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IN THE SUPREME COURT OF FLORIDA

NOEL PLANK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO.	**SC14-414**
DCA NO.	1D13-4458
CIRCUIT NO.	2013-AP-16
L. T. No.	2013-MM-1708

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

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

COLLEEN D. MULLEN
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 100327
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
Colleen.Mullen@flpd2.com

ATTORNEY FOR APPELLANT

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PRELIMINARY STATEMENT

Mr. Plank relies on the preliminary statement found in his Initial Brief. In addition, any reference to the Respondent's Answer Brief will be by (SAB) followed by the page number. Any reference to Mr. Plank's Initial Brief will be (IB) followed by the page number.

ARGUMENT

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

A. STANDARD OF REVIEW

Petitioner and Respondent agree that the standard of review in any case involving the right to counsel is de novo. (SAB-10)

B. THE MERITS

The Respondent makes several arguments that Petitioner is not entitled to the right to counsel in a direct criminal contempt hearing. Each argument will be addressed in turn.

Respondent's first argument compares Florida Rules of Criminal Procedure 3.840 and 3.830, the rules governing indirect and direct criminal contempt, respectively, for the premise that because the rule governing indirect criminal contempt enumerates specific procedural rights and the rule governing direct criminal contempt enumerated different and fewer rights, that those rights do not exist in direct criminal contempt hearings. (SAB-11-14) Respondent is correct that Rule 3.840, governing indirect criminal contempt, does enumerate such rights as giving an alleged contemnor notice for the time and place of the hearing, a reasonable amount of time to prepare a defense, bail, motions, arraignment, representation by counsel, and compulsory process for the attendance of witnesses. Fla. R. Crim. P. 3.840. Respondent also correctly notes that Rule 3.830, governing direct criminal contempt, states that "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. Respondent then asserted "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." (SAB-13); *see Williams v. State*, 698 So.2d 1350, 1351 (Fla. 1st DCA 1997).

The Respondent fails to recognize that the rule of lenity applies even to direct criminal contempt cases and the rule governing direct criminal contempt is ambiguous as to the requirement of counsel. Respondent's argument does not acknowledge that merely because rights are enumerated in one rule does not mean that those rights attach to that rule alone and therefore the presence of those rights in Rule 3.840 does not preclude them from being utilized in a hearing under Rule 3.830. Therefore, Respondent's first argument lacks merit.

"Criminal statutes are to be construed strictly in favor of the person against whom a penalty is to be imposed." *Ferguson v. State*, 377 So.2d 709, 711 (Fla. 1979); *Reino v. State*, 352 So.2d 853 (Fla. 1977). Where a criminal statute is ambiguous, the benefit of the doubt is given to the defendant, based on principles of fairness and justice. *Id.* "Applying the rule that criminal statutes must be strictly construed, nothing not clearly and intelligently

described in a statute's very words, as well as manifestly intended by the legislature, shall be considered included within its terms." *Id.*; *Earnest v. State*, 351 So.2d 957 (Fla. 1977). Because Rule 3.830 does not explicitly, clearly, and intelligently bar an alleged contemnor from having the right to an attorney, the rule should be read in favor of the alleged contemnor and cannot negate the right to counsel.

Respondent alleges that merely because Rule 3.840 enumerates the rights that an alleged contemnor is granted in an indirect criminal contempt case and Rule 3.830 specifically provides few procedural protections, Rule 3.830 should be construed as precluding any procedural protections for alleged contemnors. (SAB-14) Though comparing the rules because they are similar is informative, this does not conclusively prove that merely because those rights were enumerated in Rule 3.840, they cannot apply to Rule 3.830 as well. While those rights enumerated in both Rules 3.830 and 3.840 may be the floor of the procedural and substantive rights that an accused is entitled to, they cannot be considered the ceiling of the rights an accused is entitled to. Finding that an alleged contemnor has the right to counsel at a direct criminal contempt proceeding would not be inconsistent with those enumerated rights in Rule 3.830; it would merely enhance those rights already granted to the alleged contemnor.

Respondent second argues that because Rule 3.830 is a specific rule that governs direct criminal contempt and Rule 3.111(b) is a general rule requiring that indigent defendants be appointed counsel, the specific rule controls over the general rule. (SAB-15) Respondent fails to acknowledge, however, that not only does Rule 3.111(b) Fla. R. Crim. P. mandate the appointment of counsel for indigent defendants, but the Florida Constitution and Florida Statutes guarantee the right to counsel and specify that the public defender shall represent indigent defendants, even those charged with criminal contempt. Art. I, § 16, Fla. Const.; § 27.51, Fla. Stat. (2006). Additionally, while a specific rule controls over the general rule, in this case, the rule covering appointment of counsel for indigent defendants is not inconsistent with the rule covering direct criminal contempt.

"In all criminal prosecutions the accused shall, upon demand...shall have the right... to be heard in person, by counsel." Art. 1, § 16, Fla. Const. The right to counsel under the Florida Constitution is construed more broadly than under the U.S. Constitution. *State v. Kelly*, 999 So.2d 1029, 1040 (Fla. 2008). The U.S. Constitution also guarantees the right to counsel for all accused in a criminal prosecution. Amend. VI, U.S. Const. The only exception to the right to counsel in a criminal prosecution is where the trial judge has certified in writing that the defendant will not be imprisoned. *Kelly*, 999 So.2d at 1035. Florida statutes

mandate that the public defender shall represent indigent defendants, including those charged with criminal contempt. § 27.51, Fla. Stat. (2006). Rule 3.111(b) specifically provides that indigent persons be provided counsel in all criminal prosecutions punishable by incarceration. That there are three laws in Florida providing for counsel in criminal prosecution establishes a policy in favor of a generic right to counsel.

While a specific rule controls over the general rule, in this case, the rule covering appointment of counsel for indigent defendants is not inconsistent with the rule covering direct criminal contempt. Rule 3.830 states that a criminal contempt **may** be punished **summarily**. If you interpret summarily to mean without due process rights, as Respondent does, this still leaves open that the word "may" is permissive and that direct criminal contempts do not need to be punished summarily. However, "summarily" does not mean without due process rights afforded to the accused, it means, "1. Short; concise; 2. Without the usual formalities; esp., without a jury; 3. Immediate; done without delay." Black's Law Dictionary 690 (3rd pocket ed. 2006). Short, concise proceedings are routine in court and defendants are not barred from having counsel or being provided counsel if counsel is necessary, such as at arraignments or first appearances, where assistance of counsel is mandated. *Sardinia v. State*, 168 So.2d 674, 677 (Fla. 1964); Fla. R. Crim P. 3.130(c). Just because a hearing may be short is not inconsistent

with the right to counsel and where there is ambiguity, it should be resolved in favor of the accused.

Respondent third asserts that because in direct criminal contempt, the trial judge personally saw the conduct that has been charged as contemptuous, a lawyer would be ineffective in convincing the judge that the accused is innocent. (SAB-16) The Respondent further argues that because the language in Rule 3.830 mandates only that the judge "inquire as to whether the defendant has any cause to show why he or she should not be adjudged guilty of contempt of court," rather than the simpler language of Rule 3.840 mandating a "hearing to determine the guilt or innocence of the defendant," that there is no way to prove that a person accused of direct criminal contempt is innocent. (SAB-16) This ignores the simple fact that judges are human and not infallible. Second, any argument assuming that a person accused of direct criminal contempt has no defense must fail.

Though Respondent seems to assume that judges are infallible and that since the judge has personal knowledge of the conduct that makes up the contempt charge, there would be no use for an attorney representing a person charged with direct criminal contempt, this is simply not true. Judges have been known to make mistakes, overlooked things, or to have misapprehended things, and it is unreasonable to chance incarcerating an innocent person on possible human error. *See*, Fla. R. Civ. P. 1.540(b); Fla. R. Crim P. 3.192.

One of the purposes of an attorney representing a defendant to prevent mistakes from occurring which will lead to the incarceration of an innocent person. Even if all of the acts or conduct has been seen by a trial judge and that judge has made absolutely no mistakes regarding the actions, an accused still has a right to counsel. In any other criminal case, merely because a judge has seen conduct, or there is no possibility that a person is innocent of the accusation, they are still entitled to representation by counsel because our system of justice provides for it. A person is entitled to a lawyer in spite of a judge's belief in their guilt. In addition, Rule 3.830 provides an accused with the right to be heard and to present evidence, both of which would be meaningless without the right to counsel.

Respondent fourth argues that the need for immediate, brief, and informal hearings in summary direct criminal contempt hearings is inconsistent with the delays associated with either appointing counsel for an accused or allowing the accused to obtain counsel. (SAB-17) However, it is not mandatory that direct criminal contempt hearings be immediate. Nor are the delays associated with the right to counsel adequate reason to deny counsel to an accused. Immediacy is a consideration, but not a controlling one. The right to counsel should prevail in any instance where incarceration is possible. While it may make holding immediate, brief, and informal hearings more difficult for trial courts in direct criminal contempt

hearings, the right to counsel outweighs the potential for any delay.

Respondent fifth argues that if the right to counsel is afforded to a person accused of direct criminal contempt, disorder, chaos, abuse, and disruptive conduct will occur in trial courts across the state with trial judges powerless to stop it. (SAB-19-20) This argument completely ignores the power of a trial judge to remove disruptive or contemptuous persons from their courtroom and to charge them with and try them for criminal contempt after affording them the right to counsel. Further, this argument is merely a "parade of horribles" argument by the Respondent and thus merits no further discussion.

Respondent then further argued that being able to immediately punish a contemnor without the right to counsel "sends a message to everyone in the courtroom that they must treat our courts with proper respect." (SAB-21) Again, removing a contemptuous person from a courtroom would have the same effect, while affording them the right to counsel at a contempt hearing. Contempt proceedings are not designed to send a message to the public; they are used to punish specific behavior by an individual.

Respondent sixth asserts that because *Argersinger v. Hamlin* did not explicitly overrule *In re Oliver* and that because *Turner v. Rogers* found no right to counsel in summary proceedings, that in direct criminal contempt cases there is no right to counsel.

Argersinger v. Hamlin, 407 U.S. 25 (1972); *In re Oliver*, 333 U.S. 257 (1948); *Turner v. Rogers*, 131 S. Ct. 2507 (2011). Respondent ignores that Florida's right to counsel is broader than the federal right to counsel. Respondent also fails to recognize the difference between civil and criminal contempt, the fact that the right to counsel in criminal cases is based on the Sixth Amendment, not the Due Process Clause of the Fourteenth Amendment, and the fact that the factors which, in *Turner* persuaded against the requirement of counsel, are not present in a direct criminal contempt case.

"[T]he decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law." *Kelly*, 999 So.2d at 1042; *quoting* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977). The main difference between *Turner* and any direct criminal contempt case is that in the criminal context, the Sixth Amendment governs the right to counsel, however it does not govern civil cases. The argument for a right to counsel in civil contempt cases in *Turner* was based on the Due Process Clause and therefore involves different constitutional considerations than in a direct criminal contempt case. However, for a civil hearing to be fair, relevant factors to consider include:

> (1) the nature of 'the private interest that will be affected,' (2) the comparative 'risk' of an 'erroneous deprivation' of that interest with and without 'additional or

> substitute procedural safeguards,' and (3) the nature and magnitude of any countervailing interest in not providing 'additional or substitute procedural requirements.'

Turner, 131 S.Ct. at 2517-18; *quoting Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The first factor weighs in favor of the right to counsel in direct criminal contempt proceedings because any deprivation of personal liberty through legal proceedings demands due process protection. *Turner*, 131 S.Ct. at 2518; *Addington v. Texas*, 441 U.S. 418, 425 (1979). The second and third factors, which in *Turner* weighed against providing counsel to the contemnor because the risk of incarceration was weighed against procedures safeguarding against imprisonment for inability, rather than failure, to pay, the fact that the person opposing the defendant would not be represented by counsel, and the availability of "substitute procedural safeguards," would not apply in a criminal contempt case. *Id*; *Mathews*, 424 U.S. at 335. In a direct criminal contempt case, there is no question of ability or failure to pay, the opposing party is the judge, who not only is presiding over the hearing, but is also an attorney, and there are no "substitute procedural safeguards," protecting an alleged contemnor. Therefore, though Respondent argues that *Turner* persuades against a right to counsel, it actually is more persuasive for the right to counsel.

Respondent's seventh argument is that because courts have found that through his conduct, a defendant may lose his right to

counsel, the right to counsel is not absolute and that there should be no such right for direct criminal contempt cases. (SAB-27-29) The cases that Respondent relies on are based on the right to counsel after a defendant has acted antagonistically towards his court appointed counsel in criminal proceedings, where the defendant has forfeited his right to counsel through conduct showing his disdain for the counsel and unwillingness to be represented by counsel. This is not relevant where the alleged contemnor neither knew of his right to counsel, nor was allowed counsel in the first place, nor by his actions manifested his intent to represent himself.

Respondent eighth states that Mr. Plank argues that his conduct did not constitute direct criminal contempt. (SAB-29) Unfortunately, Respondent misunderstood the argument Mr. Plank made. Mr. Plank argued that because the direct criminal contempt hearing did not meet the *Oliver* exceptions of a case that is immediate and for the purpose of preventing the "demoralization of the courts' authority before the public," that the *Oliver* exception to the right to counsel does not apply. *Oliver*, 333 U.S. at 275.

Respondent last argues that because all of the "essential" elements of the contempt were directly observed by Judge Dempsey, it was proper to hold Mr. Plank in contempt. (SAB-30-36) Whether or not Mr. Plank's actions were contemptuous or not is irrelevant to whether or not he had the right to counsel at the direct criminal

contempt hearing. A person's right to counsel does not hinge on whether or not they were innocent of the charged conduct, but on whether or not they were charged with a criminal offense that may be punished with incarceration. Mr. Plank was in fact punished with incarceration after being found guilty of direct criminal contempt at a hearing without counsel.

"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." *Powell v. Alabama*, 287 U.S. 45, 68 (1932). A person should not be incarcerated for direct criminal contempt unless the right to counsel has attached. 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 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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Virginia Harris, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL 32399-1050, at crimapptlh@myfloridalegal.com, and by US Mail to appellant, Noel Plank, 7623 Meridale Dr., Tallahassee, FL 32305, on this date, July 17, 2014.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Colleen D. Mullen
COLLEEN D. MULLEN
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 100327
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FL 32301
(850) 606-8500
Colleen.Mullen@flpd2.com

ATTORNEY FOR APPELLANT