No. SC90425

IN THE
SUPREME COURT OF MISSOURI

CARL SMITH,

Petitioner,

v.

THE HONORABLE GARY WITT and SHERIFF RAYMOND PACE,

Respondents.

ON WRIT OF HABEAS CORPUS

RESPONDENT HONORABLE GARY WITT'S BRIEF

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ATTORNEYS FOR RESPONDENT HONORABLE GARY WITT

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JURISDICTIONAL STATEMENT

This is an original proceeding wherein Petitioner, Carl Smith, seeks relief under a writ of habeas corpus following sentence of 120 days' incarceration after a jury finding of guilt for indirect criminal contempt of court. Though originally taken into custody on September 28, 2009 in Douglas County, Petitioner was transferred that same date to Ozark County and therefore, until this Court's issuance of a preliminary order of release, in the custody of Ozark County Sheriff Raymond Pace.

Petitioner initially filed for writ of habeas corpus in both this Court (on September 28, 2009) and in the Missouri Court of Appeals, Southern District, SD30094 (on September 29, 2009). The Southern District denied Petitioner's *Petition* on September 30, 2009.

Under Supreme Court Rule 91.02(a), "when a person who is held in custody on a charge of crime seeks the benefit of this Rule 91, the petition in the first instance shall be to a circuit or associate circuit judge for the custody 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."

Though Smith was sentenced to confinement in the Douglas County Jail on September 28, 2009, he was immediately transferred to the Ozark County Jail. Petitioner claims as "good cause" his failure to file initially in Douglas County the fact that Douglas County Associate Circuit Judge, R. Craig Carter was the object of Smith's statements which the jury found contemptuous, and that the Presiding Circuit Judge, John Moody, was also an object of Smith's wrath as exemplified by Smith's attachments to his *Petition*.

However, at the time of filing his *Petition*, Smith was being held in custody in Ozark County, about which county and its judiciary Smith he has voiced no complaint nor asserted any cause, good or otherwise, as required by S.Ct.R. 91.02(a).

Since no adequate reason is given by Petitioner for misdirection of his *Petition* to this Court, Respondent Witt contends this matter should be referred to the Ozark County Circuit Court for resolution.

STATEMENT OF FACTS

A. Procedural History

On April 16, 2008, Petitioner, attorney Carl Smith, was charged with the unclassified misdemeanor of Contempt of Court pursuant to Supreme Court Rule 36.01. (Rel.Att., pp. 214-215).[1] After assignment of Respondent, Judge Gary D. Witt, Associate Circuit Judge of Platte County (hereinafter "Judge Witt"), and discovery, a jury trial was held on August 5, 2009 in Douglas County Circuit Court (Trial Transcript – hereinafter "Resp. Ex. 1", at p.2; Rel.Att., p. 234). At the conclusion of the evidence and arguments of counsel, the jury found Petitioner guilty of criminal contempt of court (Resp. Ex. 1, p. 130; Rel.Att., p. 234).

On September 28, 2009, Judge Witt heard and denied Smith's motion for new trial (Transcript of Pre-trial proceedings and Sentencing – hereinafter "Resp. Ex. 2" at p.78). In sentencing Smith, Judge Witt told him that he found "the actions that you took in this case to be deplorable" (Resp. Ex. 2, p. 101). Judge Witt therefore entered his *Judgment of Contempt*, finding that pursuant to the jury verdict, Smith was adjudged to be guilty of

[1] Petitioner has filed with the Court an attachment, the pages of which have been Bates-stamped, numbering from 001 to 379. Included in this attachment are copies of documents the State filed at trial as State's Exhibit 1 – *Petition for Writ of Prohibition* along with178 pages of attachments thereto, and State's Exhibit 2 – Judge Carter's three page *Order* dated April 16, 2008. Respondent will cite to these documents, and other Bates-stamped "Exhibits" as they are included in Petitioner's attachments as "Rel.Att.," and reference the Bates-stamped page rather than an Exhibit number.

criminal contempt of court (Rel.Att., pp. 376-377). He also entered his *Judgment of Commitment for Criminal Contempt*, sentencing Smith to the custody of the Douglas County Sheriff for a period of 120 days in the Douglas County jail, and assessing court costs against Smith (Resp. Ex. 2, p. 101; Rel.Att., pp. 378-379). Smith was, that same day transferred to the Ozark County Jail, maintained by Respondent Ozark County Sheriff Raymond Pace.

B. Evidence

Smith contests the sufficiency of the evidence against him. Viewed in the light most favorable to the jury's verdict, the evidence presented at trial showed that:

On March 31, 2008, Carl Smith, an attorney practicing within and before the 44th Judicial Circuit, appeared before Associate Circuit Judge R. Craig Carter of Douglas County. Judge Carter had been appointed by Judge John Moody, presiding circuit judge of the 44th Circuit, to oversee the conduct of a Douglas County grand jury which had just been convened (Resp. Ex. 1, pp. 44-45, 68). Just after the grand jurors were sworn in, Smith, on behalf of his legal secretary Amanda Kay Evans and a client named Ron Jarrett, filed a *Motion to Quash Subpoena and Motion for Continuance* (Rel.Att., pp. 121-123, 223-225). He contended that production of the documents requested pursuant to the grand jury's subpoena – certain notary records of Evans relating to Jarrett - was improper for a variety of reasons (Resp. Ex. 1, pp. 48-49, 72, 74-76). He further suggested his belief that some of the handwriting on the subpoena was that of the prosecutor's father, another attorney. And he additionally suggested that the calling of the grand jury was in retribution for Jarrett's filing of a motion to disqualify the prosecuting attorney in a criminal case pending against Jarrett. (Rel.Att., pp. 121-123)

Following a legal argument, with no evidence being offered by either side (Resp. Ex. 1, p. 51), Judge Carter overruled Smith on his motion to quash and, rather than require attendance and production that day, gave him 7 days in which to file a challenge to that decision in the Missouri Court of Appeals, Southern District (Resp. Ex. 1, pp. 50, 53, 81-82; Rel.Att., p. 176).

On April 3, 2008, Smith filed with the Southern District a ten page *Petition for Writ of Prohibition*, naming Judge Carter as "Respondent," and listing Ron Jarrett and Amanda Kay Evans as "Relators." (Rel.Att., p. 003). Smith appended to his *Petition* 178 pages of "attachments" (Rel.Att., pp. 013-212), containing affidavits, deposition transcripts, letters and court filings in which Smith, and others, made allegations against Douglas County Prosecuting Attorney Christopher Wade (Rel.Att., pp. 084-090, 097-098, 115-127, 138-144), and circuit Judge John Moody (Rel.Att., pp. 093-098, 174-185), claiming they had committed criminal offenses; against the Attorney General and his office (Rel.Att., pp. 117-127, 180), and against other attorneys practicing in the 44th Judicial Circuit (Rel.Att., pp. 117-127, 174-185, 186-187, 370-372).

In addition to filing his *Petition* with the appellate court, Smith served a copy on Judge Carter at the judge's office in Douglas County (Resp. Ex. 1, p. 57).

On page 4 of his *Petition* seeking review of Judge Carter's denial of his motion to quash, Smith made the following written statements:

> "The attached exhibits reflect the personal interest, bias and purported criminal conduct of Respondent, Prosecuting Attorney Christopher Wade, and others (sic) members of 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.
>
> * * *
>
> "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 . . . .

(Resp. Ex. 1, p 62).

Following receipt of Smith's *Petition*, Judge Carter, in a matter he styled "*In re: Criminal Contempt of Attorney Carl Smith,*" issued an "*Order*" of contempt dated April 16, 2008 (Resp. Ex. 1, pp. 58-59; Rel.Att. pp. 213-215). In his *Order*, Judge Carter certified that: Carl Smith had appeared in front of him and filed and argued a motion to quash a grand jury subpoena; that he had overruled Smith's motion, but granted him 7 days in which to file for a writ of prohibition with the Court of Appeals; and that the Court of Appeals had denied Smith his Writ. (Resp. Ex. 1, pp. 53, 82; Rel.Att., pp. 213-215).

In his *Order*, Judge Carter set forth the above-referenced paragraphs from Smith's Petition for Writ of Prohibition, then further stated:

> "Mr. Smith's Petition continues on to defame the elected Douglas County Prosecuting Attorney, several members of the local bar, and even goes so far as to question actions of the Office of the Chief Disciplinary Counsel's actions

(sic). Additionally, the affidavits and exhibits attached to Mr. Smith's Petition are the most scurrilous, defamatory, venomous attack on the Judicial System the Court has ever witnessed. Indeed, Mr. Smith's writing 'tends to degrade or make impotent the authority of the court or to impede or embarrass the administration of justice.' *Curtis v. Tozer*, 374 S.W.3d 557, 568 (Mo. App. 1964)."

(Rel.Att., p. 214).

Judge Carter, "pursuant to Missouri Rule of Criminal Procedure 36.01," ordered the Circuit Clerk to file a copy of his *Order*, as well as Smith's *Petition for Writ of Prohibition*, and "the Court of Appeals' Order, dated April 4, 2008, wherein that Court denied the Writ of Prohibition" in a new court file. Judge Carter also ordered that a copy of his *Order*, after assignment of a case number, be sent to the presiding judge with a request that he request the assignment of a judge to the contempt proceeding. Lastly, Judge Carter ordered that copies of his *Order* be forwarded to the Douglas County Prosecutor as well as Carl Smith, at his office. (Rel.Att., pp. 214-215).

At Smith's jury trial for criminal contempt, Judge Carter testified that while "quite of bit of" Smith's statements in his *Petition* "concerned" him (Resp. Ex. 1, p. 58), "[w]hat's contained in these two paragraphs [cited immediately above] is the reason I filed the criminal contempt" (Resp. Ex. 1, p. 63). Judge Carter specifically denied each of Smith's allegations contained in those two paragraphs (Resp. Ex. 1, pp. 63-64), and testified that he did not believe they were proper "argument" (Resp. Ex. 1, pp. 92-93). Judge Carter further testified that attorneys are "officers of the court" who have a duty to the court (Resp. Ex. 1, pp. 64-

65). Finally, Judge Carter, in his testimony, pointed out that the proper avenue for an attorney who believes a judge has committed, or is committing, wrongdoing, is to file a complaint with the Commission on Retirement, Removal and Discipline of Judges (Resp. Ex. 1, pp. 65-66, 90).

At trial, Smith neither testified in his own behalf nor offered any witnesses. Rather, through retained counsel, he questioned Judge Carter about Rule 4-1.2(c), a lawyer's obligation to abide by his client's decisions concerning the objectives of representation (Resp. Ex. 1, p. 71), and the issue of lawyers not having to "take on the moral, political viewpoints of their client" (Resp. Ex. 1, p. 87). Additionally, he inquired as to whether Judge Carter ruled, or failed to take any action due to Smith's statements – which the judge indicated he had not (Resp. Ex. 1, p. 90). Finally, Smith suggested that the Douglas County jury was being used to obtain evidence against Ron Jarrett for prosecution by neighboring Wright County.

ARGUMENT

I. Criminal Contempt and an attorney's First Amendment rights

In his 1st allegation of error, Smith argues that the trial courts of this State should be prohibited from punishing attorneys under this Court's criminal contempt Rule 36.01 and §476.110, RSMo., unless the attorney's speech creates a "clear and present danger" constituting an "immediate threat to the administration of justice." He further suggests: (1) Judges should be above being affected by "uncivil pleadings," especially when they are publicly elected, and thus should be used to the "occasional elbow" and "rhetorical barbs"; (2) That his conduct amounted merely to a "drafting error," "inartful drafting," or an "unfortunate choice of words," though admitting to having set forth an "unpleasant, harsh and perhaps unfair depiction of the grand jury process" which, he contends, was opinion, not fact, overstated, but meritorious; (3) That he acted at the behest of a "deceitful client" (Ron Jarrett) in making an "unpersuasive argument" and for using the language he chose; and (4) That allowing a criminal contempt proceeding against an attorney will "chill" advocacy.

A. Standard of Review –

It is settled law that every constitutional court of common-law jurisdiction has the inherent power to punish for contempt, and cannot be shorn of such power by statute. *Osborne v. Purdome*, 244 S.W.2d 1005, 1012 (Mo. 1952).

"[T]here are two classes of contempt – civil and criminal, each class having two subcategories – direct and indirect . . . Criminal contempt is punitive in nature and acts to protect, preserve, and vindicate the authority and dignity of the judicial system and to deter future defiance." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo. banc 1994); *Teefey v. Teefey*, 533 S.W.2d 563, 566 (Mo. banc 1976). The distinction between criminal and civil contempt is reflected in the content of the judgment, whether the remedy is

coercive or punitive." *Chassaing*, 887 S.W.2d at 578; *McMilian v. Rennau*, 619 S.W.2d 848, 851 (Mo. App., W.D. 1981).

A direct contempt occurs in the immediate presence of the court or so near as to interrupt its proceedings. *Chassaing*, *Id.*; *Curtis v. Tozer*, 374 S.W.2d 557, 568 (Mo. App., St.L.D. 1964). If the judge certifies that he or she saw the conduct constituting contempt, a direct contempt may be punished summarily. *Chassaing*, *Id.*; Rule 36.01(a).

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." *Chassaing*, *Id.*; *Curtis*, 374 S.W.2d at 568; *Thornton v. Doyle*, 969 S.W.2d 342, 344 (Mo. App., E.D. 1998). The procedural differences in direct and indirect contempt actions are based upon the availability of the facts to the judge who must make a determination of contempt. *Chassaing*, *Id.*; *Mechanic v. Gruensfelder*, 461 S.W.2d 298, 307 (Mo. App., St.L.D. 1970).

"The purpose of criminal contempt is to protect the power and dignity of the law. The contempt power is part of the judicial power of the courts, and inherent in the constitution of this state." *State ex rel. Lepper v. Kinder*, 14 S.W.3d 674, 677 (Mo. App., W.D. 2000).

Criminal contempt "stems from a court's inherent power to protect the judicial system established by the people as the proper and official method of settling disputes. Without this power courts are no more than advisory bodies to be heeded, or not, at the whim of the individual. A court has inherent power to punish contemptuous acts and to preserve and vindicate the law's power and dignity." *State ex rel Picerno v. Mauer*, 920 S.W.2d 904, 910

(Mo. App., W.D. 1996)(citations omitted). If an attorney or party receives an adverse ruling "there is no right of counsel to resist or insult the judge." *Id.* at 911.

As in *Chassaing* and *Osborne*, the instant case is clearly one of indirect criminal contempt. In *Chassaing*, where an attorney was found to have acted contemptuously toward an administrative law judge by yelling in a threatening manner and storming out after being admonished, the State was not attempting to have the attorney comply with an order of a tribunal; rather, the State was seeking to have the attorney punished for his conduct. 887 S.W.2d at 578. Since the attorney's conduct occurred at an administrative hearing, before the agency, as opposed to a "court," this Court found it "necessary to follow the procedures of an indirect contempt action." *Id.*

In an indirect criminal contempt action, "[a]ccording to Rule 36.01(b), relator is entitled to notice, a hearing, and a reasonable time to prepare for his defense. Due process 'requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to call other witnesses in his behalf, either by way of defense or explanation.'" *Chassaing*, 887 S.W.2d at 579, *quoting, In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 508, 92 L.Ed. 682 (1948); *Osborne*, 244 S.W.2d at 1011. However, "[t]here is no fixed formula for contempt proceedings, and technical accuracy is not required." *Osborne*, 244 S.W.2d at 1011.

"Although a criminal contempt proceeding has attributes of a criminal case, this Court has never held that criminal contempt is a specific crime or that it is to be tried as such." *Chassaing*, 887 S.W.2d at 579 (emphasis added); *Osborne*, 244 S.W.2d at 1011. "Rather,

Missouri courts have repeatedly held that a contempt proceeding is *sui generis*, that is, of its own kind. *Chassaing, Id.*; *Osborne* 244 S.W.2d at 1012; *Mechanic*, 461 S.W.2d at 309.

"In *Osborne*, this Court 'refused to hold that a criminal contempt proceeding is a criminal prosecution within the meaning of the Constitution, statutes, or case law of either the United States or the State of Missouri.' Rather, the Court stated that the 'effect of the holding in each case is that criminal contempt, is criminal in nature; and that the accused . . . can only be adjudged guilty after due notice, reasonable opportunity to defend and the presentation of sufficient evidence to warrant the judgment; and that a valid commitment in any criminal contempt case must contain the particular circumstances of the offense.'" *Chassaing, Id.*; *Osborne, Id.*

Concluding, "[t]his Court cites *Osborne* and its progeny with approval and reaffirms their holdings that a contempt proceeding is *sui generis* and, as such, is controlled by its own rules." *Chassaing, Id.* (emphasis added).

The punishment for contempt is a fine or imprisonment at the discretion of the court. §476.120; *State ex rel Burrell-El v. Autrey*, 752 S.W.2d 895, 898 (Mo. App., E.D. 1988). In Missouri, persons found guilty of indirect criminal contempt have been punished by, in one case, eight months in jail, coupled with fines of $1,000. *Osborne*, 244 S.W.2d 1005.

There is no right of appeal from a judgment of criminal contempt. *Chassaing*, 887 S.W.2d at 577; *Teefey*, 533 S.W.2d at 565; *Thornton*, 969 S.W.2d at 344. A "Relator's only rememdy would be to file a . . . writ of habeas corpus (if he is incarcerated) after being found in contempt." *Chassaing*, 887 S.W.2d at 577.

Again, this is an action for indirect criminal contempt brought pursuant to Supreme Court Rule 36.01, "Criminal Contempt", which Rule was adopted on June 13, 1979, and made effective on January 1, 1980[2], and guided by §§476.110-476.140[3].

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[2] Supreme Court Rule 36.01 provides:

(a) A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The judgment of contempt and the order of commitment shall recite the facts and shall be signed by the judge and entered of record.

(b) A criminal contempt except as provided in subdivision (a) of this Rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. 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. The defendant is entitled to be conditionally released as provided in these Rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a finding of guilt the court

B. Caselaw supports greater infringement on an attorney's speech

This Court took great pains to address the issues raised by Smith as concerns "free speech" in it's decision of *In the Matter of Westfall*, 808 S.W.2d 829 (Mo. banc 1991). In *Westfall*, this Court held that "[t]here are limitations, however, to first amendment protection. Even protected speech may be regulated. Where unbridled speech amounts to misconduct that threatens a significant state interest, the state may restrict a lawyer's exercise of personal rights guaranteed by the Constitution." 808 S.W.2d at 835. Furthermore, "[i]t is clear that the state has a substantial interest in maintaining public confidence in the administration of

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shall recite in the judgment of contempt and in the order of commitment the essential facts constituting the criminal contempt and fixing the punishment.

[3] §476.110, RSMo, "Acts constituting contempt of court," adopted in 1939, provides:

Every court of record shall have power to punish as for criminal contempt persons guilty of:

(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 or made by it;

(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.

justice. The interest is not only the litigant's but also the public's. The interest is in the administration of justice by a fair and impartial judiciary." 808 S.W.2d at 836.

This Court, in its opinion in *Westfall*, adopted the reasoning and holding of the Minnesota Supreme Court in *In re Disciplinary Action Against Graham*, where that court held:

> "This court certifies attorneys for practice to protect the public and the administration of justice. That certification implies that the individual admitted to practice law exhibits a sound capacity for judgment. Where an attorney criticizes the bench and bar, the issue is not simply whether the criticized individual has been harmed, but rather whether the criticism impugning the integrity of judge or legal officer adversely affects the administration of justice and adversely reflects on the accuser's capacity for sound judgment. An attorney who makes critical statements regarding judges and legal officers with reckless disregard as to their truth or falsity . . . exhibits a lack of judgment that conflicts with his or her position as 'an officer of the legal system and a public citizen having special responsibility for the quality of justice.'"

453 N.W.2d 313, 322 (Minn. 1990),

The United States Supreme Court has stated that "attribution of honest error to the judiciary is not cause for professional discipline." *In re Sawyer*, 360 U.S. 622, 635 (1959). Justice Brennan, in writing the plurality opinion in *Sawyer*, stated that while "lawyers are

free to criticize the state of the law" that freedom does not include the right to "suggest any unseemly complicity by the judiciary in the practice." *Id.* at 633.

What attorney Smith did in this case, essentially calling Judge Carter a "crook" and a "conspirator," and alleging that he was using the grand jury for nefarious purposes, do little justice to Smith's description of his slurs as "advocacy written in a pleading." Nor do such statements constitute "zealous advocacy" of a client, such as would provide the appellate court with information needed to accurately resolve the legal issues before it. In fact, it's difficult to see how such statements would contribute at all to the appellate court's understanding of the legal issues raised in Smith's motion to quash grand jury subpoenas. Additionally, having been given additional time (7 days) in which to seek the appellate court's writ, Smith clearly had time to think, coolly, about what he wished to write.

What Smith did is little different from what the defendants in *State v. Adams*, 229 S.W.3d 175 (Mo. App., S.D. 2007) and *State v. Cella*, 32 S.W.3d 114 (Mo. banc 2000) did – file lawsuits to try and intimidate judges. For their efforts, Adams and Cella were convicted of tampering with a judicial officer under §565.084, RSMo., and sent to prison. In *Adams*, defendant, among other things, threatened to sue the judge in federal court in order to try and get the judge to recuse himself. The judge testified at trial that he felt Adams was "trying to take over the case, to run it his way and to apply his rules to it rather than the rules of the state." 229 S.W.3d at 180. He continued, saying "it's not appropriate to use that sort of threat to try and achieve something in a case, badger a judge into taking rash actions or inappropriate action." *Id.*

This State's courts have observed that "[t]he State of Missouri unquestionably has a compelling interest in ensuring that its judicial servants are able to execute their functions without fear of threats, intimidation and harassment. Little else is more fundamental to a free society . . . Section 565.084 does not restrict certain 'speech' because of its message or content. Instead, it enjoins certain speech because of the impact it is intended to have on the person to whom it is directed. *State v. McGirk*, 999 S.W.2d 298, 299 (Mo. App., W.D. 1999), *quoted in Adams*, 229 S.W.3d at 181.

Actions by the defendants in *Adams* and *Cella*, like attorney Smith's here, are wrong. They constitute an immediate and real danger to this State's judicial system. The "wrong" is just as great where a lawyer attempts to intimidate a judge as where a private person does so. But, there is one major difference. The difference is that, unlike private persons, lawyers are tasked with knowing better. It is not unfair to say lawyers should not be able to use pleadings to threaten and/or attempt to intimidate judges. The findings of the jury of twelve citizens in this matter, reflected by the statements made during sentencing by Judge Witt, show that what Smith did, he did intentionally, crossing the line into prosecutable criminal contempt.

Although no Missouri cases have considered whether motions or comments made in court accusing judges of being corrupt would constitute a "clear and present danger" to the administration of justice, the Indiana Court of Appeals considered this very issue in *Skolnick v. State*, 388 N.E.2d 1156 (Ind. App. 1979). Skolnick, an attorney, was called to testify as a witness, during which testimony he accused the trial judge of being corrupt and having breached judicial ethics. 388 N.E.2d at 1161-62. Skolnick also stated that he was the head

of a citizens group that had been investigating corrupt judges for years and accused the judge of questioning him in order to discredit him in his efforts to "clean up the court." 388 N.E.2d at 1161-62.

Skolnick was charged and found guilty of criminal contempt of court. On appeal he alleged, among other things, that his direct criminal contempt conviction violated his right to freedom of speech; that the judge failed to file charges or set out in writing a distinct statement describing his contumacious conduct; and that the judge failed to find him guilty beyond a reasonable doubt.

In discussing the "clear and present danger" test, the Indiana court observed that "so long as critics of [a court] confine their criticism to facts and base them upon the decisions of the court, they commit no contempt no matter how severe the criticism may be; but when they pass beyond that line and charge that judicial conduct was influenced by improper, corrupt, or selfish motives, or that such conduct was affected by political prejudice or interest, the tendency is to poison the foundation of justice and create distrust, and destroy the confidence of the people in their courts." 388 N.E.2d at 1166.

The court went on to hold that the First Amendment cannot be invoked to shield those who make accusations of judicial corruption from contempt charges because such conduct crosses the boundary between protected judicial criticism and conduct posing a serious and imminent threat to the administration of justice. 388 N.E.2d at 1166.

The State of Illinois, in the 2008 case of *D'Agostino v. Lynch*, 887 N.E.2d 590, 600 (Il.App. 2008), adopted the reasoning of *Skolnick*. Lynch, a civil defendant proceeding *pro se*, was found in direct criminal contempt for filing a motion in which he alleged the judge

could not be impartial because he had been "bribed " by plaintiffs and their counsel. The judge who was the subject of Lynch's allegation transferred the matter to another judge for hearing on Lynch's motions.

At the conclusion of the motions hearing, the second judge explained that Lynch's motions and presentation disrupted and disrespected the court, characterized his allegations as "wild fabrication," and concluded that Lynch's allegations "held the state and federal courts in Illinois up to ridicule and served to lessen respect for the system." The judge found Lynch in direct criminal contempt and sentenced him to 60 days' imprisonment.

Lynch was taken into custody immediately, with no bond issuing. Shortly thereafter, the trial court denied a motion to reconsider its contempt finding, explaining that it found Lynch's actions to have been "far more disruptive than those of someone who simply shouts an expletive at a judge because his accusations were defamatory and scurrilous." 887 N.E.2d at 597.

The Illinois appellate court stayed the contempt order, ordering Lynch be released from custody pending appeal. *Id*. As in this case, on appellate review Lynch, the contemnor, alleged that: (1) the court improperly convicted him of criminal contempt because there was no evidence he intentionally embarrassed, obstructed, or hindered the court in the administration of justice, claiming he simply made "inflammatory assertions" in his motion; and (2) the contempt finding violated his First Amendment right to freedom of speech.

As Missouri courts have held, the Illinois court ruled that "[a]ll courts have the inherent power to punish contempt in order to maintain their authority. Criminal contempt is

'conduct which is calculated to embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute.' The contemnor's conduct must be willful; however, contemptuous intent may be inferred from the surrounding circumstances and the character of the conduct. A finding of criminal contempt is intended to punish the wrongdoer and vindicate the dignity and authority of the court." 887 N.E.2d at 597-98 (citations omitted).

The court also found that "conduct occurring outside the immediate presence of the judge but within an integral part of the court, such as the filing of documents with the clerk of the court, can also form the basis of a direct criminal contempt finding." 887 N.E.2d at 598.

The Illinois appellate court found that Lynch's filings and testimony were "calculated to disrupt court proceedings and bring the administration of law into disrepute," and that Lynch's actions had the effect of harassing the court and the litigants appearing before it. The court also found that Lynch "made unsubstantiated allegations of criminal misconduct against [the judge]." 887 N.E.2d at 599.

Since Lynch failed to present any evidence at his hearing to support his allegations, the appellate court found his "unsubstantiated accusations may only be viewed as an attempt to embarrass the court and derogate from its dignity." The court also pointed out that this was not a case of "judicial thin skin" – where a judge might react to derogatory remarks directed at him – since a different judge heard the case than the one Lynch made accusations against. 887 N.E.2d at 599.

As to Lynch's claim that the contempt finding violated his First Amendment right of freedom of speech, the appellate court noted that "[t]he public interest in the integrity and competence of the judicial process requires that courts and judges not be shielded from 'wholesome exposure.' To that end, the United States Supreme Court has declared that freedom of speech and freedom of the press should not be impaired through the exercise of a court's contempt power unless there is 'no doubt that the utterances in question are a serious and imminent threat to the administration of justice." *Craig v. Harney*, 331 U.S. 367, 373, 67 S.Ct. 1249, 1253, 91 L.Ed. 1546, 1551 (1947). Thus, 'the first amendment forbids the punishment by contempt for comment on pending cases in the absence of a showing that the utterances created a 'clear and present danger' to the administration of justice" 887 N.E.2d at 599-600 (Other citations omitted).

"Comments that are systematically designed to thwart the judicial process constitute a 'clear and present danger' to the administration of justice." 887 N.E.2d at 600

In the present case, Petitioner is a licensed attorney as opposed to an individual proceeding *pro se*. Also, in this case Smith was afforded a jury trial, at the conclusion of which a jury of twelve found him guilty beyond a reasonable doubt of having committed criminal contempt, while Lynch's allegations were presented solely to a judge.

Similarly, the Ohio Supreme Court, in *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 428-29 (Ohio 2003), found that "The United States Supreme Court has held that '[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In Re Sawyer*, 360

U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be."

An attorney's speech may be sanctioned if it is highly likely to obstruct or prejudice the administration of justice. These narrow restrictions are justified by the integral role that attorneys play in the judicial system, which requires them to refrain from speech or conduct that may obstruct the fair administration of justice. Thus, attorneys may not invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct. *In Re Sawyer,* 360 U.S. at 646.

The First Amendment does not shield an attorney from discipline for falsely suggesting "unseemly complicity" by the judiciary in unlawful or unethical practices. Such false statements, whether by attorneys or others, enjoy no constitutional protection when they are made with knowledge of their falsity or reckless disregard for their truth. Even a statement cast in the form of an opinion implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty. *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d at 429.

Thus, the First Amendment does not insulate an attorney from professional discipline even for expressing an opinion, during court proceedings, that a judge is corrupt when the attorney knows that the opinion has no factual basis or is reckless in that regard. *Id.* Respondent's contention that his statements are protected as unverifiable opinions is incorrect. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) rejected the premise that the first amendment mandates an inquiry into whether a statement is one of opinion or of fact.

Smith relies on *Bridges v. Californi*a, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), a case prohibiting prosecution of members of the news media for comments made in editorials regarding pending court cases, for his belief that in a criminal contempt proceeding against an attorney, the State must show the attorney's speech creates a "clear and present danger" constituting an "immediate threat to the administration of justice."

However, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991), where a state bar held a disciplinary proceeding against a lawyer who had held a press conference to discuss a pending criminal case, the Court ruled that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the "clear and present danger" of actual prejudice or imminent threat standard established for regulation of the press during pending proceedings." It stated that "a lawyer's right to free speech is extremely circumscribed in the courtroom," see, e.g., *Sacher v. U.S.* 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717 and, in a pending case, is limited outside the courtroom as well, see, *e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600. The Court's decisions have sought to balance the State's interest in regulating a specialized profession against a lawyer's First Amendment interest in the kind of speech at issue.

In *Gentile*, the Court held that "[i]n the United States, the courts have historically regulated admission to the practice of law before them and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards. 'Membership in the bar is a privilege burdened with conditions,' to use the oft-

repeated statement of Cardozo, J., as later quoted in *Theard v. U.S.*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957)." 501 U.S. at 1066.

Interestingly, the Court gave little credence to a concern of statements creating a "substantial likelihood of materially prejudicing" adjudicative proceedings in a community of 600,000 persons. Contrast that with the small community of Douglas County, for which the U.S. Census Bureau estimated its 2008 population at 13, 438.[4]

Smith cites *McMilian v. Rennau*, 619 S.W.2d 848 (Mo. App., W.D. 1981) with approval. However, in *McMilian*, unlike this case, the alleged contemnor expressed no criticism of past or contemplated action by the court in any pending case – thus there would be no possible charge of attempting, by his remarks, to influence any decision by the court or impeded the judicial function. 619 S.W.2d at 851-52. That was not the case here. Here Smith made his public statements, in writing, during the pendency of a grand jury, creating a real prospect of influence on pending matters.

Missouri's judges should not be put in the position of making decisions out of fear or intimidation. All lawyers know, or should know, that there's a "right way" and a "wrong way" to address any concerns they have about judges. The right way is to file a complaint with the Commission on Retirement, Removal and Discipline of Judges (which entity even provides a complaint form on its website). The wrong way is to publicly make spurious allegations against a judge's character in a public filing, clearly in an effort to affect on-going grand jury proceedings.

[4] http://quickfacts.census.gov/qfd/states/29/29067.html

And not all "ways" are equal or permissible under the law. For example, the First Amendment does not immunize against baseless litigation, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743, 103 S.Ct. 2161, 2170, 76 L.Ed.2d 277 (1983). Neither is an attorney immunized to put a client on the witness stand, when he knows that that witness will testify untruthfully. This is not a matter of an attorney "in good faith, espousing a legal cause, however unpopular or seemingly untenable." *Baird v. State Bar of Arizona*, 401 U.S. 1, 7, 91 S.Ct. 702, 706-07, 27 L.Ed.2d 639 (1971). Rather, it's a matter of an attorney attempting to intimidate a judge into ruling the way that attorney wished.

It is not merely "inartful" for an attorney to publicly allege, essentially, that a judge is a "criminal" and that he is using the sacrosanct grand jury process for his own nefarious purposes to imprison innocents in order to "silence" them, and engaging in a "cover-up." It's frankly difficult to imagine how calling a judge, again essentially, "a crook," can further the interests of a client or address any issue legitimately before an appellate court.

In an article in the Florida Bar Journal entitled "*Invective on Appeal: Impugning the Integrity of Judges*" 79-MAY FLBJ 41, it is asserted:

> Appellate advocacy should never be *ad hominem*. For one thing, it is ineffective; it violates the principles of persuasion posited by classical rhetoricians: logos, pathos, and ethos. Wild accusations of corruption, ethnic prejudice, or hometown favoritism violate all three: They are not reasonable, not sympathetic and not indicative of the good character or credibility of the accuser. Thus, whatever momentary psychological gratification may be realized by the flailing attorney or client is ultimately self-destructive: "Trial

> judges as well as appellate judges can make mistakes and misstate the law without being collusive or corrupt. Attorneys should limit their pleadings and briefs to addressing the legal errors. It is unprofessional to make or imply such charges, no matter how clearly wrong the ruling."

p. 45.

Though Judge Carter refused to let attorney Smith intimidate him, and refused to allow Smith to disrupt the grand jury, attorneys publicly slinging around the types of allegations that Smith did clearly present a "clear and present danger" that they will bring about evils to this State's court system that the United States Supreme Court in *Schenck v. United States*, 294 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919) warned of, the "substantive evil actually designed to impede the course of justice." *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d (1962).

Further, for Smith to attempt to blame his "devious client" for his statements rings hollow. The Supreme Court of Kansas, in *In re Comfort*, 159 P.3d 1011, 1021 (Kan. 2007), stated:

> "[t]he advocacy to which a client and the client's legal position is entitled cannot enable or justify an attorney in violating ethical restraints to which he or she is subject. 'The client made me do it' is not a valid defense. There are times when an attorney's only ethical duty is to tell a client 'no' or, perhaps, 'your legal objective is valid, but I am ethically bound to pursue it through a different means.'"

The *Comfort* court found that while the attorney and his client had legitimate objectives, "the means [they] used to accomplish these ends served no substantial purpose other than to embarrass." *Id.*

This Court should deny Petitioner's 1st allegation of error.

II and VIII – Overbreadth and alternatives to criminal contempt

In his 2nd and 8th claims of error, Petitioner Smith argues that: Criminal contempt, either under R. 36.01 or §476.110, RSMo is constitutionally "overbroad" and that other, "more narrowly tailored," remedies exist that should have been employed by Judge Carter rather than seeking prosecution of Smith for criminal contempt. He specifically mentions: Rule of Professional Conduct 4.3.5, prohibiting a lawyer form seeking to influence a judge or engaging in conduct intended to disrupt a tribunal; Rule 55.27(e) allowing a court to strike any material containing inappropriate statements from a pleading; and, in both his 2nd and his 8th claims of error, Rule 55.03(c), which he contends is the "exclusive remedy to address representations made by an attorney."

A. Standard of Review –

"The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. The showing that a law punishes a "substantial" amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression,' id., at 613." *Virginia v. Hicks*, 539 U.S. 113, 118-19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003).

The Court, in *Hicks*, stated that "[w]e have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech – especially when the overbroad statute imposes criminal

sanctions." *Virginia v. Hicks*, 539 U.S. at 119. Further, that "[o]verbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." *Id.*

However, the Court then stated, "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.' *Broadrick v. Oklahoma*, 413 U.S. at 615. For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, *ibid*., before applying the 'strong medicine of overbreadth invalidation, *id*., at 613." *Virginia v. Hicks*, 539 U.S. at 119-20.

"The overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Hicks* 539 U.S. at 122 (citations omitted) (emphasis added). "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech." 539 U.S. at 124.

B. Missouri's Rule and Statute on Criminal Contempt are not overbroad, and have not been shown by Petitioner to be "substantially overbroad" either in text or actual

application. Further, a court is not obligated to apply the punishment of a contemnor's choosing.

Obviously, attorney Smith would prefer that his conduct toward Judge Carter have been handled in one of these other manners that he cites. For example, the sanctions contained in Rule 55.03 include dismissal of a civil action, or assessment of costs and expenses incurred. However, Smith cites not one single Rule or Statute that requires that a court use one of these alternative sanctions.

Indeed, while there are other alternatives that a court could choose to punish an attorney for his actions, it could be argued that an even more serious alternative the court could have chosen would have been to file a Bar complaint, which might result in the loss of the attorney's license to practice law. But no Rule or Statute prohibits a court from doing as Judge Carter did, for what he found to be "the most scurrilous, defamatory, venomous attack on the Judicial System" he had ever witnessed (Rel.Att., p. 214).

Notwithstanding Smith's desires, Rule 36.01 and §476.110 grant every court the power to punish for criminal contempt persons who are guilty of "contemptuous or insolent behavior." If a ruling is adverse to a lawyer or a party, "there is no right of counsel to resist or insult the judge." *State ex rel Picerno v. Mauer*, 920 S.W.2d at 911. "The contempt power is part of the judicial power of the courts, and inherent in the constitution of this state." *Lepper v. Kinder*, 14 S.W.3d at 677. "It is settled law that every constitutional court of common-law jurisdiction has the inherent power to punish for contempt, and cannot be shorn of such power by statute." *Osborne v. Purdome*, 244 S.W.2d at 1012. "Criminal contempt is punitive in nature and acts to protect, preserve, and vindicate the authority and

dignity of the judicial system and to deter future defiance." *Chassaing*, 887 S.W.2d at 578. It "stems from a court's inherent power to protect the judicial system established by the people as the proper and official method of settling disputes. Without this power courts are no more than advisory bodies to be heeded or not at the whim of the individual. A court has inherent power to punish contemptuous acts and to preserve and vindicate the law's power and dignity." *State ex rel Picerno v. Mauer*, 920 S.W.2d at 911 (citations omitted).

Petitioner has not carried his burden of proving Missouri's criminal contempt statute or rule to be "substantially overbroad" as required by the Supreme Court. Thus, the proceedings against Smith were properly brought as an action for indirect criminal contempt pursuant to Supreme Court Rule 36.01.

C. Judge Witt's imposition of 120 days' jail was not vindictive as the sentence is well within that provided for by the law.

Amicus curiae ACLU argues that Judge Witt's sentencing of Petitioner to 120 was "vindictive," "excessive," and "an abuse of discretion."

"[T]he law of this State provides that punishment for criminal contempt is left to the discretion of the court imposing it." See Rule 36.01, §§ 476.110, 476.120, 476.130, RSMo." *Id*. at 249. Additionally, the U.S. Supreme Court has held that where no penalty is specified and sentence is left to the discretion of the judge, as is often true in the case of criminal contempt, the pettiness or seriousness of the contempt will be judged by the penalty actually imposed. The Court recognized that sentences of up to 6 months could be imposed for criminal contempt without guilt or innocence even being determined by a jury. *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), cited in *Ryan v. Moreland*, 653

S.W.2d 244, 248 (Mo. App., E.D. 1983). Since that time, Missouri decisions "have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." *Id.*

Further, Petitioner, as suggested by the Court in *Mayberry v. Pennsylvania*, 400 U.S. 455, 466, 91 S.Ct. 499, 505, 27 L.Ed.2d 532, 540 (1971), was given a "public trial before a judge other than the one reviled by the contemnor." In fact, before a jury of his peers in the very county he practices in and where he had been prosecuting attorney. *See also Offutt v. U.S.* 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11,16 (1954).

The change of judge, jury trial, and sentencing of Petitioner satisfied all requirements of statute, rule and caselaw.

III – Relator's claim to greater First Amendment protection in representing himself

To the best Respondent Witt is able to glean, Smith's third allegation of error is that, though he named Ron Jarrett and Amanda Kay Evans as "Relators" in the *Petition for Writ of Prohibition* he filed with the Southern District, and, though he faults his "deceitful client," Ron Jarrett, with causing him to make his contemptuous statements, he was actually acting "on behalf of himself, [and] his law office" in addition to Jarrett and Evans. In claiming to be so acting, Smith believes he had a "right to proceed without an attorney," along with, apparently, an even greater right to be free from criminal sanctions for his speech occurring in the course of an attorney's representation of himself.

A. Statement of Review –

It is not the Court's duty to supplement the deficient brief with its own research. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). This Court's Rules ensure that the appellate courts not act as an advocate for the party by speculating on facts and arguments that were not asserted. *Waller v. Shippey*, 251 S.W.3d 403, 407 (Mo. App., W.D. 2008).

B. An attorney has no greater right to make contemptuous statements in his own defense than he would in defense of a client.

Clearly, Smith desires to have his cake and eat it too. In his first claim for relief, he argues, among other things, that he merely offered the arguments that his "deceitful client" Ron Jarrett wanted him to make. Now, he claims he drafted his *Petition* on behalf of not just his client, Ron Jarrett, but also on his own behalf.

However, Smith cites this Court to no caselaw holding that an attorney is immune from the criminal contempt statutes for statements he makes in his <u>own</u> defense than he

could make in his defense of a client. Nor does Petitioner present any evidence showing that, indeed, he was also representing himself.

It is neither the Court's, nor Respondent's, duty to supplement a Petitioner's deficient brief with its own research. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). This Court's Rules ensure that the appellate courts not act as an advocate for the party by speculating on facts and arguments that were not asserted. *Waller v. Shippey*, 251 S.W.3d 403, 407 (Mo. App., W.D. 2008).

Petitioner's 3rd allegation of error has no merit and must be ruled against him.

IV and VI – Petitioner was provided all requisite Procedural Due Process

In his 4th and 6th allegations of error, Smith contends the initiation of the prosecution against him violated his right to procedural due process because Judge Carter, in his *Order* in the matter styled "In re Criminal Contempt of Attorney Carl Smith" (Rel. Att. 213-215), did not follow the Supreme Court Rules pertaining to misdemeanors (Rules 21.02, 21.03, and 21.04). Particularly, Smith alleges that that no statement of probable cause was filed, nor was a summons or warrant issued. Further, Smith argues Judge Carter's *Order* failed to state essential facts constituting criminal contempt, failed to provide the date and time and place of hearing, and did not use the words "criminal contempt" all in violation of Rule 36.01. And lastly, Petitioner claims that since §476.110, RSMo "restricts the court's inherent powers by describing the punishable acts," and since indirect criminal contempt, or criminal contempt made outside the hearing or presence of the court, is not set forth in §476.110, RSMo, the charge against Smith was improperly brought.

A. Standard of Review –

This Court has limited the required process for one charged with criminal contempt of court. "According to Rule 36.01(b), relator is entitled to notice, a hearing, and a reasonable time to prepare for his defense. Due process 'requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to call other witnesses in his behalf, either by way of defense or explanation.'" *Chassaing*, 887 S.W.2d at 579, *quoting, In re Oliver*, 68 S.Ct. at 508; *Osborne v. Purdome*,

244 S.W.2d at 1011. Again, "[t]here is no fixed formula for contempt proceedings, and technical accuracy is not required." *Osborne,* 244 S.W.2d at 1011 (emphasis added).

"Although a criminal contempt proceeding has attributes of a criminal case, this Court has never held that criminal contempt is a specific crime or that it is to be tried as such." *Chassaing, id*.(emphasis added),*; Osborne, id.* "Rather, Missouri courts have repeatedly held that a contempt proceeding is *sui generis*, that is, of its own kind. *Chassaing, id.,; Osborne,* 244 S.W.2d at 1012. "A court's inherent power to punish for contempt cannot be shorn by statute." *Osborne, Id.*

This Court, in *Osborne*, "refused to hold that a criminal contempt proceeding is a criminal prosecution within the meaning of the Constitution, statutes, or case law of either the United States or the State of Missouri." Rather, while "criminal in nature", the Court has held that the accused can only be adjudged guilty after due notice, reasonable opportunity to defend and the presentation of sufficient evidence to warrant the judgment, and following a valid commitment which contains the particular circumstances of the offense. *Chassaing,* 887 S.W.2d at 579; *Osborne*, 244 S.W.2d at 1012.

Thus, a contempt proceeding is *sui generis* and, as such, is controlled by its own rules." *Chassaing,* 887 S.W.2d at 579 (emphasis added).

B. Petitioner was properly prosecuted under Rule 36.01(b).

Petitioner Smith was prosecuted under the dictates of Rule 36.01(b), which provides, in part: that "A criminal contempt . . . shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it

as such. 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. The defendant is entitled to be conditionally released as provided in these Rules."

In his *Order*, Judge Carter certified that:

(a) Carl Smith had appeared before him to argue a motion to quash grand jury subpoena;

(b) The court had overruled Smith's motion, but granted him 7 days to file a writ of prohibition with the court of appeals;

(c) Smith provided a copy of his *Petition for Writ of Prohibition* to Judge Carter;

(d) In his petition for writ of prohibition, Smith alleged that the 178 pages of attached exhibits showed the "personal interest, bias and purported criminal conduct of Respondent (Judge Carter), Prosecuting Attorney Christopher Wade, and other[] members in the judicial system in the Forty-Fourth Judicial Circuit." He accused Judge Carter and the others cited of "convening, overseeing and handling the grand jury proceedings" in a manner amounting up to "a conspiracy 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." Further, he claimed that the Douglas County grand jury was "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 . . . ."

(e) Judge Carter found "the affidavits and exhibits attached to Mr. Smith's Petition are the most scurrilous, defamatory, venomous attack on the Judicial System the Court

has ever witnessed." And he concluded that Smith's statements "tends to degrade or make impotent the authority of the court or to impede or embarrass the administration of justice."

(Rel.Att., pp. 213-214).

Judge Carter then ordered the circuit clerk to file a copy of his *Order*, along with Smith's *Petition for Writ of Prohibition*, and the court of appeals' *Order,* dated April 4, 2008, denying the writ in a new court file (Rel.Att., p. 214). In addition, he ordered the clerk to forward his *Order*, following assignment of a case number, to the presiding judge with a request that a judge be assigned to oversee the contempt proceeding (Rel.Att., p. 214). And he ordered that copies of his *Order* be sent to both the prosecutor and to Smith at his office address (Rel.Att., p. 215).

The *Order* of Judge Carter, and the proceedings which occurred thereafter, substantially complied in all respects with the requirements of Rule 36.01. To the extent that it did not, the courts of this state have provided an allowance. *Mechanic v. Gruensfelder*, 461 S.W.2d at 309.

§476.110, RSMo, enacted in 1939, in no way restricts the power of contempt provided by this Court in its Rule 36.01, which was adopted in June of 1979 and enacted on January 1, 1980. In fact, while a portion of the common law has been codified, "all courts of record in Missouri have both inherent and statutory power to punish criminal contempt committed within or without their presence." *State ex rel. Robinson v. Hartenbach*, 754 S.W.2d 568, 570 (Mo. banc 1988) *citing Osborne*, 244 S.W.2d at 1012. Further, "[e]very constitutional

court of common law jurisdiction has inherent power to punish for contempt and cannot be shorn of such power by statute." 754 S.W.2d at 571 (emphasis added).

This Court, in *Robinson v. Hartenbach*, stated that, after scrutinizing the criminal contempt statutes, it considered them to be "reasonable." But it also ruled that "the court's inherent power is not infringed by the contempt statute," stating "[t]he court will tolerate the regulation of its contempt power, but the legislature cannot be allowed, by such regulation to substantially destroy the efficiency of the court." 754 S.W.2d at 571 (emphasis added).

The Missouri Supreme Court governs, through its Rules, proceedings taking place in the courts of this state. Article V, §5 of the Missouri Constitution provides, in part, that "(t)he supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law." "Pursuant to this authority, the supreme court promulgated and continues to adopt rules of criminal and civil procedure which supersede all statutes and court rules inconsistent therewith. S.Ct.Rules 19.02; 41.02." *See, State v. Reese*, 920 S.W.2d 94, 95 (Mo. banc 1996).

"This Court has the power to make procedural rules governing all legal matters subject only to the limitations of federal law and the Missouri Constitution. The Constitution grants this Court power to 'establish rules relating to practice, procedure and pleading for all courts . . . which shall have the force and effect of law . . . .'" *State v. Reese, Id.*

Missouri case law recognizes a direct contempt (under the statute) and an indirect contempt (under the rule). *See, e.g., Chassaing, supra.* In that case, a lawyer, during a worker's compensation hearing, left the counsel table, charged the bench while yelling at the administrative law judge, ignored the judge's order to return to the counsel table, and

stormed out of the hearing room. The lawyer was charged with a criminal contempt proceeding brought pursuant to §536.095, RSMo, but claimed there was no statutory basis for the contempt action, and thus that the trial court lacked jurisdiction. This Court, however, found that the purpose of §536.095 was to give an agency, which has no inherent contempt power, a method through which to vindicate its authority and dignity.

In *Chassaing*, this Court clarified that "there are two classes of contempt – civil and criminal, each class having two subcategories – direct and indirect." 887 S.W.2d at 578. "Criminal contempt is punitive in nature and acts to protect, preserve, and vindicate the authority and dignity of the judicial system and to defer future defiance." *Id.* "A direct contempt occurs in the immediate presence of the court or so near as to interrupt its proceedings. If the judge certifies that he or she saw the conduct constituting contempt, a direct contempt may be punished summarily. 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. The procedural differences in direct and indirect contempt actions are based upon the availability of the facts to the judge who must make a determination of contempt." *Id.* (citations omitted). If a relator's conduct had occurred in court, before a judge, it would have constituted direct contempt, and relator could have been punished summarily. Because relator's alleged conduct occurred before the agency, however, it is necessary to follow the procedures of an indirect contempt action. *Id.*

In *State ex rel. Shepherd v. Steeb*, 734 S.W.2d 610, 611 (Mo. App., W.D. 1987), a judge was displeased with an assistant prosecuting attorney about a newspaper article in which the attorney was reported to have said, out-of-court, that a change of judge had been

taken because the state could not obtain a trial setting in the judge's court. *Id.* The appellate court found "[t]here is little doubt from the series of events that the cause of offense to the court was the newspaper article published June 25, three days before respondent scheduled the July 2 hearing. If the conduct of Shepherd in making the statement to the reporter attributed to him was the gravamen of the contempt charge, then by definition of terms, the contempt was indirect." *Id* at 611-12.

Supreme Court Rule 36.01(b) governs criminal contempt occurring outside the hearing of a court. Rule 36.01 is a mixture of both procedural and substantive law and clearly contemplates criminal contempt made both either directly to a judge's face or in his presence, and also that made via written pleadings. "Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights; the distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." *State v. Reese,* 920 S.W.2d at 95, (citation omitted).

Rule 36.01(a) states that criminal contempt may be punished summarily by the judge who "saw or heard the conduct constituting the contempt" committed in the "actual presence of the court." The Rule permits a summary judgment of contempt and order of commitment. Rule 36.01(b), on the other hand, covers "criminal contempt *except as provided in subdivision (a)* of this Rule" (emphasis added) – in other words, instances of contemptuous or insolent behavior that the judge neither saw nor heard, or where the judge was not present. Rule 36.01(b), though limited to instances where the judge was not present to hear the

contempt, specifically mentions situations where the "contempt charged involves disrespect to or criticism of a judge

Since §476.110(1) contemplates only contemptuous or insolent behavior "during (the court's) session, in its immediate view and presence," the Supreme Court, as the body tasked by the State Constitution with establishing "rules relating to practice, procedure and pleading for all courts" clearly must have intended that Supreme Court Rule 36.01 be broader in application than §476.110, otherwise Rule 36.01(b) would be meaningless. If Smith's reasoning were to be adopted, a lawyer could put in writing and file as a public record, things about a judge that he would be prohibited from saying directly to the judge. Surely this Court, charged with the responsibility of establishing rules relating to the practice of law, can be understood to have deliberately prevented such circumvention through its promulgation of Rule 36.01.

V –Judge Witt had no obligation to disqualify himself

Smith, in his 5th allegation of error, contends that Judge Witt, in having had lunch with Judge Carter on a prior visit to Douglas County in September of 2008, engaged in behavior which would lead a reasonable person to question his impartiality to preside over the trial of this matter in August of 2009. He also contends that Judge Witt's having presided over a trial involving Ron Jarrett made him privy to matters which left him unable to fairly preside over Smith's contempt trial.

A. Standard of Review -

"Although a criminal contempt proceeding has attributes of a criminal case, this Court has never held that criminal contempt is a specific crime or that it is to be tried as such. A contempt proceeding is "of its own kind." *Chassaing*, 887 S.W.2d at 579. Like a crime though, "contempt must be measured by the intent with which it is committed." *Thornton v. Doyle*, 969 S.W.2d at 346. While a criminal contempt proceeding is criminal in nature and the alleged contemnor is afforded many of the protections of a criminal defendant, no court of this state, however, has conferred upon an alleged contemnor all rights given to a criminal defendant. *See, Osborne*, 244 S.W.2d at 1012 (holding change of venue will not lie in a criminal contempt case, and statute requiring informations in criminal prosecutions to be verified does not apply in an indirect criminal contempt proceeding); *see also, Teefey*, 533 S.W.2d at 565(criminal contempt conviction may not be reviewed by appeal). *Chassaing, Id at* 579-80.

Though discovery was had in this matter, even the right of discovery is not unlimited or always available in indirect criminal contempt cases. "The proceedings frequently involve

a single, uncomplicated issue for which there is no need for extensive discovery in preparation for trial. For this reason, the scope and extent of discovery is to be determined in the trial court's discretion and may be limited depending upon the facts of the case and the character or nature of the information sought." *Chassaing*, 887 S.W.2d at 580.

While "[t]he right to a change of venue, including objections to the judge, is a statutory privilege[, a]bsent a specific rule or statute, litigants in a contempt proceeding have no right to disqualify a judge." *Houston v. Hennessey*, 534 S.W.2d 52, 55 (St. L. D. 1975)(emphasis added). "[J]udges are to be accorded the same presumption granted all public officers that they will faithfully carry out the duties of their offices. We are confident that judges will not undertake to preside in matters in which they will have a personal interest or where they can not be impartial." *Id.*

A party must show a basis on which to conclude a judge was biased and prejudiced. Moreover, a disqualifying bias and prejudice is one with an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learned from participation in the case. *State v. Nicklasson*, 967 S.W.2d 596, 605 (Mo. banc 1998).

B. One charged with criminal contempt does not have the right for a change of judge. Even if he does, he has the burden to prove the judge was unable to fairly preside over the matter.

When pre-trial motions were heard on June 29, 2009, Smith's motion to disqualify Judge Witt was heard. Judge Witt explained that he and Judge Carter had lunch together in September of 2008, *some 11 months prior to trial* (Resp. Ex. 2, pp. 8, 19). And, that they

discussed "bird dogs and quail hunting and nothing about the case" (Resp. Ex. 2, p. 9). Judge Witt indicated that back in his home county he had lunch with lawyers "all the time" and "it makes no difference whether or not we've had lunch together" in regard to the outcome of cases (Resp. Ex. 2, p. 9). Respondent Judge Witt concluded that "I do not think there is anything in this case which has given rise to a recusal for cause" and he thus overruled Smith's second motion to disqualify (Resp. Ex. 2, p. 21).

Here, Smith moved, twice, for Judge Witt (the third judge to be appointed by this Court to hear this matter) to recuse himself. Judge Witt specifically addressed Smith's concerns and unequivocally stated that he could fairly sit and preside over this matter, unaffected by having, once, had lunch with Judge Carter.

Smith's argument that Judge Witt's having presided over the trial of *State v. Ron Jarrett* somehow impaired his ability to fairly sit in this matter, is similarly infirm. Though not cited by Petitioner, the Missouri Southern District, on November 17, 2009, handed down its opinion in *State v. Jarrett*, ___ S.W.3d ___, 2009 WL 3838685 (Mo. App., S.D. 2009). In that matter, Smith's client, Ron Jarrett, was charged, and convicted following a bench trial in front of Judge Witt, with perjury.

As found by the Southern District, Smith's client Jarrett testified in his own behalf at his criminal trial. He testified, among other things that "Attorney Smith 'was attempting to get information out of [him] . . . in reference to primarily [Judge] Moody, initially. He has a gross dislike for [Judge] Moody . . . . Then it went to [Ms.] MacPherson. It went to multiple other attorneys . . . .'" *State v. Jarrett* , slip op. at 3. Further, Jarrett "related that as 'time progressed, some of the things that [Attorney] Smith had told [him] w[ere] done by Mr.

Cline, by [Prosecuting Attorney] MacPherson, and by others including [Judge] Moody, which later [he] found to be lies, were completely fabricated. [He] was misled grossly' by Attorney Smith." *Id.* Finally, Jarrett testified that "Attorney Smith, told him it was not perjury to make these statements 'because it's not a pretrial motion' and he felt that Attorney Smith 'wanted to hurt these people, and he used [Appellant].' On the day he testified at the motion hearing, Attorney Smith told Appellant they were going to court to 'make [Prosecuting Attorney MacPherson] look bad, he was going to set [Prosecuting Attorney MacPherson] up to commit a misdemeanor crime . . . [Attorney Smith] completely lied to [him] about what [they] were doing in the courtroom that day." *Id.*

Interestingly, as concerns Smith's complaint that the judge could, therefore, not be fair to him having heard this evidence, Judge Witt still found Ron Jarrett guilty, not innocent, of perjury.

Prior to presiding over Smith's contempt proceedings, Judge Witt again stated unequivocally that he could fairly preside over this matter. Additionally, the State specifically limited the allegations against Smith, through it's response to his *Bill of Particulars*, to the matters in the two paragraphs discussed at length throughout this brief, choosing not even to get into the Jarrett matters.

Respondent Witt respectfully suggests that Smith had no right under the law for a change of judge, nor was he entitled to one based on his superficial and tenuous allegations, each of which was refuted by Judge Witt on the record. Petitioner presented no evidence that Judge Witt had a disqualifying bias and prejudice from an extrajudicial source. Petitioner's 5th claim is without merit.

VII – "Common Law Criminal Contempt" under Rule 36.01, has been neither eliminated nor superseded by §476.110, RSMo.

In his 7th allegation of error, Smith claims the jury found him guilty of common law contempt, which, he claims, the legislature eliminated through its promulgation of §476.110, RSMo.

A. Standard of Review -

While a portion of the common law has been codified, "all courts of record in Missouri have both inherent and statutory power to punish criminal contempt committed within or without their presence." *State ex rel. Robinson v. Hartenbach*, 754 S.W.2d at 570, *citing Osborne,* 244 S.W.2d at 1012. Further, "[e]very constitutional court of common law jurisdiction has inherent power to punish for contempt and cannot be shorn of such power by statute." 754 S.W.2d at 571 (emphasis added).

This Court, in *Robinson*, stated that, after scrutinizing the criminal contempt statutes, it considered them to be "reasonable." But it also ruled that "the court's inherent power is not infringed by the contempt statute," stating "[t]he court will tolerate the regulation of its contempt power, but the legislature cannot be allowed, by such regulation to substantially destroy the efficiency of the court." 754 S.W.2d at 571 (emphasis added).

B. Enactment of Supreme Court Rule 36.01, some 40 years after §476.110, RSMo was enacted, shows this Court's intent regarding criminal contempt

Again, this Court enacted Rule 36.01 some 40 years after §476.110, RSMo was enacted. It also specifically held that the Court's inherent power is not infringed by the contempt statute and that, while it would tolerate the regulation of its contempt power, it

would not allow the legislature, by regulation, to substantially destroy the efficiency of the court. *State ex rel. Robinson v. Hartenbach*, 754 S.W.2d at 571. This Court cannot be said to have committed a meaningless act.

Petitioner's 7th allegation of error has no merit.

IX – Subject Matter Jurisdiction –Missouri's criminal contempt statute and rule are not limited in application to criminal cases

In his 9th claim of error, Smith claims – without citation to any caselaw – that the trial court had no subject matter jurisdiction because Rule 19 limits criminal contempt to criminal cases, seemingly arguing that criminal contempt cannot occur in civil matters, but only during the course of criminal matters.

A. Standard of Review –

Initially, "[f]ailure to cite relevant legal authority in support of a point or to explain the failure to do so preserves nothing for review." *Washington v. Blackburn*, 286 S.W.3d 818, 821 (Mo. App., E.D. 2009).

Once again, this Court has held that "the distinction between criminal and civil contempt is reflected in the content of the judgment, whether the remedy is coercive or punitive." *Chassaing*, 887 S.W.2d at 578. "Although a criminal contempt proceeding has attributes of a criminal case, this Court has never held that criminal contempt is a specific crime or that it is to be tried as such." *Id* at 590, *citing Osborne*, 244 S.W.2d at 1011.

Missouri courts have repeatedly held that a contempt proceeding is *sui generis*, that is, of its own kind. *Id* at 579; *Osborne v. Purdome*, 244 S.W.2d at 1012. As such, a contempt proceeding is in fact controlled by its own rules. *Chassaing*, 887 S.W.2d at 579 (Emphasis added).

B. Criminal Contempt can be had against any attorney or litigant, whether in a civil or criminal matter.

This court has Court specifically refused to hold that a criminal contempt proceeding is a criminal prosecution within the meaning of the Constitution, statutes, or case law of either the United States or the State of Missouri. *See, Osborne, supra*. Rather, though stating that criminal contempt is criminal in nature, this Court has held that one charged with contempt can only be adjudged guilty after four requirements are met: (1) due notice; (2) reasonable opportunity to defend; (3) the presentation of sufficient evidence to warrant the judgment; and (4) that a valid commitment in any criminal contempt case must contain the particular circumstances of the offense. *Chassaing*, 887 S.W.2d at 579.

Criminal contempt has been found against persons in both civil and criminal matters. *Chassaing*, *supra*, involved criminal contempt being filed against a lawyer for his conduct during a worker's compensation hearing. This Court found that §536.095, RSMo gave even a state agency, which has no inherent contempt power, a method through which to vindicate its authority and dignity.

Missouri's courts have required certain, limited, protections. Each of these protections was afforded Petitioner Smith, and thus his 9^{th} claim is without merit.

X – Adequacy of State's Verdict Director

In his 10th claim Smith contends the State's verdict director was erroneous, charging that it contained no elements of statutory or common law criminal contempt, did not require a mental state for defendant, and did not contain an element that Smith's conduct had any actual affect on the administration of justice.

The State's Not-in-MAI Verdict Director stated as follows:

INSTRUCTION NO. _____

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about April 3, 2008, in the County of Douglas, State of Missouri, the defendant served upon R. Craig Carter a Petition for Writ of Prohibition against R. Craig Carter, and

Second, that R. Craig Carter was the Judge of the Circuit Court of Douglas County, Associate Circuit Division, Forty-fourth Judicial Circuit, and

Third, that in his Petition for Writ of Prohibition the defendant stated that R. Craig Carter, in his position as Judge, used a grand jury to threaten, install fear and imprison innocent persons to cover-up and chill public awareness of apparent misconduct using the power of his position to do so, and

Fourth, that in his Petition for Writ of Prohibition the defendant stated that R. Craig Carter, in his position as Judge, handled a grand jury as a tool to threaten, intimidate and silence any opposition to his personal control, and

Fifth, the defendant's statements degraded and made impotent the authority of the Circuit Court of Douglas County, Associate Circuit Division and impeded and embarrassed the administration of justice,

then you will find the defendant guilty of contempt of court.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of contempt of court.

A. Standard of Review –

"This court will only reverse for an instructional error if there is both error in submitting the instruction and that the error prejudiced the defendant." *State v. Kidd*, 83 S.W.3d 4, 8 (Mo. App., W.D. 2002). "A defendant is prejudiced by an erroneous instruction where the jury may have been adversely influenced by it." *State v. Caldwell*, 956 S.W.2d 265, 267 (Mo. banc 1997).

Courts "review challenges to jury instructions for error that materially affected the merits of the case, reviewing the evidence in the light most favorable to the submission of the instruction. *Newell Rubbermaid, Inc. v. Efficient Solutions*, 252 S.W.3d 164, 170 (Mo. App., E.D. 2007). "We only review a verdict if the 'instruction misdirected, misled or confused the jury' and resulted in error that materially affected the outcome of the matter." *Id.*

A verdict director must adequately follow the substantive law. *Id.* at 175. Even where language in a paragraph of a verdict director is "not perfect," and "the State could have submitted a better instruction by omitting" or "incorporating" certain words, the courts

have found a verdict director to be sufficient. *Kidd,* 81 S.W.3d at 10. The court will not overturn a verdict unless there is a complete absence of probative fact to support it and no reasonable jury would differ as to the outcome of the case." *Id.*

Courts will not disturb a trial court's refusal to submit an instruction to the jury absent a showing of an abuse of discretion. *State v. Burks*, 237 S.W.3d 225, 228 (Mo. App., S.D. 2007). Even if a reviewing finds error in a trial court's refusal to give an instruction, it will reverse only if such error was prejudicial to the defendant. *Id*.

B. The State's Verdict Director appropriately tracked the allegations against Petitioner and the law in Missouri

As set forth above, the State's Verdict Director appropriately tracked the charges as set forth by Judge Carter in his Order, as well as case law. The courts of this state have found that "[i]ndirect 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." *Thornton,* 969 S.W.2d at 344 (emphasis added); *Chassaing*, 887 S.W.2d at 578; *Curtis v. Tozer*, 374 S.W.2d at 568. Further is not required.

Petitioner's 10th allegation of error is without merit.

XI – Sufficiency of the Evidence

Under Point XI of the Petitioner's brief, he attempts to raise an issue challenging the sufficiency of the evidence. But, in advancing this issue, the Petitioner makes little or no effort to comply with any of the applicable rules of appellate procedure.

The petitioner's Point XI reads, in full,[5] as follows:

> **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.**

(Petit.Br. 24, 59).

This point, and the extremely brief "argument" that follows it, violate the rules of appellate procedure in numerous material respects. First, Rule 84.04(d)(3), provides that each point relied on shall: "(A) state what relief the petitioner or relator seeks from the appellate court; (B) identify the action that the petitioner or relator challenges; (C) state concisely the legal reasons for the challenge to respondent's action; and (D) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error." *See*, *State v. Dodd*, 10 S.W.3d 546, 555-556 (Mo.App., W.D. 1999).

[5]To make this point easier to read, it has not been rescripted in all capital letters as they appear in the Petitioner's brief. Otherwise, the point has been copied exactly as it appears in his brief.

Point XI is merely an abstract claim of alleged error, devoid of any indication as to "why" Petitioner believes the evidence against him was insufficient. As such, it is "merely bald allegations of error and offer no explanation as to how or why the evidence would have supported a different ruling." *State v. Flint*, 26 S.W.3d 178, 179 (Mo.App., W.D. 2000).

Additionally, Petitioner, in his Point XI, fails to concisely state the "legal reasons" why the trial judge allegedly erred, or explain why, in the context of the case, those legal reasons support the claim of reversible error, contrary to the requirements of Rule 84.04(d).

An insufficient point relied on presents nothing for review. *Flint, id.*. It forces the appellate court to search the argument portion of the brief or record itself to try to determine a litigant's assertions, creating the danger that the appellate court will misinterpret that contention. *In re: Marriage of House*, 292 S.W.3d 478, 482 (Mo. App., S.D. 2009). Otherwise stated, a point relied on that is written contrary to the mandatory requirements of Rule 84.04(d), which cannot be comprehended without resorting to other portions of the brief, preserves nothing for appellate review. *Dodd*, 10 S.W.3d at 556.

Nor does the Petitioner make any real effort to argue his final point. His argument consists of one paragraph stating, essentially, the State's evidence against him alleged no crime. Where, as here, a point "appears without citation of authority and little or no argument," *State v. Cooper*, 541 S.W.2d 40, 44 (Mo.App., Spr.D. 1976), or where, as here, "it is not developed in the argument portion of the brief," it will be deemed to have been abandoned. *State v. Oswald*, 14 S.W.3d 678, 680 (Mo.App., W.D. 2000).

Furthermore, Petitioner makes not *single* citation to the record in his Point XI. As in *Flint*, the Petitioner's failure to "cite any transcript pages where [this Court] might be able to

find the facts he averred," constitutes a further waiver of his claims. *Flint*, 26 S.W.3d at 179. "It is improper for [this Court] to comb through the record searching for the facts." *Flint, id.*

A. Standard of Review –

For claims regarding the sufficiency of the evidence, this Court's review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. O'Brien*, 857 S.W.2d 212, 215-16 (Mo. banc 1993). Appellate courts do not review the evidence *de novo*; rather they consider the record in the light most favorable to the verdict. *State v. Withrow*, 8 S.W.3d 75, 77 (Mo. banc 1999).

To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ "a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." *State v. O'Brien, Id.* Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored. *Id.*

Appellate courts do not act as a "super juror with veto powers," instead they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993); *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998). They may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact's province to believe all, some, or none of the witnesses' testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo.

banc 1989). Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 405-06.

B. Sufficient evidence existed to show that Petitioner committed indirect criminal contempt.

Judge Carter's *Order*, limited as the State did to the two paragraphs he quoted therein, appropriately charged Smith with the crime of contempt of court under Rule 36.01 and §476.110. In his *Order*, Judge Carter certified that: Smith had appeared in front of the Court and filed a motion to quash a grand jury subpoena; that the Court had overruled Smith's motion, but granted him 7 days in which to file for a writ of prohibition with the Court of Appeals; and that the Court of Appeals had denied Smith his Writ. (Resp. Ex. 1, pp. 49-51, 53, 59-60, 82; Rel.Att., pp. 213-215).

He also set forth the two paragraphs from Smith's Petition which about which he testified "[w]hat's contained in these two paragraphs is the reason I filed the criminal contempt" (Resp. Ex. 1, p. 63).

Judge Carter, "pursuant to Missouri Rule of Criminal Procedure 36.01," ordered the Circuit Clerk to file a copy of his *Order*, as well as Relator's *Petition for Writ of Prohibition*, and "the Court of Appeals' Order, dated April 4, 2008, wherein that Court denied the Writ of Prohibition" in a new court file. Judge Carter also ordered that a copy of his *Order*, after assignment of a case number, be sent to the presiding judge with a request that he request the assignment of a judge to the contempt proceeding. Lastly, Judge Carter ordered that copies

of his *Order* be forwarded to the Douglas County Prosecutor as well as attorney Smith, at his office. (Rel.Att., pp. 214-215).

At trial, Judge Carter explained to the jury that he had been appointed to oversee the conduct of a Douglas County grand jury and that, on March 31, 2008, Carl Smith, an attorney, had appeared before him to argue a motion he had filed seeking to quash a subpoena issued by that grand jury (Rel.Att. 121-123, 223-225). Judge Carter told the jury that, following a legal argument, he ruled against Smith on his motion, but gave him 7 days in which to file a challenge to his decision in the Missouri Court of Appeals, Southern District (Resp. Ex. 1, pp. 50, 51, 53, 81-82; Rel.Att., p. 176).

Lastly, Judge Carter told the jury that on April 3, 2008, he received, in his office in Douglas County, a copy of Smith's *Petition for Writ of Prohibition* (Resp. Ex. 1, p. 57), in which attorney Carl Smith named Judge Carter as "Respondent," and Ron Jarrett and Amanda Kay Evans as "Relators." (Rel.Att., p. 003). And that following his receipt of that *Petition*, and based on Smith's statements therein, Judge Carter initiated the criminal contempt proceedings against attorney Smith. Judge Carter specifically denied each of the allegations made by Smith in these two paragraphs (Resp. Ex. 1, pp. 63-64), and testified that he did not believe they were proper "argument" (Resp. Ex. 1, pp. 92-93). He further testified that attorneys are "officers of the court" who have a duty to the court (Resp. Ex. 1, pp. 64-65). Lastly, he pointed out that the proper avenue for an attorney, should he believe a judge has committed, or is committing, wrongdoing, is to file a complaint with the *Commission on Retirement, Removal and Discipline of Judges* (Resp. Ex. 1, pp. 65-66, 90).

These charges, and the evidence presented against Smith, were sufficient to show that Carl Smith committed the crime of contempt of court. Petitioner's 11th claim is without merit.

CONCLUSION

Petitioner is not entitled to release on Writ of Habeas Corpus. His jury conviction for contempt of court should be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 15,872 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 20th day of January, 2010, to:

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