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JURISDICTIONAL STATEMENT

This is an Application for a Writ of Habeas Corpus directed to the Honorable Gary Witt, Judge of the Circuit Court of the Sixth Judicial Circuit ("Respondent"). Attorney Carl Smith seeks a Writ of Habeas Corpus to inquire into the legality of Attorney Smith's detention. Petitioner Smith is detained in the Douglas County Jail in Ava, Missouri. Facts showing that the restraint is illegal or improper are described in detail in the Statement of Facts section and Argument section. Pursuant to Rule 91.04(a)(4), no petition for habeas corpus has been made to any higher court.

Under Rule 91.02, a petition for writ of habeas corpus "…in the first instance shall be to a circuit or associate circuit judge for the county in which the person is held in custody if at the time of the petition such judge is in the county, unless good cause is shown for filing the petition in a higher court."

Good cause exists for filing this petition in the appellate courts. There are two judges in Douglas County: the Honorable John Moody and the Honorable Craig Carter. Neither judge can be fairly asked to issue a writ of habeas corpus. Judge Carter issued the show cause order that began this proceeding and testified against Defendant at his trial. The subject matter of Petitioner's statements that gave rise to his prosecution include allegations regarding Judge Moody. The Southern District Court of Appeals denied the petition. Thus, jurisdiction lies in this Court.

Attorney Smith's trial and conviction occurred in Douglas County, Missouri, based on statements Petitioner made in a Petition for Writ of Prohibition to the Missouri Court of Appeals, Southern District. This case involves, *inter alia*, the question of whether the Free Speech Clause of the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, bars the State from prosecuting Attorney Smith for the content of his speech and thus involves the construction of a constitutional provision. As such, this Court has exclusive jurisdiction under Article V, Section 3 of the Missouri Constitution.

TABLE OF CASES AND AUTHORITIES

STATEMENT OF FACTS

Attorney Carl Smith, Bar #35575, the Petitioner, seeks relief from a guilty verdict delivered by a Douglas County jury for criminal contempt of court. The state of Missouri tried Attorney Smith for pleadings he drafted in a Petition for a Writ of Prohibition (*hereinafter*, Petition for Writ) filed by him. (Exhibit 1.) By Bill of Particulars, (Exhibit 3), the state founded the prosecution upon two paragraphs of the Petition for Writ. Elected Douglas County Associate Judge, The Honorable Robert Craig Carter ("Judge Carter"), cited the two paragraphs in the Show Cause Order, (Exhibit 2):

1. "The attached exhibits reflect the personal interest, bias and purported criminal conduct of Respondent [Judge Carter], Prosecuting Attorney Christopher Wade, and others [sic] members in the judicial system in the Forty-Fourth Judicial Circuit. Their participation in the convening, overseeing, and handling the proceedings of this grand jury are, in the least, an appearance of impropriety and, at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent persons to cover-up and chill public awareness of their own apparent misconduct using the power of their positions to do so."

> 2. When Petitioners [sic][Attorney Smith] on March 31, 2008 asked Respondent [Judge Carter] and the prosecuting attorney [Mr. Wade] who were the targets of this grand jury, Petitioners' assertion that the targets were Petitioners and their counsel [Attorney Smith] was met with the tacit admission of silence. This grand jury, as in the last grand jury in Douglas County, is being used by those in power in the judicial system as a covert tool to threaten, intimidate and silence any opposition to their personal control-not the laudable common law and statutory purposes for which the grand jury system was created." Exhibit 1.

Judge Carter received a copy of the Petition for Writ in accordance with Rule 84.24(a)(4)(B). Exhibit 1. At the time, Judge Carter presided over a grand jury assembled in Douglas County which issued a subpoena the Petition for Writ sought, in part, to prohibit. Exhibit 1. Judge Carter thereafter issued a show cause order directed to the Petitioner, Attorney Smith. Exhibit 2.

The Show Cause order contained no reference to "criminal contempt." Exhibit 2. Neither the show cause order nor a subsequently filed Bill of Particulars cited Rule 36.01 which governs criminal contempt. Exhibit 1. Exhibit 3. Neither document referred to Section 476.110 R.S.Mo. (1939), defining statutory criminal contempt. Exhibit 1, Exhibit 3. Neither document explicitly

listed or referenced the essential elements of common law criminal contempt. Exhibit 1, Exhibit 3.

Attorney Smith drafted the offending two paragraphs in the argument section of the Writ, entitled "Statement of Reasons Why Writ Should Issue" (Exhibit 4), in conformity with Rule 84.24(a)(2). Attorney Smith filed the Writ with the Missouri Court of Appeals for the Southern District on or about April 3, 2008.

The state presented no evidence as to the manner of publication save that Attorney Smith published those statements to Judge Carter by service and the Appellate Court of the Southern District by filing. During jury trial the state presented the entire body of Attorney Smith's Petition for Writ (Exhibit 1) to the trial judge. Trial Transcript, hereinafter "T.T.", 55. The state presented the jury with the two paragraphs cited by Judge Carter's show cause order.[1] T.T. 62. The state also presented the testimony of Judge Carter who denied the truth of the two paragraphs of the writ. T.T. 63.

In the course of litigation preceding trial, the trial court noted the following:

> …PLAINTIFF STIPULATES THAT THE ACTIONS OF THE DEFENDANT DID NOT INTERFERE W/GRAND JURY AND THAT

[1] The state's evidence also included sentences written before and after those two paragraphs. (Exhibit 1, page 4). The court orally instructed the jury to concentrate only on the two paragraphs.

JUDGE CARTER DID NOT RULE DIFFERENTLY, OR FAIL TO TAKE ANY ACTION WITH REGARD TO THE GRAND JURY BASED ON ACTIONS OF DEFENDANT…. (Exhibit 5).

The jury received that portion of the docket entry as evidence during the state's case-in-chief, without objection from the State. T.T. 90.

Attorney Smith's Petition for Writ sought relief from a subpoena directed to his secretary, Amanda Evans. Exhibit 6. The subpoena issued from the Douglas County grand jury ("Grand Jury."). Exhibit 6. Attorney Smith filed the Writ on behalf of himself, his law office, his secretary Amanda Evans and his client, Ron Jarrett. Exhibit 1, page "a."

At the time the Grand Jury subpoena issued, Attorney Smith defended Mr. Jarrett in Wright County as to a pending prosecution. Exhibit 1. The Wright County prosecutor, Mr. Jason MacPhearson, by Information, alleged that Mr. Jarrett committed the misdemeanors of Assault in the Third Degree, Sexual Misconduct in the Second Degree, Sexual Misconduct in the Third Degree, and Sexual Misconduct in the First Degree. Exhibit 1. By complaint, Mr. MacPhearson also alleged Mr. Jarrett committed the Class C felony of Deviate Sexual Assault. Exhibit 1. Mr. MacPhearson pursued the prosecution of Mr. Jarrett before commencement of the Grand Jury proceedings in Douglas County. Exhibit 1.

During the Douglas County Grand Jury proceedings, Mr. MacPhearson, in addition to his duties as Wright County's prosecutor, also worked for Mr. Chris

Wade as an assistant, "child support," prosecutor in Douglas County. Likewise, during the Grand Jury proceedings, Mr. Chris Wade, in addition to his duties as the Douglas County prosecutor, worked as an assistant, "child support," prosecutor for Mr. MacPhearson, in Wright County. Exhibit 1. Thus during the Grand Jury proceedings, Prosecutor Wade supervised Prosecutor MacPhearson, and Prosecutor MacPhearson supervised Prosecutor Wade, in their respective and alternating capacities as supervisor and employee in Wright and Douglas counties.

Mr. Wade assisted the Douglas County Grand Jury, and drafted the Grand Jury's subpoena. Exhibit 6. The state served the Douglas County Grand Jury's subpoena upon Attorney Smith's secretary on March 25, 2008. Exhibit 6. The subpoena required her to appear in the Douglas County Courthouse on March 31, 2008. Exhibit 6. The Douglas County subpoena directed her to produce the "notary log book for the year of 2006; any item evidencing notary work performed on behalf of Ron Jarrett." Exhibit 6.

The subpoena not issuing from Wright County, the situs of Mr. Jarrett's prosecution, Attorney Smith filed a "Motion to Quash Subpoena and Motion for Continuance" with the Grand Jury in Douglas County. Exhibit 7. The Grand Jury presiding judge, Judge Carter, conducted a hearing on the motion. T.T. 81. He denied the motion to Quash. Exhibit 1. He granted Attorney Smith seven days to file a Petition for Writ. Exhibit 1.

After receiving a copy of the Attorney Smith's Petition for Writ, Judge Carter directed Petitioner to show cause why he should not be held in contempt.

Judge Carter recused and the Honorable Gary Witt ("Judge Witt"), presiding in Platte County, Missouri, accepted this Court's appointment to Petitioner's case. Exhibit 8. Neither Judge held a show cause hearing. Exhibit 8. Neither Judge provided Attorney Smith an opportunity to withdraw or amend his pleadings. Exhibit 8.

Before trial, Petitioner filed "Defendant's 2nd Amended Motion to Dismiss on the Grounds that Prosecution Violates the Defendant's Right to Freedom of Speech." Exhibit 9. Petitioner filed "Defendant's Motion to Dismiss on the Grounds it Violates the Sixth Amendment Right to Counsel & the Converse Right to Proceed Pro Se." Exhibit 10. Petitioner filed a "Motion to Dismiss for Failure to Follow Rule 55.03." Exhibit 12. The trial court heard and overruled those motions before trial.

At the pretrial hearing, the trial court sustained a Bill of Particular's Request. Exhibit 8. After receiving the Bill of Particulars, Petitioner filed a "Motion to Dismiss for Failure to State a Cause of Action." (Exhibit 11). The trial court heard that motion on the day of trial, and following a contested hearing overruled it. T.T. 28. On the day of trial, the trial court also overruled the Petitioner's pretrial motion that the jury sentence Movant at the same time it returned a (guilty) verdict. *See* Exhibit 13.

In advance of trial, Petitioner filed "Defendant 2nd Amended Motion to Disqualify Judge." Exhibit 14. Petitioner alleged an appearance of impropriety

under Rule 2.08 Cannon 2. Exhibit 14. Petitioner conceded that the motion alleged no actual impropriety.

The Petitioner alleged an appearance of impropriety based, in part, upon the conduct of the trial court. Exhibit 14. On September 9, 2008, Petitioner appeared before the trial judge and entered a plea of not guilty. Exhibit 8. Thereafter, the trial judge adjourned court and met Judge Carter for lunch at the Red Dragon Restaurant, in the county seat of Douglas County, where the two discussed hunting. Exhibit 14, Exhibit 15.

The motion additionally alleged an appearance of impropriety based upon the trial court's "personal knowledge of disputed evidentiary facts concerning the proceeding." Exhibit 14. During Attorney Smith's motions hearing, the trial court received into evidence a copy of the trial transcript from that cause. Exhibit 16. The transcript established that the trial court heard evidence, entered judgment and sentence as a trier of fact in Mr. Ron Jarrett's perjury trial. The trial, judgment and sentence occurred on September 26, 2008. Exhibit 16.

Mr. Jarrett's perjury conviction arose from his sworn testimony in a pretrial hearing occurring during the Wright County prosecution for the sexual charges. Exhibit 16. Attorney Smith represented him during the hearing.[2] Mr. Jarrett's testimony at a Wright County pretrial hearing encompassed the allegations of an

[2] Mr. S. Dean Price represented Mr. Jarrett in the course of the perjury bench trial, judgment and sentence.

affidavit composed by Mr. Jarrett and notarized by Attorney Smith's secretary, Amanda Evans. Exhibit 17. The affidavit raised allegations, some lurid and scandalous, about Mr. Jarrett's relationships with and knowledge about officers of the court in the Forty Fourth Judicial Circuit, including Mr. MacPhearson, and some of their family members and friends. Exhibit 17. In Mr. Jarrett's pre-trial hearing, Mr. Smith pursued a motion to disqualify Wright County Prosecutor MacPhearson, based on those allegations. Exhibit 17. The subpoena issued by the Douglas County Grand Jury required Amanda Evans to produce that affidavit, drafted in 2006. Exhibit 13.

Mr. Jarrett's perjury trial transcript recorded Mr. Jarrett's statements to an Officer Younger as well as Mr. Jarrett's testimony to the trial court that Attorney Smith induced the perjury and the affidavit. Exhibit 17. The Petitioner's Motion to Disqualify Judge asserted that Mr. Jarrett's judicially determined one-hundred days jail sentence, given that he already served ninety (90) days in jail, created an inference that the trial court considered the accusation as to Mr. Smith's conduct as a fact mitigating Mr. Jarrett's sentence. Exhibit 14. The motion also alleged that by ordering a jury trial in Attorney Smith's matter, the trial court effectively increased the range of punishment above six months in jail.[3] Exhibit 14. The trial court denied the motion to disqualify. Exhibit 8.

[3] An issue exists as to the appropriate range of punishment for Petitioner's contempt charge. See Ryan v. Moreland, 653 W.W.2d 244 (Mo.App. E.D. 1983)

The trial court also denied Petitioner's requests for judgment of acquittal, Exhibit 21 and 22, which included the allegation that the state presented evidence insufficient to support a jury verdict. Petitioner objected to the trial court's verdict director, Exhibit 18, proposed by the state, on the grounds that it failed to list the essential elements of criminal contempt, either as a statutory or common law crime. The Petitioner submitted two alternatively proposed verdict directors, purportedly and respectively based on statutory and common law contempt Exhibit 20. The trial court rejected the Petitioner's proposed verdict directors.

Before the jury reached a verdict, Petitioner orally moved to dismiss the matter for lack of jurisdiction. T.T. 106. Petitioner argued that contempt actions based upon Rule 36.01 do not apply to pleadings filed in extraordinary writs or grand jury proceedings. T.T. 106-107. The trial court overruled the motion. T.T. 108.

After the jury returned a verdict of guilty, Petitioner objected to the dismissal of the jury panel. T.T. 131. The Petitioner requested that the jury

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(Holding that contempt consists of petty and serious, the former carrying a range of punishment of less than six months, the latter more than six months.) and State ex rel. Robinson v. Hartenbach, 754 S.W.2d 568, 570 (Mo.banc 1988) (Holding that the range of punishment in statutory contempt causes is limited to one year in the county jail, but leaving undecided the range of punishment for common law contempt.)

receive evidence as to sentencing, and determine sentence. The trial court overruled the objection and dismissed the panel. T.T. 132. T.T.133. After dismissing the panel, the trial court allowed Petitioner to file a request for new trial. T.T. 133. On September 28, 2009, the parties appeared before Respondent for sentencing. Respondent heard evidence and sentenced Petitioner to 120 days in the Douglas County Jail Exhibit 21, Exhibit 22.

STATEMENT OF RELIEF SOUGHT

Petitioner seeks a Writ of Habeas Corpus ordering Respondent to refrain from executing a judgment of conviction entered following a jury trial which resulted in Petitioner's conviction for criminal contempt.

STANDARD OF REVIEW

"There is no right of appeal from a judgment of criminal contempt." *Thornton v. Doyle*, 969 W.W.2d 342 (Mo.App. E.D. 1998) citing *State ex rel. Tannenbaum v. Clark*, 838 S.W.2d 26, 28 (Mo.App.W.D. 1992). A person may seek a petition for a writ of habeas corpus when the person is "restrained of liberty within this state [in order] to inquire into the cause of such restraint." Rule 91.01. Rule 91 proceedings are limited to determining the facial validity of confinement on the basis of the entire record of the proceeding in question. *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993). Review is limited to determining whether the habeas court exceeded the bounds of its jurisdiction. *Id*.; *State ex rel. White v. Davis*, 174 S.W.3d 543, 547 (Mo.App. W.D.2005).

POINTS RELIED ON

I. **PETITIONER, ATTORNEY SMITH, IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE APPLICATION OF CRIMINAL CONTEMPT TO PETITIONER'S SPEECH VIOLATED HIS RIGHT TO FREEDOM OF SPEECH, GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATE'S CONSTITUTION AS IMPOSED UPON MISSOURI BY THE FOURTEENTH AMENDMENT, BY IMPOSING CRIMINAL SANCTION FOR SPEECH OCCURING IN THE COURSE OF THE ATTORNEY'S REPRESENTATION OF HIMSELF, HIS LAW OFFICE AND HIS CLIENT IN THAT THE ATTORNEY DRAFTED PLEADINGS IN A PETITION FOR WRIT OF PROHIBITION FILED AND SERVED IN A MANNER COMPLIANT WITH SUPREME COURT RULES, WITHOUT OTHER PUBLICATION, USING JUDICIAL PROCESSES TO RAISE AN ALLEGATION OF ABUSE OF PROCESS BY THE GRAND JURY OVER WHICH AN ELECTED JUDGE PRESIDED, AND THOUGH THE ATTORNEY INARTFULLY OR OFFENSIVELY CRITICIZED THE JUDGE, THE STATE STIPULATED THAT THE CONTENT OF THE PLEADINGS IN NO WAY IMPACTED THE GRAND JURY PROCESSES OR THE JUDGE'S RULINGS AND, GIVEN THE STATE'S STIPULATION, THE PLEADINGS FELL SHORT OF**

CREATING A CLEAR AND PRESENT DANGER TO THE ORDERLY ADMINISTRATION OF JUSTICE, WHILE MORE NARROWLY TAILORED MEANS OF SANCTION, INCLUDING ATTORNEY DISCIPLINARY ACTION, JUDICIALLY ENFORCED WITHDRAWAL, STRIKING OR AMENDMENT OF PLEADINGS, EXISTED; THEREFORE, HIS TRIAL AND JURY FINDING OF GUILT VIOLATED STRICT SCRUTINY IN THAT A CRIMINAL CONVICTION WAS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENT INTEREST.

Bridges v. State of California, 314 U.S. 252 (1941).

United States v. Williams, 539 U.S. 113 (2003).

Section 476.110, RSMo.

II. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE EITHER STATUTORY CONTEMPT OR COMMON LAW CONTEMPT IS OVERBROAD AND VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATE'S CONSITUTION AS IMPOSED UPON MISSOURI BY THE FOURTEENTH AMENDMENT IN THAT IT ALLOWS FOR THE PUNISHMENT OF PROTECTED, CONTENT-BASED SPEECH AND SPEECH THAT FALLS SHORT OF CREATING A CLEAR AND PRESENT DANGER TO THE ORDERLY ADMINISTRATION OF

JUSTICE AND ALLOWS PROSECUTION WHILE MORE NARROWLY TAILORED MEANS OF SANCTION, INCLUDING ATTORNEY DISCIPLINARY ACTION, JUDICIALLY IMPOSED WITHDRAWAL, STRIKING OR AMENDMENT OF PLEADINGS, EXIST; THEREFORE, HIS CONVICTION VIOLATES STRICT SCRUTINY IN THAT A CRIMINAL CONVICTION IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENT INTEREST.

Bridges v. State of California, 314 U.S. 252 (1941).

United States v. Williams, 539 U.S. 113 (2003).

Section 476.110, RSMo.

III. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE APPLICATION OF CRIMINAL CONTEMPT TO PETITIONER'S PLEADINGS VIOLATED HIS RIGHT TO PROCEED PRO SE, GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATE'S CONSTITUTION AS IMPOSED UPON MISSOURI BY THE FOURTEENTH AMENDMENT, BY IMPOSING CRIMINAL SANCTION FOR HIS SPEECH OCCURING IN THE COURSE OF THE ATTORNEY'S REPRESENTATION OF HIMSELF IN THAT THE ATTORNEY DRAFTED PLEADINGS IN A PETITION FOR WRIT OF PROHIBITION FILED AND SERVED IN A MANNER

COMPLIANT WITH SUPREME COURT RULES, WITHOUT OTHER PUBLICATION, USING JUDICIAL PROCESSES TO RAISE AN ALLEGATION OF ABUSE OF PROCESS BY THE GRAND JURY OVER WHICH AN ELECTED JUDGE PRESIDED, AND THOUGH THE ATTORNEY INARTFULLY OF OFFENSIVELY CRITICIZED THE JUDGE, THE STATE STIPULATED THAT THE CONTENT OF THE PLEADINGS IN NO WAY IMPACTED THE GRAND JURY PROCESS OR THE JUDGES RULINGS AND, GIVEN THE STATE'S STIPULATION, THE PLEADINGS FELL SHORT OF CREATING A CLEAR AND PREENT DANGER TO THE ORDERLY ADMINISTRATION OF JUSTICE, WHILE MORE NARROWLY TAILORED MEANS OF SANCTION, INCLUDING ATTORNEY DISCIPLINARY ACTION, JUDICIALLY IMPOSED WITHDRAWAL, STRIKING OR AMENDMENT OF PLEADINGS, EXISTED; THEREFORE, HIS TRIAL AND JURY FINDING OF GUILT VIOLATED STRICT SCRUTINY IN THAT A CRIMINAL CONVICTION IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENT INTEREST.

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985).

U.S. Const., Amend. VI.

IV. PETITIONER, ATTORNEY SMITH, IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR

CRIMINAL CONTEMPT BECAUSE THE PROSECUTION FOR CRIMINAL CONTEMPT VIOLATED THE PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS, GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATE'S CONSTITUTION AS IMPOSED UPON MISSOURI BY THE UNITED STATE'S CONSTITUTION BECAUSE THE STATE FAILED TO FOLLOW RULE 21.01'S REQUIREMENT TO FILE AN INFORMATION OR INDICTEMENT, FAILED TO SUPPPORT THE CHARGING DOCUMENT BY A STATEMENT OF PROBABLE CAUSE AS REQUIRED BY RULES 21.02 AND 21.04 AND FAILED TO FILE A PETITION OR PLEADING ALLEGING CRIMINAL CONTEMPT AS REQUIRED BY RULE 36.01 AND BECAUSE NO COURT OR STATE AGENCY SERVED THE PETITIONER WITH FORMAL PROCESS, SUMMONS OR WARRANT.

Missouri Rule of Criminal Procedure 21.

U.S. Const., Amend. V.

V. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE THE TRIAL COURT'S CONDUCT IN HAVING LUNCH WITH JUDGE CARTER, WHO ISSUED THE SHOW CAUSE ORDER IN A PUBLIC RESTAURANT IN THE DOUGLAS COUNTY SEAT ON THE DATE OF PETITIONER'S ARRAIGNMENT

WOULD LEAD A REASONABLE LAYPERSON TO QUESTION THE TRIAL JUDGE'S IMPARTIALITY; THUS, RULE 2.03, CANON 3E(1) REQUIRED RECUSAL IN THIS CIRCUMSTANCE BECAUSE THE TRIAL JUDGE PRESIDED IN A BENCH TRIAL OF A SUBSTANTIALLY RELATED MATTER, STATE V. RON JARRETT, REACHED A VERDICT AND IMPOSED SENTENCE AS TO THAT MATTER AFTER HEARING MITIGATING EVIDENCE THAT IMPLICATED ATTORNEY SMITH IN THAT CRIMINAL CONDUCT.

Moore v. Moore, 134 S.W.3d 110 (Mo. App. 2004).

Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238 (Mo. App. 1999).

Missouri Code of Judicial Conduct, Rule 2.03, Canon 3E.

VI. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE HE WAS DENIED PROCEDURAL DUE PROCESS IN THAT HIS CONVICTION WAS BASED ON CHARGING DOCUMENTS THE CONTENTS OF WHICH FAILED TO ALLEGE A CRIME.

State ex. rel. Selleck v. Reynolds, 158 S.W. 671 (Mo. Banc 1913).

Section 476.110, RSMo.

VII. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE THE JURY FOUND HIM GUILTY OF

COMMON LAW CONTEMPT, WHICH THE LEGISLATURE ELIMINATED.

Section 476.110, RSMo.

Mika v. Central Bank of Kansas City, 112 S.W.3d 82, 90 (Mo.App. W.D. 2003).

VIII. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE THE STATE FAILED TO FOLLOW RULE 55.03, THE EXCLUSIVE REMEDY TO ADDRESS REPRESENTATIONS MADE BY AN ATTORNEY.

Missouri Rule of Civil Procedure 55.03.

IX. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION IN THAT SUPREME COURT RULE 19 LIMITS CRIMINAL CONTEMPT TO CRIMINAL CASES.

Missouri Rule of Criminal Procedure 19.

Missouri Rule of Criminal Procedure 36.

X. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM RESPONDENT FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE RESPONDENT ERRED AT TRIAL IN APPROVING THE STATE'S PROPOSED VERDICT DIRECTOR AND REFUSING PETITIONER'S PROPOSED VERDICT

DIRECTOR BECAUSE THE INTRUCTION OF THE STATE FAILED TO REQUIRE FINDINGS AS THE ESSENTIAL ELEMENTS OF CONTEMPT.

State v. Shirley, 657 S.W.2d 686, 688 (Mo. App. E.D. 1983).

XI. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE RESPONDENT ERRED IN OVERRULING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE BECAUSE THE EVIDENCE WAS INSUFFICIENT.

State v. Vandevere, 175 S.W.3d 107, 108 (Mo. banc 2005).

ARGUMENT[4]

I. PETITIONER, ATTORNEY SMITH, IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE APPLICATION OF CRIMINAL CONTEMPT TO PETITIONER'S SPEECH VIOLATED HIS RIGHT TO FREEDOM OF SPEECH, GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATE'S CONSTITUTION AS IMPOSED UPON MISSOURI BY THE FOURTEENTH

[4] Petitioner incorporates all exhibits previously submitted into his argument.

AMENDMENT, BY PLACING CRIMINAL SANCTION FOR SPEECH OCCURING IN THE COURSE OF THE ATTORNEY'S REPRESENTATION OF HIMSELF, HIS LAW OFFICE AND HIS CLIENT IN THAT THE ATTORNEY DRAFTED PLEADINGS IN A PETITION FOR WRIT OF PROHIBITION FILED AND SERVED IN A MANNER COMPLIANT WITH SUPREME COURT RULES, WITHOUT OTHER PUBLICATION, USING JUDICIAL PROCESSES TO RAISE AN ALLEGATION OF ABUSE OF PROCESS BY THE GRAND JURY OVER WHICH AN ELECTED JUDGE PRESIDED, AND THOUGH THE ATTORNEY INARTFULLY OR OFFENSIVELY CRITICIZED THE JUDGE, THE STATE STIPULATED THAT THE CONTENT OF THE PLEADINGS IN NO WAY IMPACTED THE GRAND JURY PROCESSES OR THE JUDGE'S RULINGS AND, GIVEN THE STATE'S STIPULATION, THE PLEADINGS FELL SHORT OF CREATING A CLEAR AND PRESENT DANGER TO THE ORDERLY ADMINISTRATION OF JUSTICE, WHILE MORE NARROWLY TAILORED MEANS OF SANCTION, INCLUDING ATTORNEY

DISCIPLINARY ACTION, JUDICIALLY ENFORCED WITHDRAWAL, STRIKING OR AMENDMENT OF PLEADINGS, EXISTED; THEREFORE, HIS TRIAL AND JURY FINDING OF GUILT VIOLATED STRICT SCRUTINY IN THAT A CRIMINAL CONVICTION WAS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENT INTEREST.

Courts cannot censor attorney speech absent clear and present danger. *Bridges v. State of California*, 314 U.S. 252 (1941). Criminal contempt seeks to avoid disruption of the judicial process, not criticism of it. The state of Missouri tried Attorney Smith for a crime supposedly committed by drafting and filing a pleading in support of a Writ of Prohibition. The Writ sought redress from a ruling issued by the Judge Carter by stating:

1. "The attached exhibits reflect the personal interest, bias and purported criminal conduct of Respondent [Judge Carter], Prosecuting Attorney Christopher Wade, and others [sic] members in the judicial system in the Forty-Fourth Judicial Circuit. Their participation in the convening, overseeing, and handling the proceedings of this grand jury are, in the least, an appearance of impropriety and, at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent

persons to cover-up and chill public awareness of their own apparent misconduct using the power of their positions to do so."

2. When Petitioners [sic][Attorney Smith] on March 31, 2008 asked Respondent [Judge Carter] and the prosecuting attorney [Mr. Wade] who were the targets of this grand jury, Petitioners' assertion that the targets were Petitioners and their counsel [Attorney Smith] was met with the tacit admission of silence. This grand jury, as in the last grand jury in Douglas County, is being used by those in power in the judicial system as a covert tool to threaten, intimidate and silence any opposition to their personal control-not the laudable common law and statutory purposes for which the grand jury system was created." Exhibit 1.

The State presented no evidence that Attorney Smith caused clear and present danger to the judicial processes. Rather, the state conceded the point.

> …PLAINTIFF STIPULATES THAT THE ACTIONS OF THE DEFENDANT DID NOT INTERFERE W/GRAND JURY AND THAT JUDGE CARTER DID NOT RULE DIFFERENTLY, OR FAIL TO TAKE ANY ACTION WITH REGARD TO THE GRAND JURY BASED ON ACTIONS OF DEFENDANT…. (Exhibit 5).

No uproar occurred in any court room. No bailiffs beat off the mob. Nothing disruptive happened to anyone other than Attorney Smith, who faces a jail sentence.

1. *If a citizen's speech creates no clear and present danger, then the First Amendment bans criminal prosecution of it.*

While a citizen is not protected by the First Amendment when yelling fire in a crowded theater, regulation of protected speech is permissible only when that speech presents a "…clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 294 U.S. 47, 52 (1919). The courts apply the *Schenck* standard of "clear and present danger" to criminal contempt prosecutions. In *Bridges v. State of California*, 314 U.S. 252 (1941), a state court convicted and fined newspaper publishers for criminal contempt based on statements made in editorials regarding pending cases. *Bridges*, 314 U.S. at 259. In reviewing First Amendment case law and reversing the convictions, the Court stated "…the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.* at 263.

The Court again applied the "clear and present danger" standard in reversing the contempt conviction of a Florida newspaper editor, for editorial comments made about pending cases. *Pennekamp v. Florida*, 328 U.S. 331 (1946). In *Craig v. Harney*, 331 U.S. 367 (1947), the Court applied the "clear and present danger" standard in reversing contempt convictions of a newspaper publisher based on criticism of a judge. *Harney*, 331 U.S. at 376. The Court declared that the "…vehemence of the language alone…" did not amount to contempt. *Id.* The threat to the administration of justice must also be imminent, or immediate. *Id.* In

reversing the conviction the court found no imminent or immediate threat caused by the vehement criticism of the judge. *Id.* Finally, in *Wood v. Georgia*, 370 U.S. 375 (1962), the Supreme Court again applied the "clear and present danger" standard when reversing criminal contempt convictions for speech-related incidents. *See Wood v. Georgia*, 370 U.S. 375 (1962).

Missouri courts follow the clear and present danger standard. In *McMilian v. Rennau*, 619 S.W.2d 848 (Mo. App. 1981), the Missouri Court of Appeals for the Western District reversed a judgment of contempt against a sheriff (McMilian) who attempted to contact a judge about a pending case and then, through a bailiff, told the judge that "…all judges are full of shit…" and "…to stick it up his fucking ass…" when the judge refused to talk to McMilian. *Rennau*, 619 S.W.2d at 850. The Western District held that the trial court lacked contempt authority over McMilian because the record revealed no "…demonstrated impediment to the judicial process, real, threatened and imminent." *Id.* at 853. In the criminal contempt setting, the *McMilian* court followed the "clear and present danger" standard. *Id.*

2. *The substantial likelihood of material prejudice test only applies to non criminal sanctions for uncivil speech.*

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), five Justices, writing for the majority, in dictum stated that the disciplinary actions for attorney speech should be subjected to a less restrictive test. The test still remained formidable: the justices stated that the disciplinary authority may discipline

speech which produced a "substantial likelihood of materially prejudicing an adjudicative proceeding." *Gentile*, 501 U.S. at 1063. *Gentile* concerned a Nevada attorney (Gentile) who held a press conference upon the indictment of one of his clients. *Id.* at 1033. Nevada's Supreme Court Rule 177 prohibited attorneys from making *extrajudicial* statements that had a "substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* (emphasis added). The Nevada State Bar recommended a private reprimand, prompting Gentile's appeal. *Id.*

Ultimately, the Court struck down Nevada's Rule 177 as being void for vagueness due to a "safe harbor" provision that led Gentile to believe he was safe from discipline. *Id.* at 1048-49. However, in dicta, the Court endorsed Nevada's "substantial likelihood" threshold for attorneys making extrajudicial statements concerning pending cases. *Id.* at 1072.

Petitioner's case is distinguishable. Petitioner faced a criminal prosecution, not a disciplinary proceeding. Petitioner faced jail, not a private reprimand. Petitioner made a remark in the quiet judicial setting of an appellate pleading, not an extrajudicial press conference before the media. *Gentile* did not change the "clear and present danger" standard in criminal contempt cases, and never overruled *Bridges*, *Pennekamp*, or *Wood*.

3. *The First Amendment bars prosecution of Attorney Smith under either the clear and present danger test or substantial likelihood of material prejudice test.*

Similarly to *Gentile*, however, the state presented to the jury no evidence in Attorney Smith intended to disrupt the administration of the court nor that he did so. Nor could he, in context. Assuming pleadings without merit and no threat of harm, the most vehement, profane, bold faced, large font, all-capitalized pleading of an appearance of impropriety in a Writ Petition will not stir a leaf in the foliage of the courthouse surrounds, much less create a substantial likelihood of material prejudice nor clear and present danger. Attorney Smith's pleadings contained no threats or profanity. During a hearing on June 29, 2009, the Assistant Attorney General *admitted* that "the actions of [Petitioner] did not interfere with the Grand Jury." Exhibit 8. The Assistant Attorney General further stipulated that Judge Carter "…did not rule differently or fail to take any action with regard to the Grand Jury based on actions of [Petitioner]." Ex. 8.

i. Elected trial judges are not substantially likely to alter rulings after reading an uncivil pleading.

Courts find attorney criticism of elected trial judges protected. *See, e.g.*, *Wood v. Georgia*, 370 U.S. 375 (1962)(local sheriff's criticism judge regarding charge to grand jury protected); *Pennekamp v. Florida*, 328 U.S. 331 (1946) (newspaper editor's criticism of a judge during pending case protected); *Craig v. Harney*, 331 U.S. 367 (1947)(newspaper criticism of judge during trial protected); *McMilian v. Rennau*, 619 S.W.2d 848 (Mo. App. 1981)(insult to judge protected). Elected trial judges undertake the gauntlet of political discourse in seeking their position, so they lack the fragility of insulated academics. The public invested in

trial judges their vote; and as stakeholders, the public not infrequently demands accountability of their elected judges. Trial judges face headlines, courtroom gossip, and more than their share of frowns from the gallery. They preside over the crucible of the adversarial process, where they at times receive the occasional elbow from attorneys charged with protecting clients; attorneys, who occasionally mistake the duty of loyalty for persuasive advocacy. Rhetorical barbs and uncivil pleadings do not ordinarily move the elected trial judge from the post of fair arbiter. For this reason, an uncivil argument made in a pleading should not be considered to substantially affect the rulings of such a fair arbiter.

ii. Inartful pleadings do not create a substantial likelihood of material prejudice.

Petitioner's prosecution is based on the appearance of the word "Respondent" in a pleading to the Southern District. The reference arises with no context. None of the exhibits established that proposition, although they described criminal or immoral conduct of others. In context, the use of the word Respondent suggests a drafting error. A petition for writ of prohibition must allege wrongdoing by the judge. Rule 97.03. That requirement apparently led to an unfortunate choice of words by including Judge Carter, though not by name, with the people Mr. Jarrett's affidavit discussed. While the two offending paragraphs arguably constituted inartful drafting, they created no imminent threat to the power of the court necessary to justify punishing speech based on its content. Petitioner created no immediate, imminent threat to the decorum of the court or the

administration of its duties. Therefore, Petitioner's speech created no clear and present danger. Without a clear and present danger, the First Amendment protects Petitioner's offensive speech.

iii. *Arguments do not present a clear and present danger nor substantial likelihood of material prejudice.*

Attorney Smith drafted the harsh criticism in two paragraphs in the argument section of the Writ, entitled "Statement of Reasons Why Writ Should Issue." (Exhibit 4). He drafted the pleadings in the classic form of argument, in the argument section of the Petition. Rule 84.24(a)(2) requires argument in Petitions for Extraordinary Writs. He referenced exhibits attached to the Petition. He drew inferences from the facts described in the exhibits. The inferences drew an unpleasant, harsh and perhaps unfair depiction of a Grand Jury process and the Forty Fourth Judicial Circuit.

That said, these arguments share a basic quality with opinions: they do not pretend to assert fact. Courts traditionally protect opinions when the persons who utter them face sanction. The courts also protect pleadings.

In this case, the court should protect the author of these pleadings. Though overstated, Attorney Smith raised a valid and meritorious issue that Judge Carter wrongfully failed to quash the subpoena. The Grand Jury issued a subpoena compelling Attorney Smith's secretary, Amanda Evans, to produce the "notary log book for the year of 2006; any item evidencing notary work performed on behalf of Ron Jarrett." Exhibit 6. Attorney Smith represented Ron Jarrett in Wright

County as to a criminal charge. Attorney Smith filed a motion to quash the subpoena. At trial, Judge Carter conceded that he interpreted the subpoena to request work product not limited to the affidavit already disclosed in the Wright County prosecution. T.T. 79. Judge Carter also allowed that the motion had merit. T.T. 82. This Court addressed a petition for writ of prohibition attacking a similarly worded grand jury subpoena, and quashed it. *State ex rel. Rogers v. Cohen*, 262 S.W.3d 648 (Mo. 2008). The ruling occurred three months after Attorney Smith filed his Petition for Writ. *Id.*

The judge and the prosecutors created an opening for a fair, though disputable, argument. In this matter, the Douglas County grand jury issued a subpoena for material "evidencing notary work performed on behalf" of Attorney Smith's client Ron Jarrett who faced prosecution in Wright County. The prosecutor of Wright County employed the prosecutor of Douglas County as an assistant. T.T. 97-98. The Douglas County Prosecutor employed the Wright County prosecutor as his assistant. T.T. 97-98. The Douglas County Grand Jury, presided over by Judge Carter, assisted by the Douglas County prosecutor, issued a subpoena seeking privileged information relevant to the Wright County prosecutor's case against Mr. Jarrett. Exhibit 1. The sanctity of the grand jury process may fairly be questioned by the target of the grand jury subpoena.

Mr. Smith never explicitly argued that abuse. Yet, the facts remain that the state indisputably obtained a jail sentence for the pleading of the argument or opinion that there was something rotten in the Forty-Fourth Judicial Circuit. In

Attorney Smith's words: "Their participation in the convening, overseeing, and handling the proceedings of this grand jury are, in the least, an appearance of impropriety…." The argument as to impropriety arose from facts known by the judge before whom Petitioner sought relief. Exhibit 1.

In the continuation of the argument, Attorney Smith's pleadings draw the readers from the possibility of an appearance of impropriety to darker motives in that the exhibits showed: "[and], at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent persons to cover-up and chill public awareness of their own apparent misconduct using the power of their positions to do so." At the farthest limits of persuasion, Attorney Smith drafted the pleadings in the form of argument, offering the reader a range of inferences from appearance of impropriety, to at most, the use of judicial processes in furtherance of personal or political interest. He pled argument or opinion, not fact. However robust, he pled it in an obscure legal process and no cold wind blew as a result.

iv. Allowing the prosecution of Attorney Smith will chill advocacy of attorneys.

By prosecuting a lawyer for a pleading drafted from the perspective of the client, the state confused the lawyer with the client: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Rule 4-1.2. At the least, the state convicted a lawyer for pleading an

unpersuasive argument made on behalf of a deceitful client. At most the state convicted him for the lawyer's written equivalent of "where are your glasses, Ump." Inappropriate, maybe, but hardly worthy of criminal prosecution.

4. The court should discharge Petitioner.

Without more evidence than two paragraphs of pleadings from the argument section of a petition, the State's case failed. The First Amendment forbids the prosecution of contempt unless the speech created a clear and present danger. From the state's case in chief, no evidence supported the inference that any one other than Judge Carter or employee(s) or member(s) of the Missouri Court of Appeals of the Southern district knew about the pleadings. The pleadings find themselves published herein, with an audience greater in quantity if not quality. Yet no clear and present danger swept down upon the judiciary after their filing. Because the First Amendment forbids censorship of attorney speech by criminal sanction in the absence of clear and present danger, the writ prohibiting the trial court from further action must issue with orders vacating the finding of guilt.

II. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE EITHER STATUTORY CONTEMPT OR COMMON LAW CONTEMPT IS OVERBROAD AND VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED

STATE'S CONSITUTION AS IMPOSED UPON MISSOURI BY THE FOURTEENTH AMENDMENT IN THAT IT ALLOWS FOR THE PUNISHMENT OF PROTECTED, CONTENT-BASED SPEECH AND SPEECH THAT FALLS SHORT OF CREATING A CLEAR AND PRESENT DANGER TO THE ORDERLY ADMINISTRATION OF JUSTICE AND ALLOWS PROSECUTION WHILE MORE NARROWLY TAILORED MEANS OF SANCTION, INCLUDING ATTORNEY DISCIPLINARY ACTION, JUDICIALLY IMPOSED WITHDRAWAL, STRIKING OR AMENDMENT OF PLEADINGS, EXIST; THEREFORE, HIS CONVICTION VIOLATES STRICT SCRUTINY IN THAT A CRIMINAL CONVICTION IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENT INTEREST.

> Those who won our independence knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Whitney v. California, 247 U.S. 357 (1927).

A. Criminal Contempt, Prosecuted Under Section 476.110, Is Unconstitutionally Overbroad Because it Prohibits Protected Speech

A statute is facially invalid if it "prohibits a substantial amount of protected speech." *United States v. Williams*, 539 U.S. 113, 119-120 (2003). In Missouri, statute governs contempt of court. RSMo 476.110. Section 476.110 restricts the court's inherent contempt powers by describing the punishable acts. Section 476.110 allows the courts to punish for:

> (1) Disorderly, contemptuous or insolent behavior committed during its session, in its immediate view and presence, and directly tending to interrupt its proceeding or to impair the respect due to its authority;
>
> (2) Any breach of the peace, noise or other disturbance directly tending to interrupt its proceedings;
>
> (3) Willful disobedience of any process or order lawfully issued by [the court];
>
> (4) Resistance willfully offered by any person to the lawful order or process of the court;
>
> (5) The 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. RSMo 476.110.

While the State's Bill of Particulars and verdict director indicate Petitioner's prosecution was based in common law, to the extent that Petitioner's prosecution was based on Section 476.110, Section 476.110 is overbroad. Section

476.110 sets no limit on what speech, if any, may be prosecuted. Section 476.110 allows for the punishment of any speech so long as it violates a court order (Section 476.110(3), RSMo), is considered disorderly, contemptuous, or insolent (Section 476.110(1), RSMo), or constitutes any breach of the peace "directly tending to interrupt" court proceedings (Section 476.110(2), RSMo). Even if Section 476.110 allows for the prosecution of an individual based on non-protected speech, such as obscene speech, it would also allow for the prosecution of protected speech, such as content or viewpoint-based speech, which is the speech at issue in this case. Such a sweeping restriction is unconstitutional.

B. *Criminal Contempt Prosecuted Under the Common Law is Overbroad Because it Prohibits Protected Speech*

If a common law criminal contempt exists, its elements appear to be: 1) actual knowledge of; 2) a court order; 3) that the court order was lawful; 4) willful conduct in violation of the court order's terms; 5) the intent to defy and degrade the court order; and 6) actual obstruction of the administration of justice. *See State Ex Rel. Girard v. Percich*, 557 S.W.2d 25, 36 (Mo. App. 1977). Again, the common law, to the extent that it exists, is overbroad. Common law contempt is unconstitutionally overbroad for much the same reason Section 476.110 is overbroad. Based on the elements that appear to comprise common law contempt, any speech, even protected speech, may be punished. A heated disagreement with a judge in violation of a "court order" could form the basis of a criminal contempt prosecution. The ability to prohibit such a wide range of potential speech is the

very definition of overbreadth. *See United States v. Williams*, 539 U.S. 113, 119-120 (2003). This Court cannot tolerate such a restriction on freedom of speech.

C. Petitioner's Conviction Based on the Content of His Speech Fails Strict Scrutiny Because it is Not Narrowly Tailored to Further a Compelling State Interest

The State prosecuted Petitioner based on the content of his speech, nothing else. Petitioner's prosecution criminally condemns statements written in a pleading. That being the case, Petitioner's prosecution is a content-based speech restriction. As such, it is entitled to strict scrutiny. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985). The state satisfies strict scrutiny only if the state proves the restriction is narrowly tailored to serve a compelling government interest. *Cornelius*, 473 U.S. at 800. The question at this point is not whether the speech is protected, because Petitioner's speech created no clear and present danger to the orderly administration of justice. The question is whether the State has a compelling interest in restricting it, and if so, whether the contempt prosecution is narrowly tailored to serve that interest. *Id.* If the Court considers any interest advanced by the State to be a compelling government interest for strict scrutiny purposes, the Court must consider whether criminal contempt is a narrowly tailored remedy. *Id.* If it is not, it fails strict scrutiny and the restriction is unconstitutional. *Id.*

Review of the remedies available readily disclose that more narrowly tailored remedies are available that may address the issue in this case without the

necessity of a criminal prosecution. Any of these possible alternatives better serve the First Amendment by reducing the "chilling" effect of speech caused by the threat of criminal prosecution, especially prosecution for overreaching in a pleading, which is an unfortunate reality among even the best lawyers.

Rule of Professional Conduct 4.3.5 limits a lawyer's communication to a tribunal when advocating on behalf of a client. The Rule prohibits lawyers from "seeking to influence a judge" or engaging "in conduct intended to disrupt a tribunal." Rule 4.3.5. Violation of Rule 4.3.5 may lead to serious consequences, but also the rule may lead, as in *Gentile*, to a private reprimand. An issue remains as to whether the form of restriction used by the State is narrowly tailored to serve its interest in maintaining the integrity and decorum of the court. Certainly, *Gentile* proscribes prosecution because no substantial likelihood existed that Petitioner materially prejudiced a trial judge presiding over a grand jury.

Missouri Supreme Court Rules contemplate a different remedy for Petitioner's speech. Rule 55.27(e) allows a trial or appellate court to strike any material from a pleading that contains inappropriate statements. Rule 55.27(e) confers on the court the power to do so at any time, without a motion from either party. Rule 55.27(e), Rule 41.01(a)(1). The appellate courts hold the option of simply deleting the objectionable language from the Writ of Prohibition that is the subject of Petitioner's prosecution. Deleting the objectionable language is more narrowly tailored to the State's interest. Thus, like Rule 4.3.5, Rule 55.27(e)

eliminates the need for criminal prosecution over speech. This, along with Rule 4.3.5, is not yet the end of the remedies available to the Court.

Rule 55.03(c) states that an attorney filing pleadings certifies that the pleadings are for no improper purpose. Violation of Rule 55.03(c) may result in sanctions including the awarding of attorney's fees and requiring the offender to correct or withdraw the statement. Rule 55.03(c) thus provides yet another way to preserve the integrity of the court while at the same time preserving the integrity of the First Amendment.

The criminal prosecution of Petitioner, on the other hand, punishes speech, and therefore, chills speech. Under the First Amendment, such a prosecution is unconstitutional. Because Petitioner's prosecution violates the First Amendment, Petitioner asks this Court to issue a Writ of Prohibition.

III. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE APPLICATION OF CRIMINAL CONTEMPT TO PETITIONER'S PLEADINGS VIOLATED HIS RIGHT TO PROCEED PRO SE, GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATE'S CONSTITUTION AS IMPOSED UPON MISSOURI BY THE FOURTEENTH AMENDMENT, BY IMPOSING CRIMINAL SANCTION FOR HIS SPEECH OCCURING IN THE COURSE OF THE ATTORNEY'S

REPRESENTATION OF HIMSELF IN THAT THE ATTORNEY DRAFTED PLEADINGS IN A PETITION FOR WRIT OF PROHIBITION FILED AND SERVED IN A MANNER COMPLIANT WITH SUPREME COURT RULES, WITHOUT OTHER PUBLICATION, USING JUDICIAL PROCESSES TO RAISE AN ALLEGATION OF ABUSE OF PROCESS BY THE GRAND JURY OVER WHICH AN ELECTED JUDGE PRESIDED, AND THOUGH THE ATTORNEY INARTFULLY OF OFFENSIVELY CRITICIZED THE JUDGE, THE STATE STIPULATED THAT THE CONTENT OF THE PLEADINGS IN NO WAY IMPACTED THE GRAND JURY PROCESS OR THE JUDGES RULINGS AND, GIVEN THE STATE'S STIPULATION, THE PLEADINGS FELL SHORT OF CREATING A CLEAR AND PREENT DANGER TO THE ORDERLY ADMINISTRATION OF JUSTICE, WHILE MORE NARROWLY TAILORED MEANS OF SANCTION, INCLUDING ATTORNEY DISCIPLINARY ACTION, JUDICIALLY IMPOSED WITHDRAWAL, STRIKING OR AMENDMENT OF PLEADINGS, EXISTED; THEREFORE, HIS TRIAL AND JURY FINDING OF GUILT VIOLATED STRICT SCRUTINY IN THAT A CRIMINAL CONVICTION

IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENT INTEREST.

Petitioner's criminal prosecution for contempt of court is unconstitutional as applied to Petitioner's speech because it violates his right to counsel under the Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. Petitioner's prosecution creates a chilling effect on speech, and thus, inhibits the attorney's ability to represent his client, and the converse right to proceed without an attorney. *See, e.g., In Re Little,* 404 U.S. 553, 555 (1972)(*per curiam*)(*pro se* defendant's argument that judge was biased protected). In this case, Petitioner, in his Petition for Writ of Prohibition, acted on behalf of himself, his law office, his assistant, Amanda Evans and Ron Jarrett his client. The right to counsel is a direct constitutional right. U.S. Const., Amend. VI. By way of analogy, an abridgment on such a right should face strict scrutiny, similar to the abridgment of speech based on its content. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985). Under strict scrutiny, Petitioner's conviction fails because, as discussed above, more narrowly drawn means exist to achieve whatever interest the State advances while protecting Petitioner's right to proceed *pro se*.

IV. PETITIONER, ATTORNEY SMITH, IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE THE PROSECUTION FOR CRIMINAL CONTEMPT

VIOLATED THE PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS, GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATE'S CONSTITUTION AS IMPOSED UPON MISSOURI BY THE UNITED STATE'S CONSTITUTION BECAUSE THE STATE FAILED TO FOLLOW RULE 21.01'S REQUIREMENT TO FILE AN INFORMATION OR INDICTEMENT, FAILED TO SUPPPORT THE CHARGING DOCUMENT BY A STATEMENT OF PROBABLE CAUSE AS REQUIRED BY RULES 21.02 AND 21.04 AND FAILED TO FILE A PETITION OR PLEADING ALLEGING CRIMINAL CONTEMPT AS REQUIRED BY RULE 36.01 AND BECAUSE NO COURT OR STATE AGENCY SERVED THE PETITIONER WITH FORMAL PROCESS, SUMMONS OR WARRANT.

Missouri Rule of Criminal Procedure Rule 21.02 requires the prosecutor to support a misdemeanor charge with a statement of probable cause. Rule 21.02. Under Rule 21.04, the probable cause statement must be in writing and contain information such as: 1) name of the accused; 2) date and place of crime; 3) facts supporting probable cause; 4) a statement that the facts in the probable cause statement are true; and 5) a signature. Rule 21.04. Further, under Rule 21.03, a summons or warrant must issue. In this case, no formal process was issued to

Petitioner. No warrant issued, nor did a summons issue. The State prepared no probable cause statement. Thus, Petitioner's prosecution violated Rules 21.02 and 21.04 and should be reversed.

V. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM EXECUTING A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE JUDGE WITT'S ACTIONS IN HAVING LUNCH WITH JUDGE CARTER IN A PUBLIC RESTAURANT IN THE DOUGLAS COUNTY SEAT ON THE DATE OF PETITIONER'S ARRAIGNMENT WOULD LEAD A REASONABLE LAYPERSON TO QUESTION JUDGE WITT'S IMPARTIALITY; THUS, RULE 2.03, CANON 3E(1) REQUIRED RECUSAL; FURTHER, JUDGE WITT PRESIDED OVER THE BENCH TRIAL OF RON JARRETT, WHOSE AFFIDAVITS FORMED THE BASIS OF THE SPEECH FOR WHICH THE STATE PROSECUTED PETITIONER.

Missouri's Code of Judicial Conduct states that a judge "…*shall* recuse in a proceeding in which the judge's impartiality might reasonably be questioned…" Rule 2.03, Canon 3E(1)(emphasis added). A judge is required to recuse not only where there is an actual bias, but also where a "…reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court." *Moore v. Moore*, 134 S.W.3d 110, 115 (Mo. App.

2004). The affirmative duty is "…a duty owed to the public in order to promote confidence in the impartiality of the judiciary." *Robin Farms, Inc. v. Bartholome*, 989 S.W.2d 238 (Mo. App. 1999). The "reasonable person" standard is objective, not subjective. *Id.* The "reasonable person" standard refers to a reasonable layperson. *Youngblood v. Youngblood*, 194 S.W.3d 886, 896 (Mo. App. 2006). Further, while it has been held that based on the *sui generis* nature of a criminal contempt proceeding, no statute or rule provided for a change of judge without cause (*see Erhart v. Todd*, 325 S.W.2d 750 (Mo. 1959)), Canon 3E(1) provides for recusal in the interests of maintaining judicial impartiality, rather than a change of judge as a matter of statutory right. Rule 2.03, Canon 3E(1).

Judge Carter testified at a deposition on April 28, 2009 (Ex. 3). During his testimony, Judge Carter admitted having lunch with Judge Witt at the Ruby Garden Restaurant in Ava, Missouri, after Judge Carter's Order. Only minutes from the Douglas County Courthouse in Ava, and in the public view, Judge Witt had lunch with an endorsed State's witness in a criminal case after Judge Carter filed the Order. Judge Carter testified that he and Judge Witt did not discuss Petitioner's case and that they were only "acquaintances." Exhibit 3. Although Judge Carter failed to recall the court date, Judge Witt admitted the lunch occurred before or after Petitioner's arraignment. Exhibit 2. The lunch created circumstances that would cause a reasonable layperson to question Judge Witt's impartiality. A reasonable layperson seeing Judge Witt and Judge Carter eating together after Judge Witt's assignment to the case would naturally raise questions

as to whether Petitioner's case came up during conversation. These circumstances required Judge Witt's recusal. The appearance of impropriety rendered the proceedings questionable, the rulings on Petitioner's pre-trial motions doubtful, and the conviction appears unsound. Thus, Petitioner's conviction must be reversed.

Although Judge Witt's lunch with Judge Carter created a sufficient appearance of impropriety to require Judge Witt's recusal, another ground exists that required Judge Witt's recusal. Judge Witt presided over the perjury trial of Ron Jarrett, case number 08-DGCR0002. See Exhibit 7. Petitioner's statements that resulted in his prosecution for criminal contempt substantially arose from his inclusion of and reference to affidavits authored by Ron Jarrett. See Exhibit 8. Judge Witt convicted Ron Jarrett of perjury after a bench trial. The alleged perjury arose from testimony substantially and materially related to the contents of Mr. Jarrett's affidavits. In Mr. Jarrett's trial, the State and Mr. Jarrett's defense counsel presented and referred to the affidavits. See Exhibit 7.

When a judge presides over substantially related matters or the judge determined facts in one proceeding and presides over a jury in the other, the Court must consider whether being apprised of "personal knowledge of disputed evidentiary facts concerning the proceeding" created an appearance of impropriety. *Bartlett v. Kansas City Southern Railway Co.*, 854 S.W.2d 396 (Mo.Banc 1993). Here, Judge Witt clearly possessed personal knowledge of the disputed facts in Petitioner's jury trial. The disputed facts arose from affidavits

that became the subject of Ron Jarrett's perjury prosecution, over which Judge Witt presided. Judge Witt's knowledge of the affidavits that formed the basis of the speech for which Petitioner was prosecuted created an appearance from which a reasonable lay person could conclude that the Court's impartiality might be impaired. Moreover, Judge Witt ate lunch with the complaining witness on the day of Realtor's arraignment. This factor tipped the balance in favor of recusal. *Bartlett*, 854 S.W.2d at 402. Therefore, Petitioner's conviction must be reversed and Petitioner must be discharged.

VI. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE HE WAS DENIED PROCEDURAL DUE PROCESS IN THAT HIS CONVICTION WAS BASED ON CHARGING DOCUMENTS THE CONTENTS OF WHICH FAILED TO ALLEGE A CRIME.

"It is only one short step from the assertion of inherent power to the assumption of absolute power." *State ex. rel. Selleck v. Reynolds*, 158 S.W. 671, 681 (Mo.banc 1913) (Brown, J., concurring). Although a court's inherent power to punish for contempt cannot be "shorn" by statute, *see Osborne v. Purdome*, 244 S.W.2d 332, 334 (Mo. 1954), that power is subject to statutory enactment. *Ex Parte Ryan*, 607S.W.2d 888, 890-91 (Mo. App. 1980). Further, statutory requirements are mandatory. *State Ex Rel. Robinson v. Hartenbach*, 754 S.W.2d

568 (Mo. Banc. 1988)(citing *Ex Parte Hough,* 544 S.W.2d 333, 334 (Mo. App. 1976).

Missouri statute abrogates common law criminal contempt. RSMo 476.110. Section 476.110 restricts the court's inherent contempt powers by describing the punishable acts. The statute allows the courts to punish for:

> (1) Disorderly, contemptuous or insolent behavior committed during its session, in its immediate view and presence, and directly tending to interrupt its proceeding or to impair the respect due to its authority;
>
> (2) Any breach of the peace, noise or other disturbance directly tending to interrupt its proceedings;
>
> (3) Willful disobedience of any process or order lawfully issued by [the court];
>
> (4) Resistance willfully offered by any person to the lawful order or process of the court;
>
> (5) The 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.

RSMo 476.110.

Further, to the extent that a common law criminal contempt exists, its elements appear to be: 1) actual knowledge of; 2) a court order; 3) that the court order was lawful; 4) willful conduct in violation of the court order's terms; 5) the intent to defy and degrade the court order; and 6) actual obstruction of the

administration of justice. *See State Ex Rel. Girard v. Percich*, 557 S.W.2d 25, 36 (Mo. App. 1977).

Supreme Court Rule 36.01(b) requires the following with regard to notice in a criminal contempt action: 1) the notice must state the time and place of hearing; 2) the notice must state the essential facts alleging contempt and must describe those acts as criminal contempt. Rule 36.01(b). Further, the notice "…shall be given orally by the judge in open court in the presence of the defendant or, on application of the prosecuting attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest." Rule 36.01(b). Moreover, procedural due process in a criminal contempt case requires the following: 1) the alleged contemnor be advised of the charges against him; 2) have a reasonable opportunity to meet those charges; 3) the right to be represented by counsel; 4) the opportunity to present evidence in defense or explanation. *See Mechanic v. Gruensfelder*, 461 S.W.2d 298, 309 (Mo. App. 1970).

Here, Judge Carter's order (Ex. 1) does not state the essential facts constituting the alleged contempt, nor does it state the time and place of a hearing. In fact, the Order never uses the words "criminal contempt" and never begins to set a time and place for hearing. Without these elements, Rule 36.01(b) is not satisfied. While some allowance has been granted regarding a court's failure to include a time and place of hearing in its contempt order (*see, e.g. Mechanic v.*

Gruensfelder, *supra*, at 310), such allowance cuts against the clear language of Rule 36.01(b).

Petitioner's prosecution began with a show cause order issued by the Honorable Craig Carter. Ex. 1. Judge Carter's order came in response to statements made in a writ of prohibition Petitioner filed in the Missouri Court of Appeals for the Southern District. *See* Ex. 1.The trial judge, the Honorable Gary Witt, granted Petitioner's Motion for Bill of Particulars. In response, the State filed a Bill of Particulars. Exhibit 2. The Bill alleges no contempt. The Bill essentially stated that Petitioner filed a Petition for Writ of Prohibition, that Judge Carter signed a contempt order, a conclusory statement that the contempt order set forth the facts constituting contempt, that Judge Carter referred to exhibits the State *did not intend to rely on* as "scurrilous," "defamatory," and "venomous," but that the State thought such evidence would still be admissible. The Bill fails to apprise Petitioner of the nature of the allegations. The Bill simply says that Judge Carter "set forth two paragraphs from [Petitioner's] petition" and that the State only intended to proceed on those two paragraphs. The Bill makes no mention of how the two paragraphs constituted contempt, whether that contempt was direct or indirect, or whether the state contemplate pursuing contempt by statute or common law contempt (to the extent common law criminal contempt exists). The words "criminal contempt" never appear in the Bill.

The Bill clearly alleges no act that would constitute contempt under Section 476.110, RSMo, because no language from the statute appears in the Bill. The

absence of any language from Section 476.110 indicates that the State proceeded under common law. However, no language approximating the traditional elements of common law contempt appeared in the Bill. Thus, the Bill failed to allege an offense under any form of criminal contempt. Based on the deficiency in the "charging language," Petitioner's conviction must not be executed.

VII. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE THE JURY FOUND HIM GUILTY OF COMMON LAW CONTEMPT, WHICH THE LEGISLATURE ELIMINATED.

Courts have inherent powers, one of which is the contempt power. *State ex rel. Robinson v. Hartenbach*, 754 S.W.2d 568, 571 (Mo. banc 1988). The court's inherent powers may not be "shorn" by statute. *see Osborne v. Purdome*, 244 S.W.2d 332, 334 (Mo. 1954). However, that power is subject to statutory enactment. *Ex Parte Ryan*, 607S.W.2d 888, 890-91 (Mo. App. 1980). Further, statutory requirements are mandatory. *Hartenbach*, 754 S.W.2d 568 (Mo. Banc. 1988)(citing *Ex Parte Hough*, 544 S.W.2d 333, 334 (Mo. App. 1976). Unless a statute expressly or impliedly abrogates common law, the common law stands. *Mika v. Central Bank of Kansas City*, 112 S.W.3d 82, 90 (Mo.App. W.D. 2003). Section 476.110 describes in specific detail the acts punishable as criminal contempt, impliedly rejecting common law acts formerly punishable. Federal courts operate under similar limitations. Under 18 U.S.C. § 401, United States

courts may punish contempt by fine or imprisonment, and specifies that the behavior punishable is: "(1) Misbehavior or any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401 (2002).

Petitioner's prosecution thus appears to have arisen out of law that no longer exists, common law contempt. Exhibit 18. Judge Carter did not accuse Petitioner of a crime under statute. Exhibit 2. The State did not charge a crime under statute. Exhibit 3. Nor did the State prosecute Petitioner's case under statute. Exhibit 18. Because the State's case was founded upon non-existent common law, this Court should discharge Petitioner.

VIII. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE THE STATE FAILED TO FOLLOW RULE 55.03, THE EXCLUSIVE REMEDY TO ADDRESS REPRESENTATIONS MADE BY AN ATTORNEY.

Rule 55.03 provides the exclusive remedy to address representations made by an attorney. Rule 55.03 imposes limits of content and manner of representations in the court by "pleading, motion or other paper filed with or submitted to the Court." The Rule constructively imposes upon the attorney or party who makes representations to the Court that those representations have three characteristics:

(1) The claim, defense, request, demand, objection, contention or argument is not presented or maintained for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) The claims, defenses and other legal contentions therein are warranted by existing law or by non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) The allegations and other factual contentions have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for reasonable investigation or discovery. Rule 55.03(c) (1,2,3)

Rule 55.03(f) provides the courts the means of maintaining an action for sanctions following the dismissal of the civil action. Further, Rule 55.03(d) requires a reasonable opportunity to respond following a finding by the Court that the lawyer, law firm or party violated Rule 55.03(c) instructions.

Rule 55.03(d)(2) limits sanctions both to that which is sufficient to deter repetition of the conduct or comparable conduct by other similarly situated. Where a Court on its own initiative enters an order against the attorney, law firm or party, the Court must direct same to "withdraw or correct the question, claim, defense, request, demand, objection, contention or argument" before it enters a

show cause order. Rule 55.03(d)(2). The Court failed to allow the Defendant the opportunity to withdraw or correct the questioned representations.

Rule 55.03(d)(1) permits the sanctions to "include directives of a non monetary nature, and order to pay a penalty in to the Court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys fees and expenses occurred as a result of the violation." Rule 55.03(d)(1). In this case, the State seeks a criminal conviction and jail time. The punishment and prosecution exceeds permissible sanctions allowed by Rule 55.03.

In the alternative, Missouri Courts construe statutes and common law which regulate fundamental rights narrowly to avoid jeopardizing constitutional objections. *Berdella v. Pender*, 821 S.W.2d 846, 850 (Mo. 1991). The common law and statutory strictures are inapplicable given that an unquestionably constitutionally sound procedure exists to address the speech at issue. By design or in effect, Rule 55.03 constitutes the sole procedure to sanction the Defendant's conduct alleged by the State and the trial court's show cause order.

IX. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION IN THAT SUPREME COURT RULE 19 LIMITS CRIMINAL CONTEMPT TO CRIMINAL CASES.

Missouri Rule of Criminal Procedure 19.01 states: "Rules 19 to 36, *inclusive*, govern the procedure in all courts of this state having jurisdiction of *criminal proceedings*. Rule 19.01 (emphasis added). Missouri Rule of Criminal Procedure 36.01 governs common law criminal contempt, providing that a judge may punish direct contempt summarily, and providing the procedure by which indirect contempt may be punished. Rule 36.01.

Under Rule 19, criminal contempt may be punished only in criminal cases. The language of Rule 19 clearly states that Rules 19 to 36, *inclusive*, govern procedure in *criminal* proceedings. The use of the phrase "criminal proceeding" vests in trial courts jurisdiction to punish for contempt committed during a criminal proceeding only. Petitioner made the statements at issue during a grand jury proceeding over which Judge Carter presided. No criminal charges were pending, against Petitioner or the clients he represented in his petition. Therefore, the trial court lacked subject matter jurisdiction to hear Petitioner's case. Thus, Petitioner should be discharged.

X. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE RESPONDENT ERRED AT TRIAL IN APPROVING THE STATE'S PROPOSED VERDICT DIRECTOR AND REFUSING PETITIONER'S PROPOSED VERDICT DIRECTOR BECAUSE THE INSTRUCTION OF THE STATE FAILED TO REQUIRE

FINDINGS AS TO THE ESSENTIAL ELEMENTS OF CONTEMPT.

At trial, Respondent overruled Petitioner's objection to the State's proposed verdict director. See Exhibit 18. Respondent also refused Petitioner's proposed verdict directors. See Exhibits 19 and 20. The State's verdict director contained no elements of statutory or common law criminal contempt. The State's verdict director attributed no mental state to Petitioner's statements or the effect of those statements on the administration of justice. Exhibit 18. The State's verdict director simply set out the date, county, statements made by Petitioner, and that those statements "…degraded and made impotent the authority of the [Douglas County Court]…" and "…impeded and embarrassed the administration of justice."

A verdict director must instruct the jury to find every fact necessary to comprise the essential elements of the charged crime. *State v. Shirley*, 657 S.W.2d 686, 688 (Mo. App. E.D. 1983). Under the State's verdict director, the jury was not required to find willful disobedience of a court order or process, nor any intent on Petitioner's part to embarrass or impede the administration of justice. The jury only needed to find that Petitioner made the statements and that the statements "…degraded and made impotent the authority of the [Douglas County Court]…" and "…impeded and embarrassed the administration of justice." Such an instruction lacked any element of intent, any finding that a lawful order existed, any willful conduct in violation of that order, or any intent that such conduct would impede the administration of justice. Therefore, Petitioner's conviction

based on the State's verdict director must be reversed, and Respondent must be prohibited from executing a judgment of conviction based on a defective verdict director.

XI. PETITIONER IS ENTITLED TO AN ORDER DISCHARGING HIM FROM A JUDGMENT OF CONVICTION FOR CRIMINAL CONTEMPT BECAUSE RESPONDENT ERRED IN OVERRULING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE BECAUSE THE EVIDENCE WAS INSUFFICIENT.

A court's review of a challenge to the sufficiency of the evidence supporting a criminal conviction is limited to "a determination of whether the [S]tate presented sufficient evidence from which a trier of fact could have reasonably found the defendant guilty." *State v. Vandevere*, 175 S.W.3d 107, 108 (Mo. banc 2005). After hearing all the evidence at Petitioner's trial, Respondent overruled Petitioner's motions for judgment of acquittal at the close of the State's evidence and again at the close of all the evidence. The State's evidence tracked its Bill of Particulars. The Bill of Particulars, as argued above, alleged no crime. Therefore, the evidence presented at trial proved no crime sufficiently. Thus, Respondent erred in overruling Petitioner's motions for judgment of acquittal.

CONCLUSION

Based on the facts, the arguments above, and the serious constitutional dilemma posed by imprisoning Petitioner for his speech and advocacy, Petitioner prays this Court to order Petitioner's discharge pursuant to Rule 91.18, and vacate his conviction and sentence.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered to all attorneys of record and to Respondent, the Honorable Gary Witt, by depositing same with the United States Postal Service, postage pre-paid, to their business address, on the _____ day of December, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

Pursuant to Rule 84.06(c), the undersigned hereby certifies that this brief complies with the limitation of Rule 84.06(b). The brief is in Microsoft Word 2002 format, contains 12,394 words, and is concluded with a signature block containing the information required by Rule 55.03.

_____

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned hereby certifies that a 3 ½ inch, IBM-PC compatible floppy disk containing a copy of the brief is being filed along with this written brief. The undersigned further certifies that the disk has been scanned for viruses and is virus-free.

_____

APPENDIX