakim v. State*, 53 So. 3d 1171 (Fla. 2d DCA 2011) and quash the decision rendered in *Plank v. State*, 130 So. 3d 289 (Fla. 1st DCA 2014).

ARGUMENT

ISSUE:
THE TRIAL COURT ERRED BY NOT APPOINTING COUNSEL OR GIVING MR. PLANK THE OPPORTUNITY TO SEEK COUNSEL.

A. STANDARD OF REVIEW

Any failure of a trial court to exercise its contempt power in a manner consistent with the Florida Rules of Criminal Procedure is fundamental error. *Al-Hakim v. State*, 53 So. 3d 1171, 1173 (Fla. 2d DCA 2011); *See Hutcheson v. State*, 903 So. 2d 1060, 1062 (Fla. 5th DCA 2005). Asserted denial (of due process) is to be tested by an appraisal of the totality of facts in a given case. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963); *quoting Betts v. Brady*, 316 U.S. 455, 462 (1942). The presumption of correctness applies to the judgment of contempt, because it is a final decision after trial. *Murrell v. State*, 595 So. 2d 1049, 1050 (Fla. 4th DCA 1992); *In Re Weinstein*, 518 So. 2d 1370, 1372 (Fla. 4th DCA 1988). Any defect in a criminal contempt proceeding, whether direct or indirect, is fundamental error. *Garrett v. State*, 876 So. 2d 24, 25-26 (Fla. 1st DCA 2004).

B. THE MERITS

Judge Dempsey erred by failing to give Mr. Plank appointed counsel or the opportunity to seek counsel prior to charging, trying, and convicting him of direct criminal contempt and sentencing him to fifteen days incarceration. "Counsel shall be provided to all indigent persons *in all prosecutions* for offenses

punishable by incarceration including appeals from the conviction thereof." Fla. R. Crim. P. 3.111(b)(1)(emphasis added).

In its opinion in *Plank*, the First District affirmed his conviction for direct criminal contempt on the authority of *Williams*, 698 So. 2d 1350 and *Saunders*, 319 So. 2d 118, holding that in direct criminal contempt a defendant does not have the right to counsel under either the Sixth Amendment to the U.S. Constitution or the Florida Rules of Criminal Procedure. In *Saunders*, the First District held that a defendant does not have the right to counsel in direct criminal contempt cases because the interest of the judicial process and those hailed into court to an orderly administration of justice outweighs the interest of the accused to appointed counsel. 319 So. 2d at 125. The court further concluded that although it had recently been held that no person could be imprisoned for any offense without the assistance of counsel, because the case so holding did not involve direct criminal contempt, it did not overrule the holding that direct criminal contempt could be dealt with summarily. *Id.*

Petitioner respectfully disagrees with the First District's reasoning and conclusion. First, because there is no exception to Rule 3.111(b) that counsel be provided to indigent defendants in prosecutions for offenses punishable by imprisonment, due process requires that counsel be appointed. Second, there is no reason to conclude, as the First District did, that merely because the case

holding that there is an absolute right to counsel in any case where imprisonment may result did not deal with direct criminal contempt, that such offense is excluded from that rule. Third, the interest that the court seeks to protect, that of judges, witnesses, lawyers, and anyone else in court, to the orderly administration of justice, is the very interest that must be balanced by a contemnor's right to counsel, lest the contemnor be abused by the system.

"In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." Amend. VI, U.S. Const. The Florida Constitution guarantees the right to counsel in all criminal prosecutions. Art. I, § 16, Fla. Const. At the initiation of adversarial criminal proceedings, the Sixth Amendment right to counsel attaches. *Spivey v. State*, 45 So. 3d 51, 54 (Fla. 1st DCA 2010); *Miranda v. Arizona*, 384 U.S. 436, 469-73 (1966). "Counsel shall be provided to all indigent persons in all prosecutions for offenses punishable by incarceration including appeals from the conviction thereof." Fla. R. Crim. P. 3.111(b)(1). The laws governing the right to counsel provide for no exceptions to the rule that the right prevails in all prosecutions where the accused may be incarcerated, not even for direct criminal contempt.

The Due Process Clause of the Fourteenth Amendment incorporates the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Gideon, 372 U.S. at 341; *quoting Powell v. Alabama*, 287 U.S. 45, 67 (1932). This expressly includes the right to counsel, including for petty or misdemeanor offenses. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972). This is because "[t]he Sixth amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'" *Gideon*, 372 U.S. at 343; *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Groppi v. Leslie, 404 U.S. 496, 502-03 (1972); *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Though the minimum guarantee in Florida is the right to be heard before being adjudicated guilty of contempt, the Supreme Court held that:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell, 287 U.S. at 68-69.

Florida specifically provides that "[t]he public defender shall represent, without additional compensation, any person determined to be indigent under § 27.52 and... (b) Under arrest for or charged with... 3. Criminal contempt." § 27.51, Fla. Stat (2006). Criminal contempt is "a crime in the ordinary sense," governed by the Rules of Criminal Procedure and the Florida Constitution. *Parisi v. Broward County*, 769 So. 2d 359, 364 (Fla. 2000); *Burk v. Washington*, 713 So. 2d 988, 992-93 (Fla. 1998). As such, "by specifying in section 27.51 that the public defender shall represent indigent persons charged with a misdemeanor, the legislature intended such representation to include indigent persons charged with criminal contempt." *Moorman v. Bently*, 490 So. 2d 186, 187 (Fla. 2d DCA 1986).

The right to counsel is guaranteed in all criminal prosecutions, unless the trial judge certifies in writing that the defendant will not be imprisoned for the charged offense. *State v. Kelly*, 999 So. 2d 1029, 1035 (Fla. 2008). Florida law about right to counsel differs from federal law, in that Florida affords greater rights to counsel than does the Sixth Amendment. *Kelly*, 999 So. 2d at 1040. Under the Sixth Amendment standard, the right to counsel is limited to those cases where the defendant is actually imprisoned for the charged offense, whereas, under Florida law, if the offense is punishable by imprisonment, the defendant has the right to counsel. *Id.*; *Scott v. Illinois*, 440 U.S. 367, 373-74

(1979); Fla. R. Crim. P. 3.111(b)(1)(1992). "In spite of the uncertainty which may have existed at an earlier time, it is well settled that criminal contempt is a crime." *Mann v. State*, 476 So. 2d 1369, 1374 (Fla. 2d DCA 1985); *Aaron v. State*, 284 So. 2d 673 (Fla. 1973)

Because Florida Rule of Criminal Procedure 3.111(b), Article 1, section 16 of the Florida Constitution, and the Sixth Amendment provide no exception for direct criminal contempt in stating that any defendant accused of a crime where incarceration may result must be provided the right to counsel, Mr. Plank must have been provided counsel prior to being adjudicated in contempt and sentenced to jail. Though Florida Rule of Criminal Procedure 3.830 provides that direct criminal contempt may be dealt with summarily, it still provides that the accused be given the opportunity to be heard and to present mitigating evidence prior to adjudication. The right to be heard and present evidence without counsel in criminal court is meaningless to a defendant not skilled in the law or rules of criminal procedure and evidence. Merely because Rule 3.830 does not explicitly provide a defendant a right to counsel does not mean that the defendant has no right to counsel, especially in light of the fact that Rule 3.111(b) does explicitly provide for counsel for indigent defendants.

The First District, following *In re Oliver*, 333 U.S. 257 (1948), holds that defendants lose their due process rights to

counsel because there is a contemptuous act committed within view of a judge. *Plank*, 130 So. 3d at 290. *Oliver* holds that where immediate punishment, to prevent "demoralization of the court's authority before the public" is essential, there is a narrow exception to the due process requirements. *In re Oliver*, 333 U.S. 257, 275 (1948). The court in *Oliver* held that this exception applies only to "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..." *Id.* If all the essential elements of the offense are not personally observed by the judge, such that he must depend on statements made by others, due process requires that the accused be represented by counsel. *Id.* "[K]nowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense." *Id.*

The Supreme Court clarified the exception to the due process requirements of contempt committed in the presence of the court by saying:

> However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise.

Oliver, 333 U.S. at 274; *discussing Ex parte Terry*, 128 U.S. 289 (1888).

"When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument." *Cooke v. U.S.*, 267 U.S. 517, 536 (1925). Due process requires that the accused be able to have assistance of counsel in the prosecution of contempt not committed in open court. *Id.* at 537.

Several courts, including the First District, still follow the rule from *In re Oliver*, finding that misconduct committed in open court, in the presence of the judge, are the exception to the due process requirements of counsel. *Plank*, 130 So. 3d at 290; *Brandt v. Gooding*, 636 F.2d 124, 134 (4th Cir. 2011); *Mann v. Hendrian*, 871 F.2d 51, 52 (7th Cir. 1989); *U.S. v. Baldwin*, 770 F.2d 1550 (11th Cir. 1985); *Ramirez v. State*, 279 Ga. 13, 14 (Ga. 2005); *Lilienthal v. District Court of Sixteenth Judicial Dist., Rosebud County*, 200 Mont. 236, 242 (Mont. 1982); *Town of Nottingham v. Cedar Waters, Inc.*, 118 N.H. 282, 286 (N.H. 1978); *World Family Farms, Inc. V. Heartland Organic Foods, Inc.*, 661 N.W.2d 719, 724 (S.D. 2003); *Van Hake v. Thomas*, 759 P.2d 1162, 1171 (Utah 1988).

However, the rule in *Oliver* predated *Argersinger*, where only with a knowing and intelligent waiver of counsel may an unrepresented person be imprisoned for any offense. *Argersinger*, 407 U.S. at 37. The right to trial by jury is a fundamental right because it is a safeguard against a "corrupt or overzealous

prosecutor and against the complaint, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). This protects the accused by not entrusting the plenary powers over life and liberty to one judge or group of judges. *Id.* However, "in a summary proceeding for direct criminal contempt, 'the otherwise inconsistent functions of prosecutor, jury, and judge mesh into a single individual.'" *U.S. v. Neal*, 101 F.3d 993, 996 (4th Cir. 1996); *quoting Sandstrom v. Butterworth*, 738 F.2d 1200, 1209 (11th Cir. 1984). Though *Argersinger* did not involve charges of direct criminal contempt, nor did it explicitly overrule *Oliver*, the due process protections it seeks to vindicate and the reasoning behind the them apply equally to cases involving direct criminal contempt.

Only in "serious criminal cases," usually defined as cases involving six months imprisonment or more, is there a requirement that the accused have the opportunity to be tried by a jury of his peers. *Baldwin v. New York*, 399 U.S. 66, 69 (1970). This Court has expanded this holding to Florida cases involving criminal contempt. *Aaron v. State*, 284 So. 2d 673 (Fla. 1973) There is no similar limitation on the right to assistance of counsel, however, and even in petty cases, involving imprisonment of fewer than six months, the accused must be afforded the right to counsel. *Argersinger*, 407 U.S. at 30. This is because it is not true that "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when

a person can be sent off for six months or more." *Id.* at 33.

The protection of the right to counsel was extended to misdemeanors and petty offenses in part because those cases, "far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result." *Argersinger.* 407 U.S. at 34. Because imprisonment, even for a short period of time or a "petty" matter may result in serious consequences to the person's career and reputation, someone accused will seldom view the matter as "petty." *Baldwin,* 399 U.S. at 73. "The Fourteenth Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' and there cannot constitutionally be a difference in the quality of process based merely upon a supposed difference in the sanction involved." *Gideon,* 372 U.S. at 347 (J. Clark, concurring). "[A]ny deprivation of liberty is a serious matter." *Argersinger,* 407 U.S. at 47 (C.J. Burger, concurring). Distinguishing between serious and petty crimes to determine the right to counsel was criticized further:

> There is little ground, therefore, to assume that a defendant, unaided by counsel, will be any more able adequately to defend himself against the lesser charges that may involve confinement than more serious charges. Appeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually case when judgment is entered on an uncounseled trial record.

Argersinger, 407 U.S. at 47 (C.J. Burger, concurring).

Some courts determine whether a contemnor has a right to counsel based on the "seriousness" of the action, on a case-by-case

basis, determined by the trial court. *Dep't of Human Services v. Rael*, 642 P.2d 1099, 1102 (N.M. 1982). Other courts have found a right to counsel in all direct criminal contempt proceedings, except where an emergency, such as physically threatening people or property in the courtroom has occurred. *Pitts v. State*, 421 A.2d 901 (Del. Super. Ct. 1980).

Courts that have found the right to counsel in direct criminal contempt cases have found that it is the Fourteenth Amendment's due process protections that guarantee the right to counsel, as well as principles of fundamental fairness. *Segovia v. Likens*, 901 N.E.2d 310, 318 (Ohio Ct. App. 2008). Some of those courts have found that whether a contemnor has a right to counsel at a contempt proceeding is determined by whether an actual deprivation of liberty may result from the proceeding, regardless of whether the contempt is criminal or civil. *See, e.g., Ridgway v. Baker*, 720 F.2d 1409, 1413 (5th Cir. 1983); *State v. Browder*, 486 P.2d 925, 935 (Alaska 1971); *Arkansas Dep't Of Human Services v. Mainard*, 358 Ark. 204, 210 (Ark. 2004); *Emerick v. Emerick*, 28 Conn.App. 794, 798 (Conn. App. Ct. 1992); *Black v. Div. of Child Support Enforcement*, 686 A.2d 164, 168 (Del. 1996); *S.E.C. v. Bilzerian*, 729 F.Supp.2d 1, 8 (D.C. 2010); *People v. Johnson*, 407 Mich. 134, 147-48 (Mich. 1977); *Allen v. Sheriff of Lancaster County*, 245 Neb. 149, 151 (Neb. 1994); *King v. King*, 144 N.C.App. 391, 393-94 (N.C. Ct. App. 1990); *In re Neff*, 20 Ohio App.2d 213, 233-34 (Ohio Ct. App. 1969); *Com. v. Crawford*,

352 A.2d 52, 54 (Pa. 1976).

A nebulous distinction between civil and criminal contempt has been held to be of no consequence where a potential sentence is pending against a contemnor because "jail doors clang with the same finality behind an indigent who is held in contempt and incarcerated for nonpayment of child support... as they do behind an indigent who is incarcerated for violation of a criminal statute." *McNabb v. Osmundson*, 315 N.W.2d 9, 11 (Iowa 1982); *see also Ciraolo v. Madigan*, 443 F.2d 314 (9th Cir. 1971). Put another way, "criminal contempt is a crime in the ordinary sense... convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

The First District, the Third District, and the Fourth District Courts of Appeal continue to follow the *Oliver* rule, denying due process rights to those accused of direct criminal contempt. *See, e.g., Plank*, 130 So. 3d 289; *Searcy v. State*, 971 So. 2d 1008, 1014 (Fla. 3d DCA 2008); *Forbes v. State*, 933 So. 2d 706, 711 (Fla. 4th DCA 2006). Even if *Oliver* still prevails in Federal cases of direct criminal contempt, Florida provides greater protections for those accused of crimes, including Rule 3.111(b), providing for the right to counsel, and the holding that there can be no possibility of imprisonment in a criminal case unless the

accused has been afforded the right to counsel. *Kelly*, 999 So. 2d at 1040. However, Mr. Plank urges the Court to hold that *Argersinger* implicitly overruled *Oliver*, and protect the due process rights of those accused of crimes which may result in incarceration and preserve the fundamentals of our system of justice. In the alternative, petitioner urges this Court to hold that the due process right to counsel has evolved since the time of *Oliver*. At the time *Oliver* was released, only those accused of capital crimes had the right to counsel under the Sixth Amendment. *Betts*, 316 U.S. 455. However, fifteen years later, in *Gideon*, the Supreme Court found that all indigent criminal defendants charged with felonies had the right to counsel. *Gideon*, 372 U.S. 335. The Court further expanded this holding to misdemeanors and petty offenses nine years later in *Argersinger*. *Argersinger*, 407 U.S. 25. Therefore, the right to counsel has evolved significantly since *Oliver* was decided.

The First District found that the power of summary criminal contempt proceedings, where the accused is unrepresented by counsel, is necessary to preserve the orderly administration of justice and give vindication to judges, lawyers, witnesses, and all who are hailed into court. Petitioner urges this Court to reject this reasoning because it is those very people from whom an accused needs protection through the right to counsel. Otherwise, what is to stop a court from holding that it is necessary to preserve the

rights of a victim of a crime that an accused be summarily tried without the right to an attorney? This is the very reason the right to a jury and the right to counsel has been a fundamental right since the founding of our nation and must be preserved.

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge... Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. 156.

Expanding on the right of the accused to a trial by jury, the *Argersinger* court held that the right to an attorney, even in petty cases, is necessary because of the expenditures put forth by governments to try defendants. 407 U.S. at 32. Further:

> Lawyers to prosecute are everywhere deemed essential to protect the public's interest in orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

Argersinger, 407 U.S. at 32.

While there may be a concern that if the power of the court to summarily punish for direct criminal contempt is circumscribed by the right of the accused to counsel, it will leave courts with no remedy to deal with contemnors, this concern is unfounded. Trial courts will still have the power to remove an actor from their

courtroom and later, with the due process protections firmly in place, try them for their contemptuous actions. Further "[t]he contempt power, however, is of limited utility in dealing with an incorrigible, a cunning psychopath, or an accused bent on frustrating the particular trial or undermining the process of justice." *Mayberry v. Pennsylvania*, 400 U.S. 455, 467 (1971)(C.J. Burger, concurring). The best solution in that situation will be to remove the accused, which will protect both the order and quiet that is due the adversarial process, while allowing the accused their due process protections.

Affording the accused in a direct criminal contempt proceeding his right to counsel does not diminish the rights of those who come to court on business and are disturbed by the alleged contemnor's conduct. Affording the accused this right merely protects him from those in power who through avarice or negligence would incarcerate those who have not been proven guilty beyond a reasonable doubt. Though it may make summarily punishing alleged contemnors a more involved and less immediate procedure, those contemnors will not be left unpunished, they will just be punished after a hearing involving all the due process protections afforded defendants who may be punished with incarceration.

Mr. Plank was unrepresented during the hearing for contempt and the adjudication of the case. He was never told he had the right to an attorney, nor was he given the chance to seek legal

representation. Mr. Plank was intoxicated at the time of the hearing, hindering his ability to present any defense. Mr. Plank was without counsel and he had a judge who, at the contempt hearing, was acting as prosecutor, jury, and judge. All the potential for abuses in the system of direct criminal contempt were present at Mr. Plank's hearing. "Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament." *Bloom*, 391 U.S. at 202. As a layperson, he is at a disadvantage when it comes to the science of the law, such that he did not know what evidence may have been inadmissible, such as the illegal breathalyzer, nor did he know how to articulate even an argument to possibly mitigate his sentence. This is exemplified by him stating that he did not know what to say when Judge Dempsey asked him for any mitigating circumstances. (R1-25) He lost his liberty for fifteen days because he did not know how to demonstrate his innocence and he did not have counsel, learned in the law, experienced in criminal justice, to assist him.

The purpose of *criminal* contempt... is to *punish*." *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985)(emphasis in original). A criminal contempt proceeding vindicates the authority of the court or punishes a contemnor for intentionally violating a court order. *Id.*; *Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983). At common law, a trial court has had broad, discretionary power to hold a person in contempt. *Al-Hakim*, 53 So. 3d at 1173; *See Parisi v. Broward* 769

So. 2d 359, 363 (Fla. 2000). "Because this type of proceeding is punitive in nature, potential criminal contemnors are entitled to the same constitutional due process protections afforded criminal defendants in more typical criminal proceedings. *Bowen*, 471 So. 2d at 1277; *see Aaron v. State*, 284 So. 2d 673 (Fla. 1973).

Direct contempt is directed against the dignity and authority of a judge or a court. *Martinez v. State*, 339 So. 2d 1133, 1134 (Fla. 2d DCA 1976); *Ex parte Earman*, 95 So. 755 (Fla. 1923). Further, direct contempt is:

> An insult committed in the presence of the court of a judge when acting as such, or a resistance of or an interference with the lawful authority of the court or judge in his presence, or improper conduct so near to the court or judge acting judicially as to interrupt or hinder judicial proceedings.

Martinez, 339 So. 2d at 1134; *Earman*, 95 So. 755.

The summary or direct contempt hearing has been defined as:

> A procedure which dispenses with the formality, delay, and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial.

Sacher v. U.S., 343 U.S. 1, 9 (1952). This requires that the proceeding and punishment must be "substantially contemporaneous" with the contempt. *U.S. v. Lumumba*, 741 F.2d 12, 15-17 (2d Cir. 1984).

Use of drugs or alcohol prior to appearing for a court proceeding, unless there is an actual disruption to the court

proceeding, is not direct criminal contempt because even with a drug test, the conduct for which the contemnor is held has not been committed in the presence or view of the judge. *Paley v. Second Jud. Dist. Ct.*, 310 P.3d 590, 593 (Nev. 2013); *see also Cameron v. State*, 102 Md. App. 600, 610 (Md. Ct. Spec. App. 1994)(finding that a party who appeared drunk, but was not disruptive, rebellious, insubordinate, or willfully disobedient was not in direct criminal contempt); *In re J.H.*, 213 P.2d 545, 548-49 (Okla. 2008)(no direct contempt for appearing under the influence of cocaine, where the parties did not disturb the judicial proceedings).

This case does not fit within the narrow exception of direct criminal contempt cases that allows cases to be adjudicated without affording the accused the right to counsel. The narrow exception requires that there be immediate punishment to prevent "demoralization of the courts authority before the public." *Oliver*, 333 U.S. at 275. Here, Mr. Plank was not immediately punished, nor did the punishment serve the purpose of rehabilitating any perceived demoralization of the court's authority. The hearing was held hours later, at 4:02 p.m., while the jury selection was held between 1:56 p.m. and 2:21 p.m. (R1-15; R1-35) In fact, there was time to give Mr. Plank a breathalyzer before the contempt hearing. Evidence that convicted Mr. Plank, including the breathalyzer and the smell of alcohol on his clothing, was not evidence that Judge Dempsey knew, she therefore had to rely on witnesses and other

venire persons for that information. Because the punishment in this case was not immediate, Mr. Plank should have been given the opportunity to receive legal representation, even under the more lenient *Oliver* standard.

Because Mr. Plank was not allowed to seek legal representation nor appointed counsel, his contempt conviction should be overturned.

CONCLUSION

For the above asserted reasons, this Court should reverse Mr. Plank's conviction for direct criminal contempt and remand for a new trial at which he is afforded counsel. This Court should also approve the decisions in *Woods*, 987 So. 2d 669, and *Al-Hakim*, 53 So. 3d 1171 and quash the decision rendered in *Plank*, 130 So. 3d 289.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Virginia Harris, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Crimapptlh@myfloridalegal.com as agreed by the parties, and by U.S. mail to appellant, Noel Plank, 7623 Meridale Dr., Tallahassee, FL 32305, on this 12th day of May, 2014.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

/s/ Colleen D. Mullen
COLLEEN D. MULLEN
Assistant Public Defender
Florida Bar No. 100327
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
Colleen.Mullen@flpd2.com
(850) 606-1000

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF FLORIDA

NOEL PLANK,

Petitioner,

v.

CASE NO. SC14-414
L.T. NO. 1D13-4458

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX TO

INITIAL BRIEF ON THE MERITS

Plank v. State, 39 Fla. L. Weekly D227a
(Fla. 1st DCA Jan. 29, 2014)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOEL PLANK,

Appellant,

CASE NO. 1D13-4458

v.

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed January 29, 2014.

An appeal from the Circuit Court for Leon County.
Angela C. Dempsey, Judge.

Nancy A. Daniels, Public Defender, and Colleen D. Mullen, Assistant Public Defender, Tallahassee, for Appellant.

William N. Meggs, State Attorney, and Charles Dewrell, Assistant State Attorney, Tallahassee, for Appellee.

ON MOTION FOR REHEARING, CLARIFICATION, REQUEST FOR WRITTEN OPINION, AND CERTIFICATION OF CONFLICT

PER CURIAM.

We deny Appellant's motion for rehearing, but grant his motion for a written opinion and substitute this opinion in place of our previously issued per curiam affirmance.

Appellant was found guilty of direct criminal contempt and sentenced to 30 days in jail for arriving drunk to jury duty and disrupting the process of jury selection. He raises three issues in this direct appeal. We affirm two of the issues without further comment, and affirm the remaining issue for the reasons that follow.

Appellant argues that the trial court erred by not appointing him counsel or giving him an opportunity to seek counsel for the contempt proceeding. We affirm on the authority of Williams v. State, 698 So. 2d 1350 (Fla. 1st DCA 1997), and Saunders v. State, 319 So. 2d 118 (Fla. 1st DCA 1975), in which this court held that a defendant does not have a right to counsel under the Sixth Amendment or the Florida Rules of Criminal Procedure when charged with direct criminal contempt. Accord Searcy v. State, 971 So. 2d 1008, 1014 (Fla. 3d DCA 2008); Forbes v. State, 933 So. 2d 706, 711 (Fla. 4th DCA 2006); see also In re Oliver, 333 U.S. 257, 274-75 (1948) (explaining that the right to counsel and other due process requirements are not implicated in contempt cases involving "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") (internal quotations and ellipses omitted); In re Terry, 128 U.S. 289, 313 (1888)

(explaining that a court's jurisdiction to punish direct contempt vests upon commission of the contemptuous act and that it is within the court's discretion to punish the offense immediately or to postpone action until the defendant is afforded an opportunity to present a defense).

We recognize that the Second District held in Woods v. State, 987 So. 2d 669 (Fla. 2d DCA 2007), and Al-Hakim v. State, 53 So. 3d 1171 (Fla. 2d DCA 2011), that a defendant has a right to counsel under the Florida Rules of Criminal Procedure in direct criminal contempt proceedings. The Fourth District reached a similar conclusion in Hayes v. State, 592 So. 2d 327 (Fla. 4th DCA 1992). But see Forbes, supra. Accordingly, we certify conflict with these cases.

AFFIRMED; CONFLICT CERTIFIED.

ROBERTS, WETHERELL, and MARSTILLER, JJ., CONCUR.