IN THE SUPREME COURT OF FLORIDA

Case No. ____

ROY ALLEN HARICH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT ON CONTEMPT CITATION

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE

LARRY HELM SPALDING
Capital Collateral
Representative
Florida Bar No. 0125540

BILLY H. NOLAS Chief Assistant CCR Florida Bar No. 0794351

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

ALLAN M. PEPPER
STEVEN GLICKSTEIN
Florida Bar No. 0223281
JOHN D. CHAPMAN
Admitted Pro Hac Vice
STANLEY N. ALPERT
Florida Bar No. 0716073
SUZANNE M. JAFFE

425 Park Avenue New York, New York **10022** (212) 836-8000

COUNSEL FOR APPELLANT

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APPELLANT'S INITIAL BRIEF ON APPEAL OF JUDGE BLOUNT'S ORDER OF CONTEMPT

John D. Chapman and Nancy Feinrider, defense counsel for Roy Harich in the proceedings below, appeal the orders of the Honorable Uriel Blount, Jr., holding defense counsel in contempt for allegedly appearing 26 minutes late for a hearing. orders were entered without any basis in law, and it is apparent that they were entered solely to intimidate counsel -- who had moved to recuse this same judge, and who had subpoenaed the judge as a fact witness -- from questioning the judge too vigorously on the witness stand and from vigilantly protecting their client's rights. As is detailed below, the contempt orders should be vacated because it is undisputed that defense counsel had no contumacious intent, the orders themselves were procedurally defective, and the lower court had no jurisdiction to issue them This brief does in any event. Notice of appeal was timely filed. not reiterate the discussion presented in Mr. Harich's initial brief from the denial of Rule 3.850 relief.

STATEMENT OF THE CASE

After this Court vacated the Circuit Court's order denying Mr. Harich's 3.850 motion, on May 3, 1989, the Honorable Uriel Blount ordered that the evidentiary hearing on the claim of conflict of interest commence in DeLand at 9:30 a.m. on June 9, 1989 (T. 473). As of that date, the mandate had not issued because Appellant had moved for reargument and jurisdiction still vested in this Court. Thus, on May 9, 1989, counsel notified Judge Blount by letter that, as Mr. Harich's appeal was still pending in this Court, the Circuit Court did not yet have

jurisdiction to set a hearing date (T. 475-76).

On June 2, 1989, Mr. Harich, through counsel, moved the Circuit Court to adjourn the evidentiary hearing because the hearing as scheduled prejudiced defendant in that the Circuit Court still did not have jurisdiction and therefore defendant could not obtain compulsory process to take discovery to prepare adequately for the hearing (T. 485-94). Unbeknownst to defendant or counsel, on June 2, 1989, this Court denied defendant's motion for rehearing and the mandate issued (T. 477-78). On June 6, 1989, defendant learned that the mandate had issued and moved Judge Blount to recuse himself because he would be called as a material witness and had pre-judged the case (T. 44). On June 8, 1989, the Chief Judge of the Seventh Judicial Circuit ordered that Judge Blount recuse himself and that Judge Foxman preside (T. Defense counsel were not advised of this order recusing 530). Judge Blount until after Judge Blount, sitting as the hearing judge in violation of the order, held them in contempt.

On the morning of June 9, 1989, defense counsel, who are not from the area, drove from Orlando (where they had flown in from out of town) to the hearing in DeLand, encountered unanticipated traffic, and became lost (T. 41). When counsel realized they would be delayed, they called the court well in advance of the hearing and informed the Court's Chambers of the situation (T. 410). Defense counsel arrived at the hearing approximately fifteen minutes late.1

^{&#}x27;Although Judge Blount believed that defense counsel arrived at 9:56 A.M., that is the time the hearing started, not the time that counsel arrived in the courtroom (T. 41).

Notwithstanding the Chief Judge's order replacing Judge Blount with Judge Foxman, Judge Blount commenced the hearing, ultra vires, at approximately 9:56 A.M. (T. 36). Judge Blount began by demanding that counsel show cause why they were delayed. Although Judge Blount found that defense counsel called his Chambers at 8:00 A.M., spoke with his secretary and informed her that they "had gotten lost and had run into traffic" and therefore would be slightly late, the Judge held counsel in contempt (T. 41-Notwithstanding the obvious absence of any contumacious intent, Judge Blount, who had been replaced as the judge in this matter the previous day, stated that "no [mitigating or excusing] circumstances have been shown . . [y]ou're . . in contempt of this Court. . . " (T. 43). Judge Blount's criminal contempt order dated June 9, 1989, followed and required payment of a total of \$500 in fines within 48 hours (T. 523, 525). Judge Foxman later stayed the payment of those fines pending appeal (T. 243). Notice of appeal was timely filed.

SUMMARY OF ARGUMENT

Judge Blount's contempt order was an abuse of discretion and should be vacated for three reasons. First, as discussed in Point I, there is no finding, nor could there have been, of contumacious intent since counsel notified the Court that they would be slightly delayed, and there is nothing in the record suggesting that the short delay was intended to embarrass, hinder, or obstruct the court's functions or authority. Second, as discussed in Point 11, the order should be vacated for failure of the lower court to comply with Rule 3.830's requirement that the judgment include "a recital of those facts upon which the adjudication of

guilt is based," Contrary to the rule's requirement, Judge Blount's order contains no recital of facts. Third, as discussed in Point 111, Judge Blount had no jurisdiction to punish counsel since the Chief Judge had ordered Judge Blount to recuse himself the day before. Nonetheless, Judge Blount took the bench and held the attorneys in contempt. As he had no jurisdiction, the contempt order was beyond the scope of his authority, ultra vires and void.

ARGUMENT

(I)

THE FACTS DO NOT WARRANT A FINDING OF CRIMINAL CONTEMPT

It is axiomatic that a judgment of criminal contempt requires
a finding that the alleged contemnors engaged in willful conduct
with the intent to obstruct the administration of justice or
degrade the presiding judge. Clein v. State, 52 So. 2d 117, 119

(Fla. 1950) (contempt is an act calculated to embarrass, hinder, or
obstruct a court in the administration of justice or which is
calculated to lessen its authority or dignity); Stevens V. State,
547 So. 2d 279 (Fla. App. 1939) (intent is an essential element of
contempt); Ray v. State, 352 So. 2d 110 (Fla. App. 1977) (criminal
contempt requires some willful act or omission calculated to
hinder the orderly functions of the court).

The attorneys' tardiness does not constitute contempt as it was not the willful disobedience of the court's scheduling order nor was it intended to hinder or degrade the presiding judge or the functions of the court. Rather, defense counsel's tardiness was caused by a combination of their having become lost and having

encountered unanticipated traffic while coming in from out of town and driving from Orlando to DeLand on the morning of the hearing. Moreover, the absence of any contumacious intent is further demonstrated by counsel's call to the Court well before the hearing informing the Court that they would be delayed and counsels' relaying their apologies for this (T. 41).

It is an abuse of discretion to find the attorneys guilty of criminal contempt based upon this brief tardiness alone. In Sewell v. State, 443 So. 2d 164 (Fla. App. 1983), the court reversed the trial court's finding of criminal contempt based upon a failure to appear at the time set by the court for commencement of the trial. Twice noting that the alleged contemnor apologized for his tardiness, the court found that, like here, there was no evidence that he was intentionally late. See also Lowe v. State, 468 So. 2d 258, 258 (Fla. App. 1985) ("Generally, the mere failure of an attorney to timely appear before a trial judge will not support a criminal contempt conviction").

Even if counsels' tardiness annoyed Judge Blount, it was not proper to hold them in criminal contempt. In <u>Vines v. Vines</u>, 357 So. 2d 243, 246 (Fla. App. 1978), which reversed a contempt judgment for a party's <u>total nonappearance</u> at a scheduled hearing, the court recognized the irrelevance of whether the judge felt aggrieved or vexed. Similarly, in <u>Litus v. McGregor</u>, 381 So. 2d 757 (Fla. App. 1980), the court reversed a criminal contempt finding where, at worst, the attorney's failure to appear at the scheduled hearing was a result of disorganization and negligence. The court stated:

[w]hile failure to appear at a hearing by counsel is

undoubtedly somewhat disrespective of a judge's planning and time management, it does not impugn the judicial function in the sense that the judge is hindered in his ability to administer justice.

381 So. 2d at 759. See also Thomson v. State, 398 So. 2d 514 (Fla. App. 1981) (appellant not guilty of criminal contempt for failure to appear where the evidence was equally susceptible of the inference that appellant merely was negligent). Mr. Harich's attorneys tried to get to court, were hindered by circumstances beyond their control, called the court and explained the situation, arrived fifteen minutes late, and apologized.

Here, the worst inference that can be drawn from the fact that the attorneys, who were not from the area, were late is that they did not contemplate the possibility of becoming lost or encountering traffic and therefore miscalculated the amount of time the trip would require. This miscalculation is not justification for a criminal contempt citation and, therefore, the finding of contempt must be reversed. See, e.g., Davis v. State, 523 So. 2d 1232 (Fla. App. 1988) (finding that evidence of defendant's intent to act contemptuously was insufficient because the evidence was not inconsistent with any reasonable hypothesis of innocence). Accord Garcia v. Pinellas County, 483 So. 2d 443 (Fla. App. 1986).

(II)

THE JUDGMENT OF CONTEMPT SHOULD BE REVERSED BECAUSE JUDGE BLOUNT DID NOT RECITE SUPPORTING FACTS, AS REQUIRED BY RULE 3.830.

As a predicate to holding anyone in contempt, Florida Rule of Criminal Procedure 3.830 requires a judgment of guilt which "shall include a recital of those facts upon which the adjudication of

guilt is based." Fla. R. Crim, P. 3.830. Judge Blount failed to do so, but instead summarily concluded that "no [excusing or mitigating] circumstances have been shown" and "[y]ou're hereby found to be in contempt of this Court. . . . " (T. 43). Judge Blount's failure to recite, in the judgment, the "facts upon which the adjudiction of guilt is based" is a deprivation of due process and requires reversal. Wells v. State, 487 So. 2d 1101, 1103 (Fla. App. 1986) (reversing judgment of contempt due to judge's technical error in failing to comply with Rule 3.830); State v. Harwood, 488 So. 2d 901 (Fla. App. 1986) (reversing contempt sanction because of failure to follow Rule 3.830 procedure).

Taken together, the court's order and the judgment indicate only that the appellants are in criminal contempt because of their arrival at the hearing "twenty-six minutes" late. (As noted, counsel were actually fifteen minutes late.) This is a mere conclusion which does not comply with Rule 3.830. In Ray v. State, 352 So. 2d 110 (Fla. App. 1977), the judgment adjudicating the attorney guilty of contempt indicated only that the attorney was in contempt because of his repeated defiance of court orders. The reviewing court reversed the contempt finding because, like Judge Blount's judgment, the Ray judgment "recite[d] conclusions," 352 So. 2d at 111, and did not reveal the contemptuous nature of the attorney's conduct. For this reason, too, the contempt citations should be vacated.

JUDGE BLOUNT DID NOT HAVE THE AUTHORITY TO ISSUE THE CONTEMPT ORDER BECAUSE HE WAS NOT PRESIDING OVER THE HEARING FOR WHICH THE APPELLANTS WERE LATE

One day prior to the hearing, by order of the Chief Judge, Judge Blount was replaced by Judge Foxman and therefore was without authority to hold the appellants guilty of criminal contempt. In fact, Judge Blount was at the hearing only because he had been subpoenaed by defense counsel to appear as a fact witness. It is black-letter law that an order issued under such circumstances is void. See, e.g., Klosenbers v. Klosenberg, 419 So. 2d 421 (Fla. App. 1932) (holding a contempt order void where it was issued by a judge who had not been specifically designated to act as judge in the proceeding).

The contempt order here was designed, if anything, to intimidate Mr. Harich's counsel. It is but another example of the unfair manner in which Mr. Harich's Rule 3.850 motion was treated—from the outset, the Seventh Judicial Circuit was intent on denying Mr. Harich's claims as quickly as possible; this case was not treated with the procedural rectitude which the law and the Florida and federal constitutions mandate in capital proceedings (See Harich v. State, Initial Brief of Appellant on the appeal of the denial of Rule 3.850 relief, pp. 48-50). The lower court's actions were not proper, and should be reversed.

CONCLUSION

For the foregoing reasons, the trial court's contempt orders, entered June 9, 1989, should be vacated.

Respectfully submitted,

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE

LARRY HELM SPALDING
Capital Collateral
Representative
Florida Bar No. 0125540

BILLY H. NOLAS Chief Assistant CCR Florida Bar No. 0794351

1533 South Monroe Street Tallahassee, Florida 32301 (904) 487-4376 KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

ALLAN M. PEPPER
STEVEN GLICKSTEIN
Florida Bar No. 0223281
JOHN D. CHAPMAN
Admitted Pro Hac Vice
STANLEY N. ALPERT
Florida Bar No. 0716073
SUZANNE M. JAFFE

425 Park Avenue New York, New York **10022** (212) 836-8000

By: Billy With for all counsel of record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Margene Roper, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 444 day of February, 1990.

Attorney