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IN THE SUPREME COURT OF FLORIDA

NOEL PLANK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-414

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Noel Plank, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of 1 volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

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

STATEMENT OF THE CASE AND FACTS

The State accepts Defendant's statement of the case and facts as generally supported by the record, subject to the following supplementation and corrections:

On April 15, 2013, at 1:56 p.m., jury selection took place before the Honorable Angela C. Dempsey. (R.34). During jury selection, Judge Dempsey inquired as to whether anyone else was trying to get her attention and then stated, "Mr. Plank." (R.36). Petitioner stated as follows:

> "Yes. 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. (R-36)."

Judge Dempsey inquired as to what 4F meant. Petitioner then responded as

follows:

> "Unqualified for military. Another thing is I'm antigovernment. I have not voted since Ronald Reagan was president. I'm not even registered to vote. And I'm also, to tell you the truth, I'm a drunk. So…" (R.36).

The trial court indicated that she was sure that there were a fair amount of people who would rather being doing something else besides jury duty that day, but that she was not going to excuse Petitioner at that time. The record indicates that the testimony concluded. (R.36).

When the testimony resumed, Judge Dempsey stated, "Mr. Plank." (R.36). Mr. Plank then responded as follows:

> "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." (R.36-37).

Judge Dempsey indicated that she did not hear the last part. (R.37). Petitioner then resumed speaking and stated as follows:

> "I know them but it may incriminate them. Not me. And as far as victim of crime, yes, I have been 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. (R.37).
>
> 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." (R.37-38).

The order of the trial court reflects that Petitioner slept through part of jury selection. The order further reflects that when the trial court took a break at about 2:55 p.m., it was difficult to wake Petitioner and that the jurors had to wait until he was awakened before they could exit the courtroom. The order of the trial court reflected that others jurors complained that Petitioner smelled like alcohol. The order indicated that Leon County Probation administered a breathalyzer to Petitioner at approximately 3:05 p.m. (R.3).

A contempt hearing was then held for Petitioner before Judge Dempsey at 4:02 p.m. on the same day. (R.15). The record reflects that the same assistant state attorney and the same assistant public defender that were present in jury selection were present for the contempt hearing. (R.16,35). Judge Dempsey indicated that the bailiffs and county probation had given Petitioner a breathalyzer. Judge Dempsey stated that at first she thought that maybe Petitioner was trying to get out of jury duty, but then she decided that he was intoxicated. While Judge Dempsey was making the statement, Petitioner interrupted her and stated, "I already blew." Judge Dempsey continued to explain that she was considering holding Petitioner in contempt, but that before she heard from him, she was going to hear from the probation officer who gave him the breathalyzer. (R.18).

Ceressa Marie Haney was called as a witness. Haney testified that she had been a probation officer for nine years in Leon County. Haney stated that the

probation officers have a handheld breathalyzer device that they use. Haney testified that, for the Intoxilyzer SD5, there is a straw that gets placed on the top, a person blows into the straw until the machine clicks, and then the machine registers what the person's blood alcohol level is. (R.19). Haney stated that the Intoxilyzer SD5 had been tested in January in order to make sure that it was accurate. (R.19-20). Haney testified that she used the Intoxilyzer about 60 percent of the time on her probationers, which included a DUI caseload. Haney stated that she used it about 15 times per week and that she never had any trouble with the quality or accuracy of the instrument. (R.20).

Haney testified that she administered the breathalyzer test to Petitioner at 3:00 p.m. and that the results were a .111. (R.20-21). Haney stated that for DUIs it was illegal to drive over .08. Haney stated that she could smell alcohol on Petitioner's "general person," but that she did not know if it was coming from his breath or his clothes. The trial court then asked petitioner if he would like to question the witness. (R.21). Petitioner stated, "what I'd like to know how is I got the smell of beer on my clothes when I never spilt one drop on my clothing." Judge Dempsey indicated that Petitioner's statement was more of an argument and that she would give him an opportunity to be heard. Judge Dempsey then asked if Petitioner had any questions about the test for witness Haney. Petitioner stated that he had no questions of Haney regarding the test. (R.22).

The trial court then asked Petitioner to come back up to the microphone. Petitioner asked for help and indicated that he had a hard time getting up out

of his chair by himself, especially with his "bracelets." (R.22). Petitioner informed Judge Dempsey that he arrived at the courthouse at 11:30. The trial court stated to Petitioner that he had arrived at the courthouse at 11:30 and that even though he knew that he was coming to the courthouse for jury duty, he blew a .11 approximately 3.5 hours later. Judge Dempsey further noted that she believed Petitioner had driven to the courthouse because he had been asking about his vehicle earlier. Petitioner confirmed that he had driven to the courthouse and indicated that he had parked in a parking garage somewhere else. (R.23).

Judge Dempsey asked Petitioner if he could provide any reason why he should not be held in contempt for his actions. (R.23). Petitioner indicated that he was extremely tired because he was up until 1:00 a.m. and then had to start work at 5:00 a.m. delivering magazines, which required him to walk in and out of his vehicle every other door. (R.23-24). Petitioner stated that he only had a couple of beers after work and that he could not afford to be coming to court because he did not get paid for taking time off. Petitioner further indicated that he was in the process of losing his house because he was behind in mortgage payments, that his work hours had been cut, and that he wanted to get out of court duty because Thursday was his busiest day. (R.24).

Judge Dempsey stated that she did not want Petitioner to lose his house, but that she did not want him coming to jury duty drunk. Judge Dempsey stated that she was finding Appellant guilty of direct criminal contempt for coming to the courthouse drunk, disrupting jury selection, and distracting other jurors. Judge Dempsey stated that she could tell that the jurors obviously

noticed that he smelled of alcohol. Judge Dempsey asked Petitioner if he had any other excusing or mitigating circumstances and he said that he did not know what else to say. (R.25). Judge Dempsey sentenced Petitioner to 30 days in jail. (R.25-26).

Judge Dempsey stated that she could not ignore Petitioner's behavior of being over the legal limit and acting disruptive during jury selection. Judge Dempsey noted that Petitioner told her during jury selection that he was a drunk and that he refused to follow the law. Judge Dempsey stated that Petitioner's blood alcohol was significantly over the legal limit after he had been at the courthouse for 3.5 hours and that the blood alcohol level would come down during that time. Judge Dempsey also noted that Petitioner drove to the courthouse, but clarified that the fact that Petitioner drove to the courthouse was not done in her presence and was not part of the direct criminal contempt. (R.26).

In Judge Dempsey's order finding Petitioner in direct criminal contempt, she indicated that when Petitioner was asked to provide some general biographical information, he responded that he should not be required to serve on a jury because he was able to evade the military draft numerous times, worked 13-hour days, had a 4F designation, and was a drunk. Judge Dempsey stated that Petitioner proceeded to sleep during part of the jury selection, that it was difficult to wake him, and that, when a break was taken at approximately 2:55 p.m., the other prospective jurors had to wait to exit the courtroom until after he was awakened. Judge Dempsey indicated that several other jurors complained that Petitioner smelled strongly of alcohol. Judge

Dempsey indicated that Ceressa Haney of Leon County Probation testified that Petitioner was administered a breathalyzer at about 3:05 p.m., that the result was .111 grams of alcohol per 210 liters of breath, and that he smelled like alcohol. Judge Dempsey indicated that Haney's testimony was credible. (R.3).

Judge Dempsey made a finding that Petitioner's actions were directed against the authority and dignity of the court and that he interfered with the judicial function. Judge Dempsey also indicated that Petitioner's acts "tended to embarrass, hinder, or obstruct the Court in the administration of justice and to lessen the Court's dignity." (R.3). The trial court also indicated that it had provided Petitioner with an opportunity to respond, but that his mitigation, which included that he was up late, delivering magazines, had a couple of beers, and was having financial difficulties, was lessened by the fact that his blood alcohol content would have been even higher when he first drove to the courthouse at 11:30 a.m. Judge Dempsey further noted that Petitioner's statements reflected that he could have come to the courthouse without drinking. (R.4). On May 2, 2013, Judge Dempsey mitigated Petitioner's sentence to time served and ordered that he be released immediately. (R.28).

SUMMARY OF ARGUMENT

The State asserts that the trial court did not commit error by failing to appoint Petitioner counsel and/or provide him with an opportunity to retain counsel. Despite the fact that Florida Rule of Criminal Procedure 3.111(b) requires that indigent defendants be appointed counsel for prosecutions for offenses punishable by imprisonment, there is a more specific rule that governs direct criminal contempt. Pursuant to the rule of statutory construction, the specific rule controls over the general rule. The language of Florida Rule of Criminal Procedure 3.830 reflects that a person may be punished summarily for direct criminal contempt, which is inconsistent with the right to counsel and all of the other rights that must accompany it. In fact, the State argues that a statement made by Petitioner in his initial brief even shows that he believes that the current rule governing direct criminal contempt cannot be reconciled with the right to counsel.

The State further asserts that case law from the United States Supreme Court and the Eleventh Circuit reflect that there is a narrow exception to due process requirements that includes charges of misconduct that occur in open court, in the presence of the judge, which disturbs the court's business, when all of the essential elements of the misconduct are under the eye of the court and where immediate punishment is essential to prevent the demoralization of the court's authority before the public. The dignity and authority of the court are still of great importance and a newer United States Supreme Court case providing defendants with the right to counsel on less serious offenses did not overrule its prior precedent regarding direct criminal contempt. In

fact, the United States Supreme Court reiterated the importance of the dignity and decorum of the court in an opinion regarding a trial court's right to remove a defendant from the courtroom during his trial based on his misconduct. Other courts have held that a defendant can lose his right to counsel even when he is facing more serious offenses based on his misconduct. Most importantly, the State asserts that as a matter of policy, trial judges should have the discretion to immediately punish contemnors who disrupt their judicial proceedings in order to control their courtrooms and uphold the dignity of the court.

Finally, in the case at bar, the State argues that Petitioner distracted the other jurors and interfered with jury selection by showing up to court drunk, smelling like alcohol, indicating that he did not want to serve a juror because he was a drunk, falling asleep during jury selection, and interfering with the ability of other jurors to exit the courtroom because it was difficult to wake him. The trial court stated that the other jurors obviously noticed that Petitioner was drunk and that they complained about the smell of his clothing. The trial court indicated that she observed the conduct and that the conduct interfered with the court's judicial function and lessened the dignity of the court. For all these reasons, this Court should affirm Petitioner's judgment and sentence for direct criminal contempt and approve the decision of the First District Court of Appeal in Plank v. State, 130 So. 3d 289 (Fla. 1st DCA 2014). The State further contends that this Court should quash the decisions rendered 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).

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT ERRED BY NOT APPONTING COUNSEL OR PROVIDING PETITIONER WITH THE OPPORTUNITY TO RETAIN COUNSEL? (RESTATED)

Standard of Review

Whether there is a right to counsel is a purely legal question reviewed de novo. United States v. Sutcliffe, 505 F.3d 944, 962 (9th Cir. 2007)(reviewing a claim of the denial of the right to counsel at sentencing de novo). The classification of the contempt as direct criminal contempt is reviewed de novo but the trial court's factual finding regarding the matter are review only for clear error. F.T.C. v. Leshin, 618 F.3d 1221, 1231-32 (11th Cir. 2010).

Burden of Persuasion

Appellant bears the burden of demonstrating prejudicial error. Section 924.051(7), Fla. Stat. (2008), provides:

> In a direct appeal ..., the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). Moreover, because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." Dade County School Bd. v. Radio

Station WQBA, 731 So. 2d 638, 645 (Fla. 1999); see Robertson v. State, 829 So. 2d 901, 906-907 (Fla. 2002).

Merits

Petitioner argues that the trial court erred by failing to appoint him counsel or to provide him with the opportunity to retain counsel prior to "charging, trying, and convicting" him of direct criminal contempt. (IB-10). Petitioner further argues that Florida Rule of Criminal Procedure 3.111(b) requires that counsel be provided to indigent defendants in prosecutions for an offense punishable by imprisonment and that there are no exceptions. (IB-11). The State respectfully disagrees.

In Plank, the First District Court of Appeal affirmed Plank's conviction for direct criminal contempt and his sentence for 30 days in jail for arriving drunk to jury duty and disrupting the jury selection proceeding. The First District relied mostly on Williams v. State, 698 So. 2d 1350 (Fla. 1st DCA 1997) and Saunders v. State, 319 So. 2d 118 (Fla. 1st DCA 1975), which reflect that a defendant does not have the right to counsel under the Sixth Amendment or the Florida Rules of Criminal Procedure when he is charged with direct criminal contempt. 130 So. 3d at 290. The Third and Fourth Districts came to similar conclusions in Searcy v. State, 971 So. 2d 1008, 1014 (Fla. 3d DCA 2008) and Forbes v. State, 933 So. 2d 706, 711 (Fla. 4th DCA 2006).

In Williams, the First District indicated that there were two types of contempt, direct criminal contempt and indirect criminal contempt and that the two types of contempt had different procedural requirements. 698 So. 2d at 1351. The court noted that Florida Rule of Criminal Procedure 3.840 governed

indirect criminal contempt and that this rule provided multiple procedural safeguards for a defendant including a right to a hearing on the matter and the right to representation by counsel at this hearing. Id. The Florida Rule of Criminal Procedure 3.840, for Indirect Criminal contempt, reflects as follows:

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 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.**
>
> (b) **Motions;** Answer. The defendant, personally or by counsel, may move to dismiss the order to show cause, move for a statement of particulars, or answer the order by way of explanation or defense. All motions and the answer shall be in writing unless specified otherwise by the judge. A defendant's omission to file motions or answer shall not be deemed as an admission of guilt of the contempt charged.
>
> (c) Order of Arrest; Bail. The judge may issue an order of arrest of the defendant if the judge has reason to believe the defendant will not appear in response to the order to show cause. The defendant shall be admitted to **bail** in the manner provided by law in criminal cases.
>
> (d) **Arraignment;** Hearing. The defendant may be arraigned at the time of the hearing, or prior thereto at the defendant's request. **A hearing to determine the guilt or innocence of the defendant shall follow a plea of not guilty.** The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose. **The defendant is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and testify in his or her own defense.** All issues of law and fact shall be heard and determined by the judge.
>
> (e) Disqualification of Judge. If the contempt charged involves disrespect to or criticism of a judge, the judge shall disqualify

himself or herself from presiding at the hearing. Another judge shall be designated by the chief justice of the supreme court.

(f) Verdict; Judgment. At the conclusion of the hearing the judge shall sign and enter of record a judgment of guilty or not guilty. There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty.

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

Fla. R. Crim. P. 3.840.

The First District then compared Florida Rule of Criminal Procedure 3.830, which reflects as follows:

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

Fla. R. Crim. P. 3.830.

The State asserts that the court correctly noted that the rule governing direct criminal contempt allows for the trial court to punish the defendant summarily and that it does not provide the defendant with the right to counsel or the right to a formal hearing. 698 So. 2d at 1351. In fact, defendants are afforded significantly more rights for indirect criminal contempt, such as a

reasonable time to prepare a defense after being served with the order to show cause, the right to file motions, an arraignment, bail, **the right to counsel**, the right to compel witnesses, and the right to a formal hearing to determine if the defendant is guilty or innocent, which are not afforded in direct criminal contempt proceedings. See Fla. R. Crim. P. 3.830 and 3.840. Therefore, the State submits that the Florida Rules of Criminal Procedure reflect that defendants are afforded significantly more rights when the conduct is not committed in the presence of the trial court including the right to counsel, which is one of many rights that is noticeably absent from the rule governing direct criminal contempt.

In addition, this Court stated in Gidden v. State, 613 So. 2d 457, 460 (Fla. 1993), that direct criminal contempt is committed within the presence of the judge and therefore, may be punished summarily. This Court further stated as follows:

> **In contrast**, **indirect criminal contempt** under rule 3.840 concerns **conduct that has occurred outside the presence of the judge. Consequently**, as reflected by the substantial requirements of rule 3.840, the indirect criminal contempt process **requires that all procedural aspects of the criminal justice process be accorded a defendant, including an appropriate charging document, an answer, an order of arrest, the right to bail, an arraignment, and a hearing. A defendant is entitled to representation by counsel, may compel the attendance of witnesses, and may testify in his own defense.** The entire proceeding is conducted in open court and made a part of the record.
>
> (Emphasis added) Id.

Therefore, even this Court has indicated that, in contrast to direct criminal contempt, conduct that occurs outside of the presence of the judge requires procedural safeguards including the right to counsel.

Appellant argues that Rule 3.111(b), without exception, requires that indigent defendants be appointed counsel for prosecutions for offenses punishable by imprisonment. (IB-11). In Al-Hakim v. State, 53 So. 3d 1171, 1173 (Fla. 2d DCA 2011), and Woods v. State, 987 So. 2d 669, 674 (Fla. 2d DCA 2007), the Second District Court of Appeal came to a similar conclusion. See also, Hayes v. State, 592 So. 2d 327, 329 (Fla. 4th DCA 1992). However, even though the State acknowledges that this rule does not explicitly provide an exception, the State contends that Rule 3.111(b) is a general rule whereas rule 3.830 is a specific rule that governs direct criminal contempt and its language is inconsistent with the notion that defendants are entitled to have counsel. In McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994), this Court stated that "a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. This Court further indicated that "[t]he more specific statute is considered to be an exception to the general terms of the more comprehensive statute. Id. The rules of statutory construction apply to other areas such as rules of procedure; regulations, sentencing guidelines; and contracts. Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)(applying a canon of statutory interpretation when interpreting rule 9(b) of the Federal Rules of Civil Procedure); Hillis v. Heimeman, 626 F. Ed 1014, 1017-18 (9th Cir. 2010)("This same principle of statutory construction applies to interpreting the Federal Rules of Civil Procedure."); Insight Systems Corp. v. United States, 115 Fed.Cl. 564, 576 (Fed Cir. 2013) (observing that it is "a basic tenet that the rules of

statutory construction apply when interpreting an agency regulation"); United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014) (observing that the rules of statutory construction apply when interpreting sentencing guidelines).

Furthermore, the State would once again point out the differences between the ample procedural safeguards provided for indirect criminal contempt versus the very minimal procedural safeguards provided for direct criminal contempt. The State asserts that for indirect criminal contempt, which includes conduct that is not observed by the trial court, the defendants need time to prepare a defense and to present a defense before the trial judge. This phase of the proceeding is important to a defendant because he will have the opportunity to present a defense to the charge before a trial judge who was not an eyewitness to the conduct. However, in direct criminal proceedings, the trial judge personally saw the conduct and therefore, already knows whether or not the defendant is guilty of the offense. The State asserts that for this reason, a lawyer would not be effective in convincing the trial judge that the defendant was "innocent" of the charge because the trial judge has personal knowledge that the conduct occurred. The State submits that this notion is even suggested by the language of the two rules. For example, in rule 3.840, it reflects that "[a] hearing **to determine the guilt or innocence** of the defendant shall follow a plea of not guilty." (Emphasis added). See Fla. R. Crim. P. 3.840(d). However, in rule 3.830, the language does not reflect that a hearing will determine the guilt or innocence of a defendant, but states that the judge will, "inquire as to whether the defendant has any cause to show why he or she should not be adjudged guilty of contempt by the court and

sentenced therefor." See Fla. R. Crim. P. 3.830.

Most importantly, the language in rule 3.830 states that "[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." Fla. R. Crim. P. 3.830. The State asserts that this language is wholly inconsistent with the right to counsel and the right to prepare a defense. Black's Law Dictionary defines a "summary contempt proceeding" as "the name of the immediate hearing to see if contempt of court has been committed." Black's Law Dictionary further defines "summary, n" as "[a]n abridgement; brief, compendium; also a short application to a court or judge, without the formality of a full proceeding." See Black's Law Dictionary (Online edition, last accessed June 18, 2014). The State asserts that an immediate, brief, and informal hearing is inconsistent with a defendant having time to be appointed counsel or to retain counsel and to have time to confer with that counsel in order to prepare a defense or to present mitigation. The State submits that there is a reason that indirect criminal contempt has numerous procedural safeguards in addition to the right to counsel, which includes a reasonable time to prepare a defense. Time is needed in order to appoint or to retain counsel and time is needed to confer with counsel and to prepare a defense. These procedural safeguards cannot be reconciled with a rule that allows for an individual to be punished immediately. In fact, Petitioner overlooks that often times an individual may not be indigent and that it can take quite a bit of time to retain an attorney. The State asserts that if this Court determines that a defendant has a right to an attorney in a direct criminal contempt

proceeding, then all of the other rights that accompany the right to counsel in indirect criminal proceedings would have to be provided to a defendant charged with direct criminal contempt as well. The State argues that what Petitioner is really asking this Court to do is to abolish the rule governing direct criminal contempt and to treat all conduct that constitutes contempt in the same fashion as indirect criminal contempt. Petitioner essentially acknowledges this in his initial brief when he states, "[t]hough 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 to defendants who may be punished with incarceration." (Emphasis added) (IB-24). Therefore, the State argues that with this statement, Petitioner admits that the current rule governing direct criminal contempt cannot be reconciled with a right to counsel and the other rights that must accompany the right to counsel.

In the case of In re Oliver, 333 U.S. 257, 508-509 (1948), the United States Supreme Court indicated that while normally a person charged with contempt of court should be advised of the charges against him, have a reasonable opportunity to defend and/or explain the charges, have the right to be represented by counsel, and have the right to testify or to call witnesses on his behalf, a narrow exception to those due process requirements exists. The Court stated that "[t]he narrow exception to these due process requirements 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. Additionally, even in 2011, the United States Supreme Court stated in Turner v. Rogers,--U.S.--,131 S.Ct 2507, 2516 (2011), "[t]his Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a criminal case. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). And we have held that this same rule applies to criminal contempt proceedings (**other than summary proceedings**). United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); Cooke v. United States, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925)." (Emphasis added).

Petitioner suggests that there is no difference between conduct that occurs in front of the court and conduct that occurs outside of the presence of the court in regard to upholding the dignity of the court. Petitioner further indicates that the trial court should have to wait to punish the contemnor until after he or she receives "all the due process protections afforded defendants who may be punished with incarceration." (IB-24). The State strongly disagrees. Petitioner ignores the abusive and/or disruptive conduct that can occur in front of our trial judges. Petitioner also ignores the importance of upholding the dignity and authority of the court, which the State asserts is no less important today than it was at the time of Oliver. Trial judges are often faced with individuals that cuss at them, threaten them, spit in court, through themselves down to the ground while wildly moving

their arms about, throw their feces, and as noted in the case at bar, they sometimes show up drunk to court and disrupt a person's trial. While this list certainly is not exhaustive and can include less egregious behavior, the State asserts that there is no defense to this type of behavior, the behavior is degrading to the trial judge and to the court system as a whole, and trial judges should be given the discretion to control their courtrooms and to vindicate the authority of the court. Since the behavior occurred right in front of the judge, the judge should be able to put a stop to it immediately and should not have to indulge it further by providing the contemnor with a lawyer and other procedural safeguards, which really allow the contemnor to disrupt the court system even further. The State submits that the contemnor needs to be punished immediately so that he understands that his behavior is totally unacceptable and so that everyone else in the courtroom understands that there is a certain amount of respect that they must show to our judges and to our court system in general. In Fisher v. State, 248 So. 2d 479, 487 (Fla. 1971), this Court stated as follows in regard to direct criminal contempt:

> The purpose of such rule (criminal contempt) is to clothe the trial court with full and complete power to enforce all rules of procedure and the conduct of all parties in the trial of the cases or hearings before him, whether in chambers or before a jury. It is an essential power and one necessary to the orderly functioning of the courts and the fair and efficient administration of justice. The nature of the summary procedures are to enable the court to enforce its orders promptly and with dispatch. **It is designed to prevent, without attempting to cover every possible act, such acts as drunkenness in the courtroom, the use of profanity, disrespect to opposing counsel or the court or the court officials or any other act of a similar nature seen or heard by the court.** (Emphasis added and word in parenthetical added).

The State further asserts that summary punishment not only affects the contemnor, but that it sends a message to everyone in the courtroom that they must treat our courts with proper respect. In addition to trials, court proceedings, such as first appearances, arraignments, pre-trial hearings, etc., often include defendants who are both incarcerated and out on bail, victims, friends or family of victims and defendants, and other interested citizens. The State asserts that if trial judges were not given the discretion to control disruptive behavior in their courtrooms, then the behavior could have a ripple effect that could turn a courtroom into a circus. Often times, especially in criminal courtrooms, the individuals who appear in court have trouble behaving themselves to begin with and that is why they are in criminal court. Even non-criminals often come to court with high emotions based on their relationship to the defendant, the victim, or the case itself. If these individuals observed another person getting away with being disrespectful to a judge or disrupting a proceeding, they could very well decide to engage in the same behavior themselves. For example, if a trial judge was conducting first appearances and one of the defendants decided to start cussing him out or spitting, simply sending the defendant back to the holding cell in order to be dealt with later would not demonstrate to the other defendants that this conduct was absolutely improper in a courtroom. Since there were no consequences to the disruptive defendant's behavior, other defendants could decide to engage in the same type of behavior. However, if the trial judge immediately sentenced the disruptive defendant to 90 days in jail, then that would send a much stronger message to everyone that disruptive behavior is

absolutely not acceptable in a courtroom and that the failure to engage in proper courtroom etiquette has immediate consequences.

The State asserts that removing someone from court with the idea that he will be dealt with only after procedural safeguards are provided, does not adequately uphold the dignity the court, but actually indulges the disruptive behavior. As noted above, there really is no defense to disruptive conduct that occurs in front of the judge. In fact, the State submits that the best way for an individual to respond to direct criminal contempt is to apologize profusely and maybe to present personal mitigation, which can easily be done by the contemnor who does not need a lawyer to hold his hand while he is doing so. The conduct that constitutes direct criminal contempt often necessitates punishing the contemnor right then and there. The rule governing direct criminal contempt does not require that the contemnor be punished summarily, but it provides the trial court with the necessary power to do so if the trial court deems that it necessary to control its courtroom and to uphold the dignity of the court.

The State further asserts that the rule governing direct criminal contempt does not prohibit the contemnor from having an attorney or preclude the judge from appointing counsel if the judge believes it to be necessary, it simply does not reflect that a defendant is entitled to one. There could be circumstances where a trial judge might permit the contemnor to have an attorney, especially if the contemnor is already represented by counsel and counsel is present when the contempt occurs. However, the trial court should be able to have the discretion to make that decision based on the

circumstances. Petitioner is asking this court to strip the trial courts of their power to control their courtrooms, which the State asserts will handicap every trial judge in his/her attempt to administer justice and it will also degrade the dignity and authority of court system.

Petitioner suggests that since Oliver predated Argersinger v. Hamlin, 407 U.S. 25 (1972), that Oliver is no longer good law. (IB-17-18). Argersinger does reflect that absent a knowing and intelligent waiver of counsel, no person can be imprisoned for any offense unless he is represented by counsel. 407 U.S. at 37. However, as acknowledged by Petitioner, Argersinger does not expressly overrule Oliver and Oliver was not overlooked by the court because it was mentioned in the opinion as to another matter. 407 U.S. at 28. Most importantly, Rogers, which was decided in 2011, acknowledged Gideon and then indicated that there is no right to counsel in summary proceedings. Id. at 2516, 131 S.Ct 2507. Furthermore, the Argersinger court indicates that counsel is necessary for the existence of a *fair trial*. 407 U.S. at 31. Agersinger discusses that an individual could be put on trial without a proper charge, that he could be convicted on improper evidence, that he may not have the skill or knowledge to adequately prepare his defense, and that he faces the danger of conviction because he may not know how to establish his innocence. Id. The State submits that these concerns do not really exist when one faces direct criminal contempt because, as opposed to other misdemeanors and petty offenses, all the essential elements of the offense are under the eye of the court. Therefore, issues related to whether or not there's a proper charge or proper evidence and whether or not an individual can prepare a defense or

establish his innocence are not as much of an issue because the judge, who was an eyewitness, takes on the role of the prosecutor, the jury, and the trial court. "In a summary proceeding for direct criminal contempt, 'the otherwise inconsistent functions of prosecutor, jury and judge mesh into a single individual.'" See United States v. Neal, 101 F. 3d 993, 997 (4th Circ. 1996) (citing Sandstrom v. Butterworth, 738 F.2d 1200, 1209 (11th Cir. 1984)). In addition, the reasoning in Argersinger does not address the importance of immediate punishment when an individual disrupts the court proceeding, which the State asserts is necessary to uphold the dignity and authority of the court. Furthermore, even after Argersinger, Rule 42(b) of the Federal Rules of Criminal Procedure still reflects that the court may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. The rule does not indicate that the person has a right to counsel and similar to the Florida Rule, it has very few procedural safeguards. Therefore, the State disagrees with Appellant's assertion that the reasoning in Argersinger applies to direct criminal contempt. The State also disagrees with the assertion by Petitioner that Florida provides additional protections for direct criminal contempt in comparison to federal courts. The protections appear to be similar.

The State would further note that in criminal trials and other proceedings that require more legal knowledge, everyone benefits from defendants being represented by counsel. The State does not seek to deprive defendants of counsel as not only do defense attorneys protect the rights of the defendants, they also assist judges and prosecutors in the orderly administration of

justice. The State submits that it is very difficult for trial judges and/or prosecutors to proceed with trials and/or other more complicated proceedings with defendants who are not legally trained. Members of this Court have likely encountered the difficulties associated with trying to decipher the legal arguments of pro se defendants. However, a direct criminal contempt proceeding is significantly less complicated than a trial or an appellate brief and as noted above, the trial judge is an eyewitness to what occurred. Unlike a trial, where the judge was not an eyewitness to the conduct, the State asserts that a defense attorney has very little chance, if any, of convincing a trial judge that he/she did not see and/or hear the conduct that constituted the direct criminal contempt. In addition, the trial court, who was an eyewitness, acts as the prosecutor, the jury, and the judge so the defendant is not going to avoid the power of the court as he can sometimes do when he has a jury trial.

Moreover, in United States v. Baldwin, 770 F.2d 1550, 1553-1554 (11th Cir. 1985), the Eleventh Circuit explained that direct criminal contempt provided for summary disposition and that indirect criminal contempt required notice and a hearing. The court indicated that "'[t]he power to summarily hold an individual in direct criminal contempt operates to vindicate the authority of the court and stands as a bulwark against disorder and disruption in the courtroom.'" (citing Sandstrom v. Butterworth, 738 F.2d 1200, 1208-09 (11th Cir. 1984)). The Baldwin court then went on to explain that there were two justifications for summary contempt. Id. The court indicated that "[f]irst, because in a direct contempt the judge has observed the contemptuous act,

there is 'no need of evidence or assistance of counsel before punishment.' Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767 (1925). Second, the maintenance of courtroom decorum sometimes necessitates quick and forceful action." Id. The Court further stated summary contempt should only be allowed in "narrowly defined circumstances" because it allows the court to punish an individual without numerous procedural safeguards. Id.

Furthermore, in Illinois v. Allen, 397 U.S. 337 (1970), the United States Supreme Court discussed the importance of upholding the dignity, order, and decorum of the courtroom in order to ensure the proper administration of justice. The court stated, "[t]he flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." 397 U.S. at 343. The court further held that Allen lost his right, pursuant to the Sixth and Fourteenth Amendment, to be present throughout his trial after he persisted in unruly conduct after repeatedly being warned by the trial court that he would be removed from the courtroom. 397 U.S. at 346. The State asserts that this shows that upholding the dignity and decorum of the court is so important that it even outweighs a defendant's right to be present throughout his trial when this defendant exhibits behavior that disrupts the courtroom. The United States Supreme Court indicated that "[i]t would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged

with crimes." Id.

In the case at bar, Petitioner argues that his right to counsel is absolute. (IB-11). However, the United States Supreme Court rejected a similar argument in Allen when the lower court indicated that no matter how unruly or disruptive a defendant's conduct may be, he could never be held to have lost his Sixth Amendment right to be present at his own trial so long as he insisted upon being present. 397 U.S. 342. The court stated, "[w]e cannot agree that the Sixth Amendment, the cases upon which the Court of Appeals relied, or any other cases of this Court so handicap a trial judge in conducting a criminal trial." Id. Therefore, the State asserts that the United States Supreme Court has continued to recognize the importance of upholding the dignity and decorum of the court even when it results in the loss of constitutional rights. See also, Foster v. Wainwright, 686 F.2d 1382, 1387 (11th Cir. 1982) (citing Taylor v. United States, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973))(In a non-capital case, a criminal defendant's voluntary absence after the trial has commenced in his presence need not prevent continuing the trial, to and including the return of the verdict.) The State would also argue that the right to be present at one's trial is even more fundamental than the right to counsel because it existed long before the right to counsel.

Moreover, the right to counsel is not absolute as courts have held that defendants can lose their right to counsel based on their conduct. In Jackson

v. State, 2 So. 3d 1036 (Fla. 3rd DCA 2009), the Third District Court of Appeal determined that despite the fact that the Faretta[1] inquiries may not have passed legal muster, the trial court did not commit error by requiring Jackson to proceed without counsel at his trial because Jackson had forfeited and/or waived his right to counsel through his conduct, which the court described as "recalcitrance, antagonism, and personal attacks" upon each of his court-appointed attorneys. The Third District did not state that the trial courts had to provide any warning to a defendant before it deprived him/her of his right to counsel.

In addition, in United States v. McLeod, 53 F.3d 322, 325-326 (11th Cir. 1995), the court held that McLeod forfeited his right to an attorney after he was verbally abusive and threatened to harm his attorney. Id. McLeod also had threatened to sue his attorney and tried to persuade the attorney to engage in unethical conduct. Id. The court determined that McLeod did forfeit his right to an attorney at the hearing for his motion for new trial even though no warning was given and even though McLeod had asked that another attorney be appointed. Id. The State would also note that this conduct did not even occur in the presence of the court. The court made its decision based on testimony from the attorney. Id. In addition, the Eleventh Circuit indicated that "a criminal defendant may forfeit constitutional rights by virtue of his or her actions." 53 F. 3d at 325. The court referred to the United States Supreme

[1] Faretta v. California, 422 U.S. 806 (1975).

Court decision in Allen as support for this proposition. Id. Other cases also reflect that the conduct of defendants can result in the loss of the right to counsel. See United States v. Mitchell, 777 F.2d 248, 257-58 (5th Cir. 1985) (finding defendant's attempt to delay court's schedule by retaining a lawyer with a known conflict of interest resulted in "waiver" [forfeiture] of counsel.) See also United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979)(The right to assistance of counsel, cherished and fundamental though it be, may not be put to service as a means of delaying or trifling with the court.) Therefore, the State asserts that if individuals can have their right to counsel forfeited at critical stages of more serious offenses for engaging in conduct that disrupts the trial court then it makes sense that an individual would not be entitled to counsel on a much less serious offense when the charge consists of disrupting the trial court and the conduct occurred in the presence of the court.

As to the facts of the case at bar, the State submits that based on the above reasoning, the trial court did not commit error by failing to appoint counsel to Petitioner or for failing to provide him with an opportunity to retain counsel. However, Petitioner further argues that his conduct did not constitute direct criminal contempt. (IB-26-27). As stated above, the Oliver Court stated that "[t]he narrow exception to these due process requirements 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.'" (Emphasis added). 333 U.S. at 508-509. The State asserts that the behavior of Petitioner did constitute direct criminal contempt because his words and actions, most of which were nonverbal, distracted the other jurors and interfered with jury selection. The trial judge stated that at first she thought Petitioner was just trying to get out of jury duty, but then she believed that he was drunk. (R.18). The trial judge made this statement before she heard testimony about the breathalyzer so the record shows that she believed Petitioner was intoxicated based on her own observation. (R.18). The order of the trial court reflected that Petitioner indicated to the trial court that one of the reasons that he should not be required to serve on jury duty was because he was a "drunk." (R.3). The record reflects that Petitioner made this statement. (R.36). The trial judge further indicated that Petitioner was sleeping during jury selection and that during the break, jurors had to wait to exit the courtroom because it was difficult to wake the Petitioner. (R.3). During the contempt hearing, the trial court indicated that Petitioner also disrupted jury selection because the jurors were distracted by the fact that Petitioner smelled of alcohol and was drunk. (R.25). The trial court indicated in her order that the some of the jurors complained that he was drunk. (R.3). The State viewed the trial judge's statement that the jurors noticed and/or complained that Petitioner smelled of alcohol as evidence of the fact that the jurors were distracted by Petitioner, not as evidence that he was drunk. The trial court made a specific finding that Petitioner's actions were directed toward the dignity and authority of the court and that

his actions interfered with the judicial function. The trial court further made a finding that the acts of Petitioner embarrassed, hindered, or obstructed the court in the administration of justice and lessened the Court's dignity. (R.3). The trial court also explicitly stated that she was finding Petitioner in direct criminal contempt for his actions within the presence of the court. (R.4). In other words, the trial judge *personally observed* the behavior of Petitioner and the effect of Petitioner's behavior on the other jurors.

Furthermore, even though the State submits that Petitioner's above mentioned conduct constituted direct criminal contempt, the State does believe that the trial court's subsequent action of eliciting testimony from the probation officer as to the results/reliability of the breathalyzer and then asking Petitioner if he would like to question the probation officer about the test was not proper in a direct criminal contempt proceeding. The rule allows summary disposition for direct criminal contempt because it is based on the judge's own personal observations, not extrinsic evidence or the testimony of other witnesses. The record is not clear as to why Petitioner submitted to a breathalyzer. However, regardless of the motive by the trial judge for eliciting the testimony regarding Petitioner's blood alcohol level and the reliability of the breathalyzer, she did not need this testimony because her observations regarding Petitioner's drunkenness, his disruptive conduct, and its effect on the other jurors were sufficient to constitute direct criminal contempt. Perhaps the judge was simply trying to corroborate her observations. As noted above, the record reflects that the judge believed Petitioner was

intoxicated even before she received the testimony from the probation officer about the results of the breathalyzer. (R.18). However, even if Petitioner had been faking his intoxication to get out of jury duty or had been drinking, but was not intoxicated, his actions of distracting the other jurors and disrupting the jury selection process would have still constituted direct criminal contempt. In any event, the State asserts that Petitioner's actual blood alcohol level and the fact that the probation officer smelled alcohol on his person were not relevant to the issue of whether or not he disrupted jury selection and/or distracted the other jurors. All of the essential elements of contempt were observed by the trial judge pursuant to Oliver. 333 U.S. at 508-509. Petitioner's conduct constituted direct criminal contempt because it distracted the other jurors and interfered with jury selection, not simply because he was drunk.

As to Petitioner's argument that it was not direct criminal contempt because he was not punished immediately, the State submits that the trial court obviously did remove him, but it was decided that Petitioner would submit to a breathalyzer before the actual sentence was imposed. Petitioner was still sentenced fairly quickly as the contempt hearing occurred at 4:02 p.m. and the trial court's order reflected that Petitioner was preventing the other jurors from exiting the courtroom during a break at 2:55 p.m. (R.15,3). The trial court's order further reflected that a breathalyzer was administered at approximately 3:05 p.m. (R.3). Therefore, it appears that Petitioner was removed from the other jurors during the break. The State asserts that the approximate one-hour time period that elapsed between the time Petitioner was

removed from the courtroom and the time he was sentenced still constituted a quick punishment and that it was not a sufficient amount of time for someone, especially a drunk person, to get an attorney, confer with the attorney, and to prepare a defense and/or mitigation.

Moreover, the trial judge's findings are supported by the record even though her observations of Petitioner's nonverbal conduct did not expressly appear in the transcript. In any event, the record does reflect that Petitioner did more than merely attend jury selection under the influence of alcohol. Petitioner made it clear that he did not want to attend jury selection because it was a financial hardship. (R.10). However, rather than asking to be excused because of the hardship, Petitioner consumed enough alcohol to be intoxicated before showing up for jury duty. Petitioner then attended jury selection drunk, acted disruptive, and served as a hindrance to the judge and the other prospective jurors. Petitioner disturbed and delayed the jury selection process in order to be excused from jury duty. Petitioner's actions not only disrespected the judge and the court system, but disrespected every other citizen who showed up for jury selection that day. Many of those other jurors likely had things that they needed to do that day, but they still did their civic duty. The State submits that it was proper for the trial court to remove Petitioner from the courtroom under these circumstances and to conclude jury selection before resuming contact with Petitioner as numerous citizens had been called for jury selection. Petitioner's actions had already delayed the jury selection process and wasted enough time.

In addition, the State asserts that there is no disagreement between the

State and Petitioner that he was drunk. Petitioner does not contest that he indicated during jury selection that he did not want to serve on the jury because he was a drunk, that he was sleeping during the proceeding, or that they had difficulty waking him during the break, which prevented prospective jurors from exiting the courtroom. Furthermore, Petitioner does not contest the trial judge's finding that his conduct distracted the other jurors because the jurors obviously noticed that he was drunk, smelled the odor of alcohol on him, and complained about him. In fact, what Petitioner argues is that his behavior did not demoralize the trial court's authority and that the trial court had to rely on the testimony of others regarding the smell of alcohol on his clothing. (IB-27). The State asserts that interfering with jury selection by showing up to court drunk, indicating that you do not want to serve of the jury because you are a drunk, falling asleep during the proceeding so that other jurors cannot exit the courtroom, and distracting other jurors with your behavior and the smell of your clothing does demoralize the court's authority. The trial judge was in the best position to make that determination and since the behavior occurred in her presence, no lawyer could convince her that this did not occur. Additionally, the State already noted that the testimony from the probation officer was improper, but the trial court also indicated that the jurors were distracted, in part, because of the smell of alcohol on Petitioner and that they were complaining about it. (R.3,25). The trial judge indicated in her order that this occurred *in her presence*. (R.4). Therefore, the State asserts that there was no issue as to the guilt or innocence of Petitioner in regard to direct criminal contempt even when one excludes the

testimony from the probation officer.

As for mitigation, the State disagrees with Petitioner's argument that he was unable to present mitigation. During the contempt hearing, Petitioner indicated that he was extremely tired because he was up until 1:00 a.m. and then had to start work at 5:00 a.m. delivering magazines, which required him to walk in and out of his vehicle every other door. (R.23-24). Petitioner stated that he only had a couple of beers after work and that he could not afford to be coming to court because he did not get paid for taking time off. Petitioner further indicated that he was in the process of losing his house because he was behind in mortgage payments, that his work hours had been cut, and that he wanted to get out of court duty because Thursday was his busiest day. (R.24). Therefore, the record shows that Petitioner presented numerous reasons to mitigate his sentence. The State argues that Petitioner had to present personal mitigators because there is nothing mitigating about the actual conduct of showing up drunk to jury selection and disrupting the proceedings. This was likely the reason that Petitioner had nothing further to say when the trial court asked if he had anything further to say. (R.25). The State asserts that if a lawyer had been present, he/she would have merely repeated the excuses that were given by Petitioner.

Moreover, even if the trial court had committed error by determining that Petitioner's conduct constituted direct criminal contempt, this does not mean that this Court should deprive every trial judge in the State of Florida of the power to control their courtrooms and vindicate the authority of the court because one judge made a mistake. When a trial judge makes a mistake, the

appropriate remedy is for him/her to be reversed by an appellate court so that he/she can receive guidance regarding the legally appropriate procedure for handling the matter. In fact, the State respectfully asserts that an opinion from this Court specifically describing what it deems to be permissible and not permissible in direct criminal contempt proceedings would be of benefit to all of the judges in the lower courts. The best way to prevent abuses in the criminal justice system is to provide trial courts with guidance regarding direct criminal contempt, not to strip them of their discretion to impose punishment summarily.

CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the First District Court of Appeal in Plank v. State, 130 So. 3d 289 (Fla. 1st DCA 2014), should be approved, and the judgment and sentence entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on June 27, 2014, to Colleen Mullen, Esquire, 301 South Monroe Street, Suite 401, Tallahassee, Fl, 32301, and by electronic mail to colleen.mullen@flpd2.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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