IN THE SUPREME COURT OF MISSOURI
No. SC90425

CARL SMITH,
Petitioner,

THE HONORABLE GARY WITT AND SHERIFF RAYMOND PACE,
Respondents.

On Writ of Habeas Corpus

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI AND OF AMERICAN CIVIL LIBERTIES UNION OF KANSAS & WESTERN MISSOURI IN SUPPORT OF PETITIONER AS *AMICI CURIAE*

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STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amici adopt the jurisdictional statement and statement of facts as set forth in Petitioner's substitute brief filed previously with the Court in this case.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 600,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Eastern Missouri is an affiliate of the ACLU based in St. Louis with over 4,800 members in Eastern Missouri. The ACLU of Kansas and Western Missouri is an affiliate of the ACLU based in Kansas City, Missouri, with approximately 1,500 members in Western Missouri. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the First Amendment. On behalf of their members, the ACLU of Eastern Missouri and the ACLU of Kansas and Western Missouri file this brief to highlight the significant federal constitutional issues implicated by criminal contempt proceedings against lawyers as a result of statements made as part of lawyers' advocacy on behalf of clients.

SUMMARY OF ARGUMENT

The trial court erred when it failed to apply applicable First Amendment precedents to the charges of indirect criminal contempt preferred against Petitioner by Judge Carter. Because Petitioner made the statements that were the basis of the charged indirect criminal contempt in the course of his advocacy on behalf of a client in a petition for a writ of prohibition filed with the Court of Appeals, Southern District, the First Amendment obligated the State to prove that Petitioner's allegedly contemptuous statements caused either a "clear and present danger" to or an "actual obstruction" of a Missouri court proceeding. Because the State failed to prove those things, Petitioner's conviction was improper.

Furthermore, assuming *arguendo* that the conviction was proper, the trial court erred in sentencing Petitioner to 120 days in jail because such sentence is excessive, arbitrary, vindictive and an abuse of discretion on the facts of this case.

ARGUMENT

I. The Trial Court erred in failing to Apply the Proper First Amendment Standards to Carl Smith's Advocacy on Behalf of a Client.

Beginning with *Bridges v. California*, 314 U.S. 252 (1941), the Supreme Court has repeatedly held that the First Amendment imposes significant limits on the contempt powers of federal and state courts. In *Bridges*, the Court ruled that courts could not use the contempt power to punish out-of-court statements critical of the conduct of judges unless the utterances at issue presented a clear and present danger to the administration of justice. The Court summarized by noting that "[w]hat finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be *extremely serious* and the degree of imminence extremely high before utterances can be punished." *Id.* at 263 (emphasis added).

Although *Bridges* involved the application of the federal contempt statute, the Court soon applied the First Amendment to state court contempt powers. *See Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962). The Court has also held that the clear and present danger test applies to in-court statements

as well as out-of-court statements so that—to be punishable as contempt—in-court statements must constitute "an imminent … threat to the administration of justice." *Eaton v. City of Tulsa*, 415 U.S. 697, 699-700 (1974) (*per curiam*).

Moreover, in a series of cases involving in-court advocacy, the Court has held that the First Amendment limits the courts' use of the contempt power to punish the speech lawyers use in their roles as advocates. In *In re McConnell*, for instance, the Court specifically recognized that a lawyer's duties to his client require that a court give the lawyer breathing room for advocacy:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. . . .
>
> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to

> make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.

370 U.S. 230, 236 (1962).

In *Holt v. Virginia*, 381 U.S. 131 (1965), furthermore, the Court applied Constitutional limits to the contempt powers of state judges faced with zealous advocacy that attacked the judge in some way and specifically held that statements made in a motion for change of venue accusing the judge of bias could not constitute criminal contempt in light of the applicable Constitutional standards. A few years later, in *In re Little*, the Court applied the imminent threat test to hold that a summation in which the *pro se* defendant, Little, argued that he was a political prisoner and that the judge was biased against him was advocacy protected by the First Amendment. 404 U.S. 553, 555 (1972) (*per curiam*).

In *Little*, the Supreme Court also made it clear once again that "[t]rial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction of the administration of justice." *Id.* The Supreme Court has repeatedly held that lower courts must exercise the contempt power "wholly unrelated to . . . personal sensibilities, be they tender or rugged."

Offutt v. United States, 348 U.S. 11, 14 (1954). *See also Craig v. Harney*, 331 U.S. at 376.[1]

In his seminal articles on advocacy and contempt, Professor Louis S. Raveson succinctly summarized the reasons for insulating lawyer advocacy from over-zealous application of the contempt power:

> Despite the vulnerability of judicial proceedings to interference from in-court conduct, one class of courtroom expression should enjoy greater protection from the contempt power than the protection afforded extrajudicial speech. That class of expression is advocacy. Indeed, while the Court developed

[1] Judge Carter's Order to Show Cause charging Petitioner Smith with criminal contempt repeatedly characterized the allegedly contemptuous statements in terms of defamation. But defamation law serves to protect personal reputation and is thus clearly distinguishable from the law of criminal contempt, which serves to protect the administration of justice. In fact, if this were a defamation case, Petitioner's written statements in the Petition for Writ of Prohibition would be protected by an absolute privilege. *See Laun v. Union Elec. Co. of Missouri*, 166 S.W.2d 1065, 1069 (Mo. 1942).

constitutional standards protecting in-court expression from the contempt power, it was independently establishing and expanding a doctrine of first amendment protection of the advocacy activities of lawyers. In a series of cases beginning with *NAACP v. Button*, the Court held that certain state ethical rules governing attorneys' practice had to give way, under the first amendment, to the right to litigate claims as "a form of political expression" and "political association."

It is not solely, or even primarily, the decorousness of courts that ensures their value as institutions of justice; courts are most fundamentally arenas of advocacy, valued most for the contentiousness, adversarialness, and passion of the expression to which they give stage. Improper use and abuse of the contempt power threatens zealous advocacy, and the value of vigorous advocacy, not only to individual litigants but to our system of justice, requires its protection. For the heat of advocacy is necessary to catalyze the processes engendering the just resolution of disputes: the forceful presentation of facts

and argument and the crystallization of the issues and the positions of the parties.

Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power; Part One: The Conflict between Advocacy and Contempt*, 65 Wash. L. Rev. 477, 505-506 (1990). *See also* Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power*, 14 Am. J. Trial Advoc. 243 (1990).

Although Missouri's appellate courts do not appear to have dealt specifically with the Constitutional limitations upon the power of courts to hold lawyers in criminal contempt for statements made in the lawyers' roles as advocates, [2] the courts have indicated that – as a practical matter –

[2] As Respondent Witt pointed out in earlier briefing, the Missouri Supreme Court has considered the First Amendment's implications in disciplinary proceedings. *In re Westfall*, 808 S.W.2d 829, 833 (Mo. banc 1991) (in order to support discipline, a lawyer's extrajudicial statements critical of a judge must have been made with *scienter*). But a different standard applies in criminal contempt cases. Under *Bridges* and its progeny, contempt is only justified for extrajudicial statements if the allegedly contemptuous statements caused either a "clear and present danger" to or an "actual obstruction" of a court proceeding.

effective advocacy demands a buffer zone in which lawyers are free to act without fear of being held in criminal contempt. In *State ex rel. Tannenbaum v. Clark*, for instance, the court of appeals noted that "[t]he use of summary criminal contempt to punish lawyers for advocacy that is only overly zealous … contradicts the principle of an independent and assertive bar." 838 S.W.2d 26, 35 (Mo. App. 1992). The court of appeals in *Tannenbaum* concluded by noting that "[i]n a close case 'where the line between vigorous advocacy and actual obstruction defie[s] strict delineation, doubts should be resolved in favor of vigorous advocacy.'" *Id., quoting from United States ex rel. Robson v. Oliver*, 470 F.2d 10, 13 (7th Cir. 1972). Thus, the court of appeals implicitly recognized that the First Amendment requires actual obstruction before a court can constitutionally hold a lawyer in criminal contempt for advocacy.

The Missouri Supreme Court has long held that "[a] direct contempt occurs in the immediate presence of the court or so near as to interrupt its proceedings. … An indirect contempt arises from an act outside the court that tends to degrade or make impotent the authority of the court or to impede or embarrass the administration of justice." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo. banc 1994). Because the alleged contempt here appeared in the Petition for Writ of Prohibition that Carl

Smith prepared for and filed with the Missouri Court of Appeals, Southern District, the alleged contempt here was indirect as to Circuit Judge Carter, who issued the show cause order citing Mr. Smith for criminal contempt. "Abuse of a trial judge contained in a brief on appeal is not contempt of the trial court, but is contempt of the appellate court." 17 C.J.S. Contempt, § 30, p. 66.[3] Respondent Witt has acknowledged that this case involves an alleged indirect contempt. Respondent's Suggestions in Opposition to Relator's Application for Writ of Habeas Corpus at 10.

Thus, as an alleged indirect contempt of Judge Carter, the court trying the criminal contempt charges against Mr. Smith should have applied the "clear and present danger" standard enunciated by the Supreme Court in *Bridges v. California*. But there is no indication in the record that the court trying these contempt charges applied or even addressed that standard of

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[3] Because the contempt alleged was contempt of the court of appeals rather than the circuit court, the charges of criminal contempt in this case may have also been procedurally flawed. "Contempt proceedings are *sui generis* and '. . . are triable only by the court against whose authority the contempts are charged.' No other court may inquire into the charge." *Chemical Fireproofing Corp. v. Bronska*, 553 S.W.2d 710, 718-19 (Mo. App. 1977), *quoting Bessette v. Conkey Co*., 194 U.S. 324, 337 (1904).

proof. *See* Jury Instructions, Pet. Ex. 18, p. 373.

Moreover, at the trial in this case, the State utterly failed to shoulder its burden of proving that Mr. Smith's allegedly contemptuous statements caused either a "clear and present danger" to or an "actual obstruction" of any Missouri court proceeding as is required by the First Amendment as interpreted by *Bridges*, *In re McConnell*, and the other Supreme Court cases mentioned above. In fact, the State accepted Defendant Smith's proffered stipulation that the allegedly contemptuous statements in the Petition for Writ of Prohibition did not interfere with the grand jury or Judge Carter's rulings on issues before the grand jury. Pet. Ex. 5. Because Mr. Smith's allegedly contemptuous statements in the Petition for Writ of Prohibition did not cause any actual obstruction and did not present a clear and present danger of such obstruction of the workings of any court, Mr. Smith's conviction of criminal contempt on the allegations of contempt cited in Judge Carter's show cause order and in the charges of contempt tried on August 5, 2009, cannot stand scrutiny under the First Amendment.

II. The Trial Court erred by Imposing a Punishment in this Case that was Excessive and an Abuse of Discretion.

"A reviewing court may determine whether or not the punishment imposed is so excessive and incommensurate with the gravity of the offense

as to be arbitrary and vindictive." 17 C.J.S. Contempt § 146, p. 247.

"Sentences for criminal contempt are punitive in nature. Such punishments must vindicate the court's authority to have its mandates respected. The interests of orderly government demand that." *State on Inf. of McKittrick v. Koon*, 201 S.W.2d 446, 457 (Mo. 1947). Although *McKittrick* dealt with a litigant's disobedience to a court order forbidding it from selling funeral and burial insurance in Missouri, the same principles apply to all types of criminal contempt. That is, punishments for criminal contempt must vindicate the court's authority. In *McKittrick*, the Supreme Court went on to set the punishment for contempt by considering a list of factors including the mitigating factor that "[c]ontempt must be measured by the intent with which it is committed." *Id.* Professor Raveson explored in detail the factors that courts should consider in deciding whether particular advocacy amounts to contempt meriting criminal punishment. Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 Wash. L. Rev. 743 (1990). *See also* Raveson, *A New Perspective on the Judicial Contempt Power: Recommendations for Reform*, 18 Hastings Const. L.Q. 1 (1990).

In this case, Petitioner's sentence to 120 days in jail is excessive, arbitrary, and vindictive in light of the facts. First, even assuming *arguendo*

that Petitioner Smith's advocacy in the Petition for Writ of Prohibition exceeded the limits of zealous advocacy and were thus contemptuous under applicable First Amendment standards, the offending sentences appeared in an appellate brief, not in open court before citizens whose respect for the judicial system may have been tarnished by hearing such words. Second, though he may have chosen his words poorly, Mr. Smith was trying to represent zealously his clients who were subjected to the grand jury subpoena, and he was reacting to the seemingly unusual interconnections between the prosecutors in Douglas and Wright Counties working on criminal proceedings in each county as prosecutor and assistant prosecutor. Third, the sentence of 120 days is far in excess of a reasonable sentence that would be required to get a lawyer's attention and drive home the point that the kind of isolated statements made here exceed the bounds of permitted advocacy. Thus, the imposed here sentence bleeds over into impermissibly arbitrary and vindictive sentencing. For example, this sentence is the same as the one imposed upon Carlos Romious by the Greene County Circuit Court in August 2008 for a string of overtly contemptuous acts in open court. Document available on the website of the *Springfield News-Leader* at http://www.news-leader.com/assets/pdf/DO114155731.PDF. The stark comparison of the number of contemptuous acts and the openness of those

acts in these two cases shows that Petitioner Smith's sentence was excessive and should be reduced markedly, at most to time served (approximately three weeks).

CONCLUSION

Based on the foregoing and the reasons provided in Petitioner's brief, *amici* ACLU of Eastern Missouri and ACLU of Kansas & Western Missouri urge this Court to grant Petitioner's Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 3,171 words, as determined using the word-count feature of Microsoft Office Word 2003. The undersigned further certifies that the accompanying disk has been scanned and was found to be virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this brief and a copy of the brief on disk were served upon the counsel identified below by United States Mail, postage prepaid, on December 23, 2009:

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