IN THE SUPREME COURT OF MISSOURI

No. SC90425

STATE EX REL. CARL SMITH,

Petitioner,

v.

THE HONORABLE GARY WITT,

Respondent.

Original Proceeding in Habeas Corpus

BRIEF OF AMICUS CURIAE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Respectfully submitted:

MISSOURI ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

By: _____

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Missouri Association of Criminal Defense Lawyers (MACDL) is an organization dedicated to protecting the rights of persons accused of crimes in Missouri, and to fostering and enhancing the ability of Missouri lawyers to effectively represent those persons. MACDL also works to improve the criminal justice system to those ends. MACDL is an affiliate organization of the National Association of Criminal Defense Lawyers.

Amicus curiae writes in support of Petitioner Carl Smith urging this Court to issue a permanent writ of habeas corpus discharging Petitioner from his incarceration and reversing his conviction for criminal contempt on the grounds that it is an improper application of Missouri's criminal contempt statute.

The Respondent improperly and impermissibly utilized the criminal contempt statute to punish Petitioner for arguments advanced in appellate pleadings. The Petitioner's speech was not made during the court's session, nor in its immediate view or presence, and did not directly interrupt the court's proceedings or impair the respect due to the court's authority. To allow criminal prosecutions for statements made by counsel in writs and pleadings--which do not disrupt the administration of justice--will chill zealous advocacy and impair the rights of the accused to a full defense and fair trial.

INTRODUCTION

The criminal contempt prosecution of Petitioner Smith was premised upon Petitioner writing in a writ of prohibition he filed with the Missouri Court of Appeals - Southern Division, on behalf of a client he was representing on criminal charges.

In the process of reviewing potential charges against one of Petitioners' clients the grand jury filed a subpoena requesting the notary log of a secretary in Petitioner's law office. Petitioner filed a motion to quash the subpoena, which was denied. Petitioner then filed a writ of prohibition with the Missouri Court of Appeals – Southern District. In that writ, in support of quashing the affidavit, Petitioner argued on behalf of his client that there existed a "personal interest, bias and purported criminal conduct [on the part of the trial judge and prosecuting attorney]" in seeking and upholding the subpoena. Petitioner through the correct legal process challenged the motivation for the trial court's refusal to quash documents he believes to be protected. Petitioner alleged that the manner in which the trial judge and the prosecuting attorney were utilizing the county's grand jury gave:

> *"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."*

Petitioner went on to state that the county's grand juries were "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…"

In compliance with Missouri Supreme Court Rule 84.24(a)(4)(B), a copy of the writ of prohibition was forwarded to the judge against whom the writ was filed. Based upon the arguments and advocacy contained within that writ, the respondent-judge filed for criminal contempt against Petitioner. The Petitioner was charged, tried, subsequently convicted by a jury, and eventually jailed.

Petitioner seeks release from confinement through petition for a writ of habeas corpus. Amicus Curiae supports Petitioner's application.

STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amicus Curiae adopts and incorporates by reference the jurisdictional statement and statement of facts set forth in Petitioner's substitute brief, previously filed with this court.

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), amicus curiae certifies that consent to file this brief was sought from all parties. Counsel for Petitioner, Respondent Witt and petitioner-Amicus ACLU consented. Counsel for Respondent Sheriff Pace refused to consent. Proposed amicus curiae has filed a motion seeking leave to file this brief.

ARGUMENT

I. The trial court erred in allowing the prosecution of, upholding the conviction of, and jailing the Petitioner on the grounds of criminal contempt because the speech of the Petitioner was not the type sought to be prevented by Missouri's criminal contempt statute in that the speech of the Petitioner did not directly threaten the administration of justice by the charging court.

-- *In re the Matter of Indirect Criminal Contempt Proceedings Against McMillian v. Rennau,* 619 S.W.2d 848 (Mo.App.W.D. 1981).

-- *Professor Louis S. Raveson, Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power*, 65 Wash. L. Rev. 477 (1990).

Courts must have the power to enforce order and to compel compliance with their authority. *Professor Louis S. Raveson, Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power*, 65 Wash. L. Rev. 477 (1990)[1]. Orderly proceedings and obedience to the courts' commands are essential to the proper administration of justice. *Id.* An independent bar, however, is equally critical to the successful functioning of our justice system, for it is with the vigorous advocacy of adversaries that our judicial system exposes the truth and achieves justice. *Id.*

[1] Professor Raveson's two-part series on criminal contempt, while dated, provides an extremely thorough review of the criminal contempt power of the judiciary. The articles can be found at 65 Wash. L. Rev. 477 (part 1) and 65 Wash. L. Rev. 743 (part 2).

Presently, the standards governing both the limits of acceptable advocacy and the scope of the contempt power are haphazard and imprecise. *Id.* In essence, the personal sensibilities of trial judges largely govern the substantive scope of the contempt power. *Id.* The ad hoc and sporadic treatment of individual instances of contempt makes the limits uncertain, producing substantial self-censorship of zealous trial representation by lawyers. *Id.* This chilling can have a profoundly adverse effect on the quality of advocacy and the process of justice. *Id.*

- **A lawyer's duty to his clients**

Pursuant to the Missouri Rules of Professional Conduct 4-1.4, a lawyer shall act with reasonable diligence in representing a client. This means that a lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. *Id*. at Comment [1]. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. *Id.*

- **Criminal contempt in Missouri**

Missouri's criminal contempt statute is Section 476.110 R.S.Mo., and provides for criminal contempt in cases where a person is 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.

By the statute's express terms, jurisdiction to punish for contempt or insolent behavior is limited to acts committed during the court's session, in its immediate view and presence. *In re the Matter of Indirect Criminal Contempt Proceedings Against McMillian v. Rennau,* 619 S.W.2d 848 (Mo.App.W.D. 1981).[2]

"In general…punishment for criminal contempt has been defined as a recourse necessary to vindicate the authority of the court and to deter future defiance." *McMillian* at 851, (quoting: *Chemical Fireproofing Corp. v. Bronska*, 553 S.W.2d 710 at 175 (Mo.App. 1977)). The power to punish for contempt should be used sparingly, wisely, temperately and with judicial self-restraint. *In re Estate of Dothage*, 727 S.W.2d 925, 927 (Mo.App. W.D. 1987). The power should be exercised only when necessary to

[2] *In re McMillian v. Rennau* is the controlling case for charges of criminal contempt in Missouri and counsel cites heavily to that opinion. A copy is provided in the Appendix for reference by the Court.

prevent actual, direct obstruction of, or interference with, the administration of justice. *Fulton v. Fulton*, 528 S.W.2d 146, 157 (Mo.App.1975).

Because the subjection of individual freedom by expression or action is the consequence when a court's contempt power is exercised, the ultimate question is whether advancement of the general interest in an effective judicial system warrants imposition of restraint on the right of the individual to criticize and disparage. *Id.* If the judicial function is not integrally threatened by the allegedly contemptuous expression, then there is no inherent contempt power to exercise. *Id*.

As a measure applied to evaluate the degree of threat in allegedly contemptuous conduct, the theory of a "clear and present" damage has evolved. *McMillian* at 852. The "clear and present danger" concept first developed in *Schenck v. United States*, 249 U.S. 47 (1919), where the abridgment of free speech and press was acknowledged to be a casualty in contempt cases. The doctrine was more fully developed in *Bridges v. State of California*, 314 U.S. 252 (1941), which is most often cited as the authority in contempt cases. See *McMillian* at 852. The test to be employed in determining whether a given expression, statement or publication was sufficiently grievous to support contempt punishment was described in the following terms:

> *"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Bridges at 263.*

The court further observed:

"The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Bridges at 270-271.*

Freedom of speech includes the right to criticize and disparage the judiciary and judicial process, even though the terms be vitriolic, scurrilous or erroneous. *Pennekamp v. Florida,* 328 U.S. 331 (1946). To talk of a clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice. *Id.* at 328.

The vehemence of the language used is not alone the measure of the power to punish for contempt. *Craig v. Harney,* 331 U.S. 367 (1947). The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. *Id.* The danger must not be remote or even probable; it must immediately imperil the court's authority. *Id.* at 331.

- **Criminal contempt is not intended to restrict zealous advocacy.**

It is the right of counsel for every litigant to press his claims, even if it appears farfetched and untenable, to obtain the court's considered ruling. *State ex rel. Tannenbaum v. Clark,* 838 S.W.2d 26, 34 (Mo.App.W.D. 1992). Full enjoyment of that

right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. *Maness v. Meyers*, 419 U.S. 449, 459 n.7 (1975). The use of summary criminal contempt to punish lawyers for advocacy that is only overly zealous…contradicts the principle of an independent and assertive bar. *In re Contempt of Greenberg*, 849 F.2d 1251, 1255 (9th Cir. 1988).

- **Application of Section 476.110 R.S.Mo.**

Criminally charging attorneys for language advanced to a higher court in support of a client will chill the zealous representation that is essential to the proper functioning of our criminal defense system. Writs, by necessity, challenge the action of an underlying tribunal. They frequently present a direct challenge to a decision or the motivation of a trial judge. Motions to rescue judges frequently need to highlight the alleged bias or lack of impartiality of a judge. If attorneys face criminal charges for advocating their clients' positions – even if those positions tend to embarrass a sitting judge or offend his personal sensibilities – counsel will no longer have the flexibility to challenge the actions, potential bias, or motivations of an underlying court.

In this case, the filing of the writ of prohibition took the matter outside of the Respondent's authority. Once that writ was filed, the Respondent became a party.[3] Respondent could have filed any number of responses to the allegations of the Petitioner: a bar complaint, a motion to strike, or suggestions in opposition – instead, he filed for

[3] Though outside the scope of the argument advanced by Amicus Curiae, it is questionable whether the contempt, to the extent it would actually exist, more appropriately belongs to the appellate court rather than to the respondent-judge.

criminal contempt. A judge, named as a respondent in a writ, should not be able to use his authority to block or punish an advocate for speech that the judge finds disagreeable or offensive – particularly as that speech challenges the actions of that respondent-judge.

The fact that Petitioner made his speech in a writ demonstrates his adherence to the rule of law and his willingness to operate within the authority of the court. Section 476.110 R.S.Mo. is not intended to punish this type of speech.

- **Other methods of challenging the Petitioner's speech existed.**

Missouri Supreme Court Rule 4-3.5 (Impartiality and decorum of the tribunal) mandates that a lawyer shall not engage in conduct intended to disrupt a tribunal. The Comments go on to explain that:

> *"The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."*

If the trial court believes this Rule had been breached, the proper means of enforcement would have been a bar complaint to the Chief Disciplinary Counsel (which was never made), not a motion to show cause for criminal contempt.

In the case at bar, Petitioner advocated the position of his client in order to protect his client's position in a criminal prosecution. If the trial court believes that the advocacy was over zealous or inartfully executed, there were civil recourses which should have been pursued instead of a motion for criminal contempt. To have not set forth all grounds for quashing the subpoena in question would have been malpractice on the part of the attorney. If it was done inartfully, there were other mechanisms for professional review – Respondent could have filed a complaint with the Chief Disciplinary Counsel or the Respondent should have filed a motion to strike portions of the writ or challenged the assertions through suggestions in opposition.

a. The Georgia Case of *In re Sherri Jefferson*

Amicus Curiae urge the Court to consider the criminal contempt test set forth in *In re Sherri Jefferson*, 657 S.E. 2d 830 (GA 2008). In Ms. Jefferson's case the court considered a variety of in-court statements made by an attorney, within the hearing of the bench.[4] The Georgia Supreme Court held that criminal contempt should only be found in cases where: (1) the attorney's statements and attendant conduct either actually interfered with or posed an imminent threat of interfering with the administration of justice; and (2) that the attorney knew or should have known that the statements and attendant conduct exceeded the outermost bounds of permissible advocacy. *Id.*

The Georgia Supreme Court offered a test and urged its state courts to consider the following non-exhaustive list of factors: (1) the extent to which the attorney was put on

[4] Counsel acknowledges that the instant case is one of indirect contempt versus the direct contempt contemplated by the Georgia Supreme Court.

notice prior to the contempt citation that a continuation of the offending statements would constitute contempt; (2) the likely impact of the offending statements on the deliberations of the fact-finder, which calculus incorporates both the nature and timing of the offending conduct and whether the fact-finder is a judge or jury; (3) whether the offending statements occurred as an isolated incident or constituted a pattern of behavior; (4) the significance of the particular issue in question to the case as a whole and the relative gravity of the case; and (5) the extent, if any, to which the trial court provoked the offending statements with its own improper statements. See *Louis S. Raveson, Advocacy and Contempt-Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 Wash. L.Rev. 743 (IV)(D-I) (Oct.1990).

The Georgia Supreme Court found that in light of the important constitutional rights involved, in adjudicating a case of possible contempt, "doubts should be resolved in favor of vigorous advocacy. *United States ex rel. Robson v. Oliver*, 470 F.2d 10, 13 (7th Cir.1972).

"Indeed, where advocative expression is at issue, the need for such expression cannot merely be balanced against the court's interest in maintaining…integrity…; advocacy is itself essential to the court's achieving that interest." *Id.* Therefore, any balancing test for determining whether advocacy interferes sufficiently with justice, so as to make it punishable, must also consider the positive value of the advocacy to the very interest sought to be protected by the contempt power. *Id*. (Citing: *Raveson, Part One*, supra, 65 Wash. L.Rev. at 515-516). Because vigorous advocacy is essential not only to the preservation of individual rights, but also to the integrity of the judicial system whose

truth-seeking process is sought to be protected through the exercise of the contempt power, courts must be judicious in their approach to adjudicating contempt. *Id.* In considering whether to hold an attorney in contempt, the court should always assess whether there are other correctives sufficient to address the problematic conduct in question. See *In re McConnell*, supra, 370 U.S. at 234 (contempt power should be limited to least possible power adequate to the end proposed). The Georgia Supreme Court echoed the United States Supreme Court's admonition that trial judges "must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *In re Little*, 404 U.S. 553 (1972).

- **Petitioner's speech, presented in a writ, was not criminal contempt.**

Petitioner's statements in the underlying case were made on behalf of a client. They were not made to the press or to extrajudicial parties – rather they were assembled and presented to the Court of Appeals, as well as the trial judge per the Missouri Supreme Court Rules. There is no allegation that the speech contained within the writ pleadings threatened to immediately imperil the administration of justice.

While Petitioner's advocacy on the behalf of his client is alleged to have disparaged the underlying court, no evidence was presented that the statements were not made for any reason other than the pursuit of ultimate justice for Petitioner's client. Because the statements made were in the form of pleadings to a higher court, there was no clear and present danger of imminent damage to the underlying court's administration of justice.

This is not a case of disobedience or willful disregard of a court's order. This is a case of the censorship of one attorney's speech, that was made in furtherance of a client's case, which offended a judge to whom the speech was not directed. Criminal contempt proceedings in this case were inappropriate.

If advocates fear a respondent-judge will file for criminal contempt based upon the arguments set forth in a writ, cease to file writs, or they will tone down arguments – either way they will fail to serve as a zealous advocate for their client's position.

CONCLUSION

The Court should find that Section 476.110 R.S.Mo. does not apply to Petitioner's speech. Petitioner's speech was made in the form of a pleading to a higher court. Petitioner was, in good faith, advocating his client's case. Petitioner did not publish his client's allegations to a media source or the public. Rather, his speech was presented though the legal and procedurally accepted (and mandated) forum and procedure. While perhaps inartfully stated, the speech did not disrupt a judicial proceeding or present a clear and present danger to the authority of the court. If the Respondent took umbrage at the speech, a variety of other methods of response were available to him.

To find that pleadings, made in the course and scope of legal representation, constitute criminal contempt will have a chilling factor on the representation of criminal defendants in Missouri. Amicus urges the Court to take this opportunity to accordingly restrict application of Section 476.110 R.S.Mo.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent via U.S. mail on this 18th day of December to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Brief of Amicus Curiae includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06.

Relying on the word count of the Microsoft Word Program, the undersigned certifies that the total number of words contained in the Brief of amicus Curiae is 3,474 exclusive of the cover, signature block and certificates of service and compliance.

The undersigned further certifies that the disk filed with the Brief of Amicus Curiae was scanned for viruses and was found virus-free through the McAfee Virus Scan anti-virus program.

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APPENDIX