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 REPLY BRIEF

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ARGUMENT

Respondent concludes the introduction to their brief by conceding, "it seems only logical that successive findings of contempt should be protected by the Double Jeopardy clause the same way that successive criminal prosecutions are." (Page 6)[1] This issue is not in dispute. The issue is whether "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." (Page 7) Respondent presents three arguments in support of their position: (1) failing to pay criminal court costs in connection with a Show Cause order is "analogous" to *civil* child support payment enforcement; (2) failing to pay criminal court costs under a Show Cause order is "analogous" to the conduct at issue in this Court's *French*[2] opinion; and (3) it is "in the public interest" to permit Respondent to *successively* punish people for violating its Show Cause orders. As will be explained, Argument (1) is inapposite. Argument (2) is incorrect, but some discussion of Double Jeopardy jurisprudence and the "unit of prosecution" principle is necessary. And argument (3) is unsound.

Respondent attempts to use the example of *civil* child support payment enforcement, but the intended effect of this example is undermined by

[1] These page numbers reference Respondent's brief.
[2] *State v. French*, 79 S.W.3d 896 (Mo. banc 2002).

Respondent's suggestion that the Double Jeopardy clause should apply to both criminal *and* civil contempt. ("[I]t is incorrect to assume that double jeopardy would not bar a court from repeatedly holding someone in contempt … [in] civil contempt proceedings.") (Page 7) Of course, if this were true, then persons failing to pay child support also could not be subject to (or punished by) "multiple findings of contempt." This argument is confused, but Relator appreciates Respondent's attempt to apply the Double Jeopardy clause to *civil* proceedings.[3]

If, however, Respondent is suggesting that it is somehow incorrect to be applying the Double Jeopardy clause to criminal contempt, because this clause obviously does not apply in civil contempt (and there should be no difference between the two), such *reductio ad absurdum* is foreclosed by *United States v. Dixon*,[4] which expressly held that the Double Jeopardy clause attaches in non-summary criminal contempt proceedings. In the end, Respondent's attempt to analogize this case to "child support payments" is inapposite.

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[3] *Cf. United States v. Halper*, 490 U.S. 435, 443 (1989), "in the civil enforcement of a remedial sanction there can be no double jeopardy." The key difference between criminal and civil contempt is the requirement of the *purge provision* in the latter. "The contemptor must have the ability to purge himself to justify imprisonment for civil contempt." *State ex re. Barth v. Corrigan*, 870 S.W.2d 458, 459 (Mo. App. E.D. 1994). Criminal contempt, on the other hand, is designed solely to *punish*, and does not contemplate "the coercive purpose for civil contempt" by giving the "contemptor … [the] key to the jailhouse door." *Id.*

[4] *United States v. Dixon*, 509 U.S. 688 (1993).

The Double Jeopardy clause prohibits both subsequent prosecutions and multiple punishments for the "same offence." U.S. Const., Amend. V.[5] The analysis in any Double Jeopardy question turns on what meaning is given to "same offence." As an initial matter, before proceeding any further, it is important to stress that this issue – "same offence" – itself turns entirely on ***state law*** and is therefore an issue entirely of statutory construction. As Professor Amar has explained, these "are ultimately questions of substantive law, questions on which the Double Jeopardy Clause is wholly agnostic. The Clause takes substantive criminal law as it finds it; it is outlandish (and judicially unworkable) to suppose that hidden deep in the word 'offense' lies some magic metatheory of substantive criminal law. … And so it is up to the legislature to decide whether [a particular offense] should be one crime or two."[6]

In this case, we are dealing with multiple punishment (in subsequent prosecutions) under a *single* statute. This is conceptually different from the issue

[5] This distinction between multiple prosecutions and multiple punishments is best understood as the former applying to *subsequent* trials and the latter applying to multiple sentences in the *same* trial. However, as recognized by this Court in *State v. Blackman*, 968 S.W.2d 138, 140, 141 (Mo. banc 1998), this distinction was effectively destroyed by *United States v. Dixon*, 509 U.S. 688 (1993), which held that the government "is entirely free to bring [same offenses to trial] separately, and can win convictions in both. … [Thus,] this distinction between successive prosecution and successive punishment is now moot in light of Dixon."

[6] Akhil Reed Amar, "Double Jeopardy Law Made Simple," 106 Yale Law Journal 1807, 1817-1818 (1997).

of when convictions under *different* statutes constitute multiple punishment (either in the same trial or two separate trials).[7] As explained in the latter scenario, when the legislature ***intends*** to impose multiple (cumulative) punishments under two statutes, regardless of whether the two statutes proscribe the same offense under *Blockburger*, the "court's task … is at an end" and such result does not violate the Double Jeopardy clause. *Missouri v. Hunter*, 459 U.S. 359, 369 (1983).[8] The issue in the former scenario, however, dealing with multiple convictions under a *single* statute, is not whether the legislature intended to impose multiple punishment for the same offense, but whether the legislature has defined the "unit of prosecution" that gives rise to a separate offense within the *same* statute.[9]

Before proceeding any further in this analysis, it is important to stress again another principle that informs this area of the law: "the Court applies a policy of

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[7] A nice example is robbery in the first degree (Mo. Rev. Stat. § 570.023.1(2)) and armed criminal action (Mo. Rev. Stat. § 571.015), which was presented to the United States Supreme Court in *Missouri v. Hunter*, 459 U.S. 359 (1983).

[8] As will be explained presently, the *Blockburger* analysis comes into play *only* when there is no contrary legislative intent providing for additional punishment.

[9] A nice example is the criminal nonsupport statute (Mo. Rev. Stat. § 568.040), in which "the legislative intent to allow multiple punishments is clear by virtue of the statutory provision for temporal units of prosecution." *State v. French*, 79 S.W.3d 896, 899 (Mo. banc 2002). This distinction is nicely summarized in Peter Westen & Richard Drubel, "Toward a General Theory of Double Jeopardy," 1978 Sup. Ct. Rev. 81, 111 (1978) – "Here it is not that the same course of conduct is proscribed by more than one statute but that the same statute may fragment a defendant's conduct into more than one offense."

lenity … on what [the legislature] intended to be the unit of prosecution. … We do not derive criminal outlawry from some ambiguous implication." *Ladner v. United States*, 358 U.S. 169, 177, 175, 178 (1958). In other words, when faced with the possibility that the legislature did ***not*** intend separate (cumulative) punishment for a course of conduct (or was at least silent on the question), the Supreme Court's view has been that "the ambiguity should be resolved in favor of lenity," which permits only a single punishment as regards that course of conduct.[10]

With these principles in mind, we can now begin our analysis by resorting to the statute that permits Respondent to punish Relator for criminal contempt. Mo. Rev. Stat. § 476.110(3) provides that "[e]very court … shall have power to punish as for criminal contempt persons guilty of … [w]illful disobedience of any … order lawfully issued or made by it."

This statute is silent on the question of the applicable *unit of prosecution*. Nor, for that matter, does the statute provide for *cumulative punishment*. And if we

[10] This "policy of lenity" is based on the idea that the double jeopardy clause "prevent[s] the sentencing court from prescribing a greater punishment than the legislature intended." *Hunter*, 459 U.S. at 366. See also *Whalen v. United States*, 445 U.S. 684, 689 (1980), "imposing multiple punishments not authorized by [the legislature] … violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." See also *Gore v. United States*, 357 U.S. 386, 391 (1958), "when [the legislature] has not explicitly stated what the unit of offense is, the doubt will be judicially resolved in favor of lenity." Any other result creates the risk of double punishment in violation of double jeopardy.

cannot find this meaning by resort to the statute, then we cannot find that the legislature ***intended*** that repeated disobedience to the court order to pay costs constitutes two (or multiple) offenses under the statute. *Ladner*, 358 U.S. at 176.

Accordingly, in the absence of any clear legislative intent to the contrary, the answer to the question whether Relator can be punished again for criminal contempt under the statute is to be found by application of the *Blockburger* test.[11] "The test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. … [T]he Court's application of the test focuses on the statutory elements of the offense." *Albernaz v. United States*, 450 U.S. 333, 337-338 (1981).

In this case, the analysis would clearly fail the *Blockburger* test because no new or additional element would need to be proven at any of Relator's subsequent criminal contempt proceedings.[12] Hence, any subsequent finding of criminal

[11] "[A] court should apply the Blockburger test only when there is no clear legislative intent as to whether successive punishment should be imposed." *State v. Blackman*, 968 S.W.2d 138, 140 (Mo. banc 1998).

[12] The elements of criminal contempt under Mo. Rev. Stat. § 476.110 are (1) "actual knowledge of the … order"; and (2) "willful conduct in violation of its terms." *State ex rel. Girard v. Percich*, 557 S.W.2d 25, 36 (Mo. App. 1977).

contempt as regards the Show Cause Order issued in this case would violate double jeopardy under the *Blockburger* test.[13]

It is unclear, however, whether application of the *Blockburger* test is even appropriate in a unit of prosecution case – that is, in a case involving multiple convictions under a *single* statute. This point was illustrated well in Justice Rehnquist's dissenting opinion in *Whalen v. United States*, 445 U.S. 684, 703-704 (1980),

> "In *Bell v. United States*, *supra*, this Court considered a question wholly different from that considered in *Ex parte Lange* and its progeny: the proper units into which a statutory offense was to be divided. … The Court noted that Congress could, if it so desired, [authorize multiple offenses] … Finding no evidence of such intent, the Court applied the traditional 'rule of lenity' and held that petitioner could only be punished for a single count. Most significantly for our purposes, *Bell* was based entirely upon this Court's interpretation of the statute and the relevant legislative intent; it did not mention the Double Jeopardy Clause at all. … We have consistently abided by this rule since that time, noting on at least one occasion that '[t]here is no constitutional issue presented' in such cases."

Thus, according to Justice Rehnquist (dissenting in *Whalen*), in "unit-of-prosecution" cases, the only question the court needs to ask is whether the

[13] The legislature has codified the *Blockburger* test in § 556.041(1). "Blockburger's 'same-element' test appears to have been codified in Sections 556.041 and 556.046.1(1)." *Bates v. State*, 421 S.W.3d 547, 551 (Mo. App. E.D. 2014).

legislature "intended to allow a court to impose consecutive sentences on a person. … To paraphrase Lord Mansfield's statement in *Crepps v. Durden, supra*, that should be the end of the question." *Id*. at 706. This suggestion makes sense because even the *Blockburger* test is used only "to determine whether Congress has in a given situation provided that ***two statutory offenses*** may be punished cumulatively." (Emphasis added.) *Whalen*, 445 U.S. at 691. See also *Blockburger*, 284 U.S. at 304, "The applicable rule is that where the same act or transaction constitutes a violation of ***two distinct statutory provisions***, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (Emphasis added.)

In any event, the result is the same whether this Court applies the *Blockburger* test or engages solely in "interpretation of the statute and the relevant legislative intent" as suggested by Justice Rehnquist. In either case, any subsequent attempt by Respondent to punish Relator for criminal contempt in connection with the Show Cause Order issued in this case, after having punished Relator once already for criminal contempt in connection with the Show Cause Order, would be to "subject [Relator] for the same offence to be twice put in jeopardy of life or limb," in violation of the Double Jeopardy clause. Accordingly, Respondent is without authority to compel Relator to appear in court for any further Show Cause Hearings in connection with this Show Cause Order.

Finally, Relator wishes to suggest that this issue has already been *somewhat* decided in a similar case involving the question whether "the finding of a separate contempt for each refusal [to answer questions] constitutes an improper multiplication of contempts. We [the United States Supreme Court] hold that it does." *Yates v. United States*, 355 U.S. 66, 68 (1957). The petitioner in *Yates* was punished in "criminal contempt" each time he "refused to answer 11 questions." *Id.* at 69. The Court held that "only one contempt is shown on the facts of this case." *Id.* at 74. And this was true even though "[t]he contempt of this case, although single, was of a continuing nature: each refusal … continued the witness' defiance of proper authority." *Id.*

Mo. Rev. Stat. § 476.110(5) presents this exact issue[14] and is in the same statute at issue in this case. Importantly, neither § 476.110(3) nor § 476.110(5) provide for a unit of prosecution; but in any event, the Supreme Court has already held, at least with respect to § 476.110(5), that "only one contempt has been committed." *Id.* at 68. The same should hold true with respect to § 476.110(3). In the end, Respondent's attempt to analogize this case to the conduct at issue in *French* is incorrect. Unlike in *French*, there is no unit of prosecution here.

[14] Mo. Rev. Stat. § 476.110(5) provides that "[e]very court … shall have power to punish as for criminal contempt persons guilty of … [t]he contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, to refuse to answer any legal and proper interrogatory."

The basic thrust of the central issue in this case is nicely captured by The Supreme Court in *Ex parte Lange*, 85 U.S. 163, 168 (1873),

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence."

Whatever the countervailing "public interest[s]" at stake in this case may be, this Court should not lose sight of the basic facts presented in this particular case: Respondent is proposing to punish Relator (and countless others) a second time for criminal contempt for failing to pay costs *in the same case, in the same court, on the same facts, and for the same statutory offense*. The application of the "complete protection" of the Double Jeopardy clause can hardly be doubted in such a case. And again, as Justice Scalia stated rather forcefully in *Dixon*, "the text of [the Double Jeopardy Clause] looks to whether the *offenses* are the same, not the interests that the offenses violate." (Emphasis in original.) *United States v. Dixon*, 509 U.S. 688, 699 (1993). This passage was previously cited in Relator's initial brief, but additional explication is helpful, particularly in response to Respondent's

suggestion that it is "in the public interest" for Respondent to violate Double Jeopardy when necessary in attempting to enforce court-ordered payment plans.

This passage by Justice Scalia was prompted by Justice Blackmun's concern (*infra,* at 741) that the Court's holding in *Dixon* – Double Jeopardy attaches in criminal contempt proceedings – will "jeopardize the ability of trial courts to control those defendants under their supervision" by weakening use of the court's inherent contempt power to "vindicate the authority of its orders." Justice Scalia in the Court's holding in *Dixon* first noted that this "distinction seems questionable, since the court's power to … punish [for contempt] was conferred by statute; [and that] the legislature was the ultimate source of both the criminal and the contempt prohibition."[15] But, in any event, Justice Scalia concluded that "the distinction is of no moment for purposes of the Double Jeopardy Clause, the text of which looks to whether the *offenses* are the same, not the interests that the offenses violate." (Emphasis in original.) *Id*. at 699.

The awesome power of the Double Jeopardy protection transcends any local, transitory "public interest" concern. Indeed, Sir William Blackstone, in his *Commentaries*, wrote that the principle that "no man is to be brought into jeopardy of his life, more than once for the same offence … [is a] universal maxim of the

[15] In this case, the applicable statute is Mo. Rev. Stat. § 476.110.

common law."[16] This "universal maxim" has become a basic principle of the rule of law in our system of justice. As explained by Professor Amar, "[a] second punishment is a kind of double-counting, in which courts might end up imposing more punishment than the legislature authorized, in obvious violation of basic principles of the rule of law. … When the game is over, it's over. The winner is the winner; that's that; done is done."[17]

Accordingly, in this case, and in connection with Relator's violation of the Show Cause order issued by Respondent, there is "but one entire offense, whether longer or shorter in point of duration, between the earliest day laid in any indictment [or Show Cause order] and the latest day laid in any. There can be but one offense between such earliest day and the end of the continuous time embraced by all the indictments [or Show Cause orders]. … [Thus,] the court which tried them had no jurisdiction to inflict a punishment in respect of more than one of the convictions." *Ex parte Snow*, 120 U.S. 274, 285 (1887). In the end, however strong the public interest may be in the enforcement of court-ordered payment plans, the fact remains we are dealing with "but one entire offense." Relator is therefore protected by the Double Jeopardy guarantee.

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[16] Quoted in David Rudstein, "A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy," 14 Wm. & Mary Bill of Rights Jour., 193, 204 (2005).
[17] Akhil Reed Amar, "Double Jeopardy Law Made Simple," 106 Yale Law Journal 1807, 1815 (1997).

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 3,772 words in the brief as determined by the word count of the word-processing system used to prepare the brief.

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