IN THE MISSOURI SUPREME COURT

NO. SC97608

STATE EX REL. APOLLO BROWN,

Relator

v.

THE HONORABLE JASON KANOY,

Respondent

Proceeding in Prohibition from the Circuit Court of Caldwell County
Cause Number 13CL-CR00153

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this writ proceeding pursuant to Mo. Const. art. V, § 4.1, which provides that "[t]he supreme court … may issue and determine original remedial writs." Further, "[t]he supreme court shall have general superintending control over all courts and tribunals." Pursuant to this authority, on January 10, 2019, this Court issued a preliminary writ of prohibition commanding Respondent, the Honorable Jason Kanoy, to show cause why a writ of prohibition should not issue prohibiting Respondent from doing anything other than canceling the show cause hearing set for January 10, 2019, in cause number 13CL-CR00153.

Relief was previously sought, and denied, by the Missouri Court of Appeals, Western District, on December 14, 2018, in cause number WD82268.

Relator requests that this Court now make permanent the preliminary writ of prohibition issued in this cause.

STATEMENT OF FACTS

On September 11, 2014, Relator was ordered by Respondent, the Honorable Jason Kanoy, to personally appear in court on November 13, 2014, and show cause why Relator should not be held in contempt of court for failure to pay court costs in the amount of $2,059.50. (Appendix A1) The Show Cause Order further provided that "[f]ailure to pay as ordered or appear on the date above will result in a warrant for your arrest and a possible jail sentence for contempt of court."

On March 5, 2015, Respondent, the Honorable Jason Kanoy, found Relator guilty of criminal contempt under Rule 36.01(b) and sentenced Relator to imprisonment in the county jail for a term of two (2) days. (Appendix A2)

Relator has subsequently been ordered to appear for Show Cause hearings on at least thirty (30) separate occasions for failure to pay court costs since being found guilty of criminal contempt on March 5, 2015. Relator filed his Petition for Writ of Prohibition in this Court claiming that he is protected from any further Show Cause hearings and any further Orders for criminal contempt by the Double Jeopardy guarantee; this Court issued its preliminary writ on January 10, 2019.

POINTS RELIED ON

I. Relator is entitled to a permanent order prohibiting Respondent from doing anything other than canceling the show cause hearing set for January 10, 2019, in cause number 13CL-CR00153, because Relator is protected by the Double Jeopardy clause of the U.S. Const., Amend. V, in that the Double Jeopardy clause's protection attaches in nonsummary criminal contempt proceedings just as it does in other criminal prosecutions.

United States v. Dixon, 509 U.S. 688 (1993)
U.S. Const., Amend. V

ARGUMENT

I. Relator is entitled to a permanent order prohibiting Respondent from doing anything other than canceling the show cause hearing set for January 10, 2019, in cause number 13CL-CR000153, because Relator is protected by the Double Jeopardy clause of the U.S. Const., Amend. V, in that the Double Jeopardy clause's protection attaches in nonsummary criminal contempt proceedings just as it does in other criminal prosecutions.

Standard of Review

"A writ of prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted." *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. banc 2014).

Further, "there is no right to appeal from a judgment of criminal contempt." *In re: Smith v. Pace*, 313 S.W.3d 124, 129 (Mo. banc 2010). The issue in this case is whether successive findings of criminal contempt are barred by the Double Jeopardy clause of the United States and Missouri state constitutions. Writ relief is

therefore appropriate in this case since the challenged action "would otherwise escape appellate review and [Relator] would be hamstrung … were we not to use a remedial writ to correct this erroneous [authority]." *State ex rel. Gardner v. Wright*, ED106935 (August 21, 2018), slip op. at 6.

Additionally, "our review is not limited in scope because a claim of double jeopardy is an assertion of a constitutional grant of immunity which is significantly different than other constitutional guarantees pertaining to procedural rights. A trial court is without the power of jurisdiction to try or punish a defendant twice for the same offense." *State v. Gridiron*, 180 S.W.3d 1, 6 n. 2 (Mo. App. E.D. 2005).

Finally, resolution of the issues in this case requires interpretation of the United States and Missouri state constitutions.[1] "Constitutional interpretation is an issue of law that this Court reviews *de novo*." *Farmer v. Kinder*, 89 S.W.3d 447, 449 (Mo. banc 2002). And more specifically, "[a]ppellate review of double jeopardy claims is de novo." *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010).

[1] Although the language in Article I, § 19 of the Missouri state constitution does not technically apply to Relator's situation ("after being once acquitted by a jury"), this Court has previously held that there is "no readily discernible difference between the double jeopardy guarantees of the federal provision and Missouri's common law tradition." *State v. Sumlin*, 820 S.W.2d 487, 494 n. 5 (Mo. banc 1991). The Double Jeopardy clause has been made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

Analysis

"A contempt of court, although not a criminal prosecution in the usual sense, is a specific criminal offense, and the sentence or fine imposed is a judgment in a criminal case." *State ex rel. Tannenbaum v. Clark*, 838 S.W.2d 26, 28 (Mo. App. W.D. 1992). And although "a proceeding for criminal contempt is sui generis, and as such is controlled by its own rules …, one charged with criminal contempt is entitled to essentially the same rights of procedural due process as a defendant in a criminal case" (internal quotations omitted). *In re: Ryan v. Moreland*, 653 S.W.2d 244, 247 (Mo. App. E.D. 1983).

Included in this list of rights is, of course, the protection afforded by the Double Jeopardy clause, U.S. Const., Amend. V, which provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." As explained recently by the United States Supreme Court,

> "This protection applies both to successive punishments and to successive prosecutions for the same criminal offense. It is well established that criminal contempt, at least the sort enforced through nonsummary proceedings, is a crime in the ordinary sense. … We think it obvious, and today hold, that the protection of the Double Jeopardy Clause likewise attaches."

United States v. Dixon, 509 U.S. 688, 696 (1993).

And as explained by this Court in *In re: Smith v. Pace*, 313 S.W.3d 124, 130 (Mo. banc 2010),

> "There are two classes of contempt – civil and criminal, each class having two subcategories – direct and indirect. Criminal and civil contempt are distinguished by the content of the judgment. Criminal contempt is punitive in nature and … [c]ivil contempt is intended to benefit a party for whom relief has been granted by coercing compliance with the relief granted."

In this case, Respondent, the Honorable Jason Kanoy, punished Relator by criminal contempt for failure to pay court costs in the amount of $2,059.50. "[C]riminal contempt proceedings are punitive in nature." *Chemical Fireproofing Corp. v. Bronska*, 553 S.W.2d 710, 715 (Mo. App. 1977). The Order of Commitment by Respondent in this case is clearly a judgment designed to punish Relator for "disobedience of [the court's] orders." *Id*. (Appendix, A2).

And in this case, the criminal contempt punished was indirect because the contempt that was committed did not occur "in the immediate view and presence of the court," *State ex rel. Shepherd v. Steeb*, 734 S.W.2d 610, 611 (Mo. App. W.D. 1987), but was rather in connection with a previous Show Cause Order for "failure to pay as ordered" entered on September 11, 2014. (Appendix, A1).[2]

[2] Specifically, "summary punishment for direct criminal contempt … applies only to misconduct, in open court, which disturbs the court's business and where

Interestingly, while Respondent is incorrect that "[t]his matter involves successive findings of [criminal] contempt *rather than* criminal prosecutions" – the two are indistinguishable for purposes of Double Jeopardy – Respondent *is* correct, however, when he writes that "there does not appear to be any caselaw wherein double jeopardy has barred successive findings of [criminal] contempt against a person." *Answer*, p. 5.

This does ***not*** mean, however, that the Double Jeopardy clause is inapplicable in such a situation, but simply that there does not seem to be a single case anywhere in caselaw where this has been an issue – ***until now***. Indeed, this was pointed out by Justice Scalia in *Dixon* when he, in citing to an old case involving the question of whether Congress had the power to continually and successively punish "as contempt the refusal of a witness to testify before it," basically implied that such questions are merely theoretical because the possibility of this actually happening was "improbable." *Dixon*, 509 U.S. at 699.[3]

This makes Respondent's practice in this case and in similar cases in Caldwell County truly an exception. As established in Relator's Appendix in this

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immediate punishment is essential to prevent demoralization of the court's authority before the public." *Steeb*, 734 S.W.2d at 612.

[3] Justice Scalia did, however, follow this up by observing, "[b]ut to say that Congress can punish such a refusal is not to say that a criminal court can punish the same refusal *yet again*." (Emphasis in original.) *Dixon*, 509 U.S. at 699.

case, it is the routine practice of Respondent to ***continually*** and ***successively*** find defendants in criminal contempt for their failure to pay costs as ordered by the trial court. In some cases, this *same* finding of criminal contempt for failure to pay as regards the *same* order for court costs has been made in the *same* case and against the *same* criminal defendant no fewer than five or six times in a single case.[4]

Respondent, of course, acknowledges the very real possibility that this Court will find "that the Double Jeopardy clause may apply to successive findings of [criminal] contempt," and concludes by simply suggesting that "the course requested by Relator would have the effect of abolishing payment plans for fines and court costs. … [I]t is in the public interest for payment plans to exist, and that the only way for them to exist is for the courts to be able to enforce their payment plans," presumably through ***repeated*** and ***successive*** findings of criminal contempt.

It suffices simply to point out that the United States Supreme Court in *Dixon* anticipated this very argument in holding that the *text* of the Double Jeopardy clause "looks to whether the *offenses* are the same, not the interests that the offenses violate." *Dixon*, 509 U.S. at 699. Simply put, this constitutional right

[4] The typical fact pattern presented in cases involving Double Jeopardy challenges in the context of criminal contempt proceedings is when a criminal contempt proceeding is initiated but the defendant has already been prosecuted for the contemptible offense in a separate proceeding charging a substantive criminal offense, or vice versa. See, e.g., *United States v. Dixon*, 509 U.S. 688 (1993).

protects Relator from being ***continually*** and ***successively*** punished for failing to pay the court costs ordered in this case.

Respondent is also incorrect in analogizing the contempt in this case to "child support payments." To be sure, this example can be referring *either* to civil contempt proceedings for failure to pay child support *or* to a substantive criminal case charging the offense of criminal nonsupport under Mo. Rev. Stat. § 568.040.

Still, however, both analogies are inapposite. In the former, the Double Jeopardy clause would not apply since the contempt at issue is *civil* in nature (the Double Jeopardy clause applies only to criminal proceedings); and in the latter, the clause would not apply since the legislature "has in fact provided that specific periods of the prohibited conduct constitute separate offenses." *State v. French*, 79 S.W.3d 896, 900 (Mo. banc 2002). The same is not true with respect to findings of criminal contempt and so it is *incorrect* to suggest that "every instance of failing to make a payment toward his court costs … is a separate and distinct contumacious act … subjecting him to a finding of contempt" (*Answer*, p. 5-6) – all based on the same underlying Show Cause Order for failure to pay costs by the trial court.[5]

[5] The statutory authority for criminal contempt in this case can be found in Mo. Rev. Stat. § 476.110(3) ("Willful disobedience of any process or order lawfully issued or made by [the court]) and/or Mo. Rev. Stat. § 488.020(4) ("failure to pay the fee after such notice, and a showing of the party's ability to pay the fee").

This Court has previously admonished that "[t]he power to punish for contempt should be used sparingly, wisely, temperately and with judicial self-restraint." *In re: Smith v. Pace*, 313 S.W.3d 124, 130 (Mo. banc 2010).

Such obviously is not the case here. Indeed, as suggested by Ronald Goldfarb in his treatise on this subject, "[i]n these cases, a persistent inquisitor could punish a persistent contemnor indefinitely," which is in fact what we have witnessed in the related court documents included in the Appendix to this Brief.[6]

Another way of stating the matter would be to say that "the only thing between [Relator] and a one-hundred-year sentence [is] the stamina of [Respondent]." Goldfarb, p. 239-240.

"Fortunately," according to Mr. Goldfarb, "our system of justice is based on sounder criteria," and so any attempt to characterize ***successive*** findings of criminal contempt as "a new contumacious act, and therefore a separate offense[,] … is fatuous, and the practice should be unconstitutional." *Id.* at 240-241.

[6] Ronald Goldfarb, *The Contempt Power* (Columbia University Press, 1963), p. 235. Mr. Goldfarb refers to this species of contempt as "the reiterated contempt," and distinguishes it from what he calls the "crossfire contempt" in the manner presented by *United States v. Dixon*, 509 U.S. 688 (1993) (i.e. "where one act constitutes both contempt and another crime," page 234).

The overall picture and scope of the Double Jeopardy clause was perhaps best expressed by the Supreme Court in *Green v. United States*,

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."

Green v. United States, 355 U.S. 184, 187 (1957)

Simply put, failure to grant Relator the relief requested in this case will surely cause him and others similarly situated to live perpetually in a "continuing state of anxiety and insecurity." Such a result is surely prohibited by the Double Jeopardy clause, a Bill of Rights guarantee fundamental to our system of justice.

CONCLUSION

WHEREFORE, based on the foregoing reasons, Relator prays that this Court make its preliminary writ in this case permanent and to hold that Respondent is without jurisdiction or authority to schedule this matter for any further Show Cause Hearings and/or to subject Relator to any further Orders for criminal contempt.

Respectfully submitted,

/s/ Matthew Mueller

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CERTIFICATION

I hereby certify that this brief complies with the information required by Rule 55.03, that it complies with the limitations contained in Rule 84.06(b), and that it contains 3,022 words in the brief as determined by the word count of the word-processing system used to prepare the brief.

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