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**In the Supreme Court of Florida**

JENNIFER M. WOODWARD,  
*Petitioner,*

v.

STATE OF FLORIDA,  
*Respondent.*

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ON DISCRETIONARY REVIEW  
FROM THE FOURTH DISTRICT COURT OF APPEAL  
DCA No.: 4D16-2413

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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## **PRELIMINARY STATEMENT**

Petitioner Jennifer M. Woodward was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, and the appellant in the Fourth District Court of Appeal. Respondent was the appellee. In this brief, the parties will be referred to as they appear before this Court. The following symbols will be used:

- |           |   |
|-----------|---|
| “T”       | Transcript on appeal, followed by the appropriate page number                           |
| “R”       | Record on appeal, followed by the appropriate page number                               |
| “SR”      | Supplemental record filed with the Fourth District Court of Appeal on August 23, 2016   |
| “ST”      | Supplemental transcript filed with the Fourth District Court of Appeal on July 10, 2017 |
| “Pet App” | Petitioner’s appendix containing the slip opinion                                       |

## **INTRODUCTION**

This case is before this Court because of an express and direct conflict on the same issue of law: whether a trial court's failure to ensure transcription of direct contempt proceedings constitutes fundamental error. The Fourth District Court of Appeal held below that trial judges have no duty to procure court reporters for direct criminal contempt proceedings—and so transcription is not necessary to affirm a defendant's direct criminal contempt conviction. *See Woodward v. State*, 238 So. 3d 290 (Fla. 4th DCA 2018). The First and Second District Courts of Appeal have held to the contrary. *See Pole v. State*, 198 So. 3d 961, 965-66 (Fla. 2d DCA 2016); *Higgins v. Higgins*, 945 So. 2d 593, 595 (Fla. 2d DCA 2006); *Chamberlain v. Chamberlain*, 588 So. 2d 20, 23 (Fla. 1st DCA 1991).

Because criminal contempt is a crime and “[c]riminal defendants are entitled to a direct appeal as a matter of right in Florida,” *Sims v. State*, 998 So. 2d 494, 498 (Fla. 2008), Petitioner requests that this Court disapprove of the Fourth District's decision in this case. Holding otherwise would deny direct criminal contempt defendants due process by foreclosing their ability to obtain meaningful appellate review of a criminal proceeding that both this Court and the United States Supreme Court have recognized to be uniquely liable for abuse. Furthermore, the Fourth District's decision contravenes Florida Rules of Criminal Procedure 3.721 and 2.535, which mandate the transcription of criminal and sentencing proceedings.

## **STATEMENT OF THE CASE AND FACTS**

The underlying contempt proceedings originated from a probate action involving the estate of Petitioner's deceased aunt.

### ***The March 2, 2016 Hearing***

On March 2, 2016, the trial court held a hearing on a motion to appoint an administrator ad litem. (T. 15, 19).<sup>1</sup> Not long after the hearing began, Petitioner made several off-color comments. (T. 4). One of the lawyers—Mr. Mark Manceri—complained to the trial court that he did not “want to listen to [Petitioner's] peanut gallery until it's her turn to talk” because Petitioner was “interrupting everybody already.” (T. 5). Petitioner responded that she was not “at [Mr. Manceri's] service.” (T. 5). The trial court warned Petitioner that further outbursts would result in her removal from the courtroom. (T. 5).

After Petitioner again interjected, the trial court told Petitioner she was “about to be thrown out of here.” (T. 8). Mr. Manceri then asked Petitioner to repeat what she told him so that the statement could be recorded by the court reporter. (T. 8). Petitioner replied that she “could have been to Disney World four times with [her] ninety-year-old dad” during the pendency of the probate proceedings. (T. 8). At that point, the trial court told Petitioner to get “[her] face out of here” and ordered Petitioner to be removed from the courtroom. (T. 8-9).

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<sup>1</sup> A court reporter was privately procured by one of the probate attorneys.

On the way out of the courtroom, Petitioner stated that “Fort Lauderdale came to my son and abducted my son out of my house in Oakland Park in 2013. I got bigger fish to fry.” (T. 9). Petitioner also stated, “You can have the pictures and the real estate card and the Jesus stuff, because you need it.” (T. 9). Petitioner did not return for the remainder of the hearing.

### ***The March 17, 2016 Hearing***

The parties returned to court on March 17, 2016, for a hearing on an Emergency Motion for Contempt, Sanctions and Other Relief filed by one of the parties. (R. 1; ST.). For a brief moment, Petitioner was represented at the hearing by an attorney named Mr. Silverstone. (ST. 3). However, Mr. Silverstone quickly withdrew due to a conflict of interest. (ST. 3-4, 6, 22, 36). Petitioner told the trial court after Mr. Silverstone withdrew that she wanted the opportunity to retain an attorney. (ST. 24, 26-27). The trial court did not inform Petitioner of her right to appointed counsel for contempt proceedings.

During the hearing, Petitioner was called as a witness and testified that she and her son had been residing at the home to clean it, perform landscaping, and improve its resale value. (ST. 11-15). Petitioner explained she was doing so at the behest of her eighty-nine-year-old father—the estate’s personal representative—who was unable to fix up the home himself. (ST. 13, 15).

Following this testimony, Mr. Manceri asked that Petitioner be held in

contempt and sanctioned because the trial court had previously ordered that the subject home remain vacant. (ST. 18, 20). The trial court decided to delay the proceedings and re-set the matter for a later date. (Supp. T. 27, 33-34). In addition, the trial court directed Mr. Manceri to “file a rule to show cause as to why [Petitioner] should not be held in contempt of court.” (Supp. T. 34).

### ***The Show Cause Orders***

Four days later, on March, 21, 2016, the trial court entered a written order that (1) set a hearing for April 27, 2016, and (2) directed both Petitioner and the personal representative in the probate action to show cause why they should not be held in contempt or monetarily sanctioned. (R. 1-3). The order alleged that Petitioner and the personal representative “misrepresent[ed] to the Court on March 2, 2016” that a “residence was vacant when, in fact, [Petitioner] and her son . . . were inhabiting the residence without a Court Order.” (R. 1-3).

The personal representative filed an emergency motion to quash the show cause order. (R. 4-6). In the motion, counsel for the personal representative attested he had “obtained a transcript of the March 2<sup>nd</sup> hearing and nowhere in the transcript do [the personal representative or Petitioner] make any statements about the homestead property being vacant.” (R. 4-5). Because “the transcript of the March 2<sup>nd</sup> hearing indisputably show[ed] the alleged misrepresentations were not made,” the personal representative asserted “the alleged contempt [wa]s without

factual basis and the Order to Show Cause must be quashed.” (R. 5).

Without ruling on the personal representative’s motion, the trial court entered an order re-setting the show cause hearing for June 17, 2016. (R. 14-15). In the order, the trial court noted that, “[d]ue to . . . time constraints, the Show Cause Hearing did not go forward as set forth in the Order of the Court dated March 21, 2016.” (R. 15). Once again, the order directed the personal representative and Petitioner to show “why they should not be held in contempt of Court and monetarily sanctioned . . . for misrepresenting to the Court on March 2, 2016 the subject residence was vacant.” (R. 15).

### ***The June 17, 2016 Hearing***

The trial court conducted the show cause hearing as scheduled on June 17, 2016; however, no court reporter was present in the courtroom.<sup>2</sup> (Supp. R. 10). As a result, there are no transcripts of the June 17 hearing in the appellate record. (Pet. App. 3). The same day, the trial court entered a written order that adjudicated Petitioner guilty of both direct and indirect criminal contempt. (R. 16). The order provided in full as follows, (R. 16):

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<sup>2</sup> On appeal, Petitioner moved to supplement the appellate record with either the transcript of the June 17 hearing or a “certification, affidavit, or documentation” from the Broward County clerk’s office “confirming the absence of a court reporter.” In response, the clerk entered an affidavit stating that “after completing a diligent search, the transcript that [Appellant was] requesting does not appear to be part of the above court file.” (Supp. R. 10).



Jennifer Woodward is hereby sentenced to 15 days in the Broward County Jail for repeatedly refusing to answer questions posed to her under oath by attorney Marc Manceri and this Court after repeatedly directed to do so by this Court and her totally disruptive behavior before this Court to the point of making & turning the subject hearing into a circus like atmosphere after repeatedly warned to cease and desist the behavior.

Jennifer Woodward is also in indirect criminal contempt of court and sentenced to 15 days in the Broward County Jail for misrepresenting to the Court on March 2, 2016, that the residence of the decedent was vacant when in fact she and her son Paul Woodward were inhabiting the residence without court order until at least March 17, 2016 and thereby impeding the ability of the administrator ad litem of the estate to sell the subject property.

The 15 day sentences on both the direct criminal contempt (criminal rule 3.830) and the indirect criminal contempt (rule 3.840) shall run concurrent with one another.

#### ***The Fourth District Court of Appeal's Decision***

On appeal to the Fourth District Court of Appeal, Petitioner raised two arguments. First, Petitioner asserted the indirect criminal contempt conviction had to be discharged because the March 2, 2016 hearing did not reflect the contemptuous actions described in the show cause order. Second, Petitioner argued her direct criminal contempt conviction had to be vacated because the trial court's failure to ensure the presence of a court reporter precluded her from obtaining transcripts of the June 17 show cause hearing, frustrating her right to a plenary appeal and preventing the appellate court from reviewing whether the trial court complied with Florida Rule of Criminal Procedure 3.830.

The Fourth District agreed with Petitioner’s first argument and reversed the indirect criminal contempt conviction on the basis that “[t]he transcript of the March 2 hearing reveal[ed] that [Petitioner] made no representations concerning the occupancy of the property at issue.” (Pet. App. 4). Finding no factual basis, the Fourth District remanded to discharge the conviction. (Pet. App. 4).

However, the Fourth District affirmed Petitioner’s direct criminal contempt conviction and held that a court reporter was not required to be present during the direct criminal contempt proceedings. (Pet. App. 4). As the court explained:

In *Martin v. State*, 743 So. 2d 591 (Fla. 4th DCA 1999), we rejected the notion that a court reporter was required in a case involving direct criminal contempt. We noted that direct criminal contempt operates under Florida Rule of Criminal Procedure 3.830, which provides that such contempt “may be punished summarily.” *Id.* The unique aspect of direct criminal contempt is that it occurs within the presence of the court and justifies immediate action “to ensure the court’s authority is vindicated and the court can conduct its necessary functions.” *Plank [v. State]*, 190 So. 3d [594,] 603 [(Fla. 2016)]. “[T]he court must be able to act swiftly to ensure it can fulfill its obligations and preserve the dignity of court proceedings.” *Id.* at 604. Direct criminal contempt can arise in civil proceedings where, unlike a criminal proceeding, the onus is on the parties to provide a court reporter. The need to quickly reassert order in the courtroom justifies immediate action, instead of a delay, to ensure the existence of a record of the proceeding. Rule 3.830 accommodates the need for some judicial review of a direct criminal contempt by requiring a judgment of guilt to “include a recital of those facts on which the adjudication of guilt is based.” We decline Woodward’s invitation to revisit *Martin*. . . .

(Slip. Op. 4). Thereafter, Petitioner timely invoked this Court’s jurisdiction.

## **SUMMARY OF THE ARGUMENT**

Direct criminal contempt “is a setting without counterpart anywhere else in the law.” *Schenck v. State*, 645 So. 2d 71, 73–74 (Fla. 4th DCA 1994). “In a summary proceeding for direct criminal contempt, the otherwise inconsistent functions of prosecutor, jury and judge mesh into a single individual.” *United States v. Neal*, 101 F.3d 993, 997 (4th Cir. 1996). These circumstances render contempt proceedings uniquely “liable to abuse.” *Ex Parte Terry*, 128 U.S. 289, 313 (1888). For these reasons, this Court has emphasized that “it is extremely important that [trial judges] protect a[ contempt] offender’s due process rights, particularly when the punishment results in the imprisonment of the offender.” *In re Inquiry Concerning Perry*, 641 So. 2d 366, 368 (Fla. 1994).

Currently, conflict exists among Florida’s district courts of appeal regarding whether a trial court’s failure to ensure transcription of direct contempt proceedings deprives defendants of due process. The First and Second Districts have held that the failure to ensure transcription constitutes fundamental error. *See Pole v. State*, 198 So. 3d 961, 965-66 (Fla. 2d DCA 2016); *Higgins v. Higgins*, 945 So. 2d 593, 595 (Fla. 2d DCA 2006); *Chamberlain v. Chamberlain*, 588 So. 2d 20, 23 (Fla. 1st DCA 1991). The Fourth District held below that that it is not error at all. *See Woodward v. State*, 238 So. 3d 290 (Fla. 4th DCA 2018).

This Court should disapprove of the Fourth District's decision in this case and hold that transcription is a necessary component for affirming a direct criminal contempt conviction. Permitting trial courts to criminally punish direct criminal contempt defendants and sentence them to terms of incarceration without ensuring transcription of the contempt hearing is not a result that either due process or the Florida Constitution can condone. Along with frustrating a direct criminal contempt defendant's constitutional right to appeal, the Fourth District's decision contravenes Florida Rules of Criminal Procedure 3.721 and 2.535, which require transcription of criminal proceedings. Furthermore, requiring the trial judge to ensure transcription of direct criminal contempt proceedings is not unduly burdensome when counterbalanced with a criminal defendant's right to appeal.

## **ARGUMENT**

### **THIS COURT SHOULD DISAPPROVE OF THE FOURTH DISTRICT COURT OF APPEAL'S DECISION AND HOLD THAT TRIAL COURTS MUST ENSURE TRANSCRIPTION OF DIRECT CRIMINAL CONTEMPT PROCEEDINGS**

This Court should disapprove of the Fourth District's decision in this case and hold that transcription is a necessary component for affirming a direct criminal contempt conviction. "Because criminal contempt is 'a crime in the ordinary sense,'" *Parisi v. Broward County*, 769 So. 2d 359, 364 (Fla. 2000), defendants convicted of direct criminal contempt "are entitled to a direct appeal as a matter of right." *Sims v. State*, 998 So. 2d 494, 498 (Fla. 2008). "Once a criminal defendant has chosen to exercise his right to appeal, he is entitled to a full transcript of the trial record." *Hamilton v. State*, 573 So. 2d 109, 110 (Fla. 4th DCA 1991).

These principles ring particularly true in the context of direct criminal contempt. Because criminal contempt proceedings centralize so much power in the trial judge, both this Court and the United States Supreme Court have recognized that contempt is uniquely liable to abuse. "As a result, this Court has emphasized that 'a balance must be struck between the recognition that courts are vested with contempt powers to vindicate their authority and the necessity of preventing abuse of these broad contempt powers.'" *Plank v. State*, 190 So. 3d 594, 602 (Fla. 2016) (plurality opinion) (quoting *Parisi*, 769 So. 2d at 363).

Permitting trial courts to circumvent the transcription requirement when imposing direct criminal contempt sanctions denies defendants like Petitioner due process by foreclosing their ability to obtain meaningful appellate review in an arena rife with potential abuse. Furthermore, such a holding contravenes Florida Rules of Criminal Procedure 3.721 and 2.535, which mandate transcription of criminal proceedings. While Petitioner respects the need for trial courts to quickly reassert order in the courtroom, the slight delay necessary for obtaining a court reporter or assuring transcription would not substantially disrupt this process.

Currently, there is conflict among Florida's district courts regarding whether a trial judge has the responsibility to ensure the transcription of direct criminal contempt proceedings. The First and Second Districts have held that the failure to ensure transcription constitutes fundamental error. *See Pole v. State*, 198 So. 3d 961, 965-66 (Fla. 2d DCA 2016); *Higgins v. Higgins*, 945 So. 2d 593, 595 (Fla. 2d DCA 2006); *Chamberlain v. Chamberlain*, 588 So. 2d 20, 23 (Fla. 1st DCA 1991). The Fourth District held below that that it is not error at all. *See Woodward v. State*, 238 So. 3d 290 (Fla. 4th DCA 2018). Before analyzing these decisions, this Brief will provide an overview of the applicable legal principles.

### ***I. Standard of Review***

A trial court's order of direct criminal contempt is reviewed for an abuse of discretion. *See G.G.J. v. State*, 28 So. 3d 239, 240 (Fla. 4th DCA 2010); *Phelps v.*

*State*, 236 So. 3d 1162, 1163 (Fla. 2d DCA 2018). In reviewing a direct criminal contempt conviction, “any failure to follow the procedural requirements in contempt proceedings under [Florida Rule of Criminal Procedure 3.830] is fundamental error and an objection in the trial court is not required to preserve the issue for appellate review.” *Wiggs v. State*, 981 So. 2d 576, 577 (Fla. 5th DCA 2008) (citing *Hutcheson v. State*, 903 So. 2d 1060, 1062 (Fla. 5th DCA 2005); *Garrett v. State*, 876 So. 2d 24, 25 (Fla. 1st DCA 2004)).

## ***II. The Contours of Criminal Contempt***

“Contempt is an act which is calculated to embarrass, hinder, or obstruct the trial court in the administration of justice or which is calculated to lessen its authority or dignity.” *A.W. v. State*, 137 So. 3d 521, 523 (Fla. 4th DCA 2014) (quoting *M.W. v. Lofthiem*, 855 So. 2d 683, 684 (Fla. 2d DCA 2003)). “The major purpose of the law of contempt is to maintain and preserve the dignity of the judiciary and the orderly administration of justice.” *Murrell v. State*, 595 So. 2d 1049, 1050 (Fla. 4th DCA 1992). Through discretionary contempt powers, trial courts can “impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.” *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994) (quotation omitted).

Florida statutory provisions recognize the courts’ authority to act on contempt. *See* § 38.22, Fla. Stat. (2016). Depending on its purpose, contempt

proceedings can be either criminal or civil. *See Sauriol v. Sauriol*, 79 So. 3d 204, 206 (Fla. 2d DCA 2012). Criminal contempt serves to “vindicate the authority of the court and punish the intentional violation of a court order,” *Elliott v. Bradshaw*, 59 So. 3d 1182, 1184 (Fla. 4th DCA 2011), by subjecting the contemnor to a sanction that is neither reducible nor avoidable through compliance. *See Bagwell*, 512 U.S. at 828-29. In short, “[t]he purpose of *criminal* contempt . . . is to *punish*.” *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985) (emphasis in original).

Criminal contempt proceedings can either be direct or indirect. *See Demetree v. State ex rel. Marsh*, 89 So. 2d 498, 501 (Fla. 1956). The difference lies with the trial judge’s observations. *See In re Oliver*, 333 U.S. 257, 274-75 (1948). Direct criminal contempt—known also as summary contempt—is “imposed for conduct that takes place in the judge’s presence [whereas] indirect contempt sanctions are imposed for conduct that takes place outside the judge’s presence.” *Wilcoxon v. Moller*, 132 So. 3d 281, 286 (Fla. 4th DCA 2014) (q.o.).

The sort of contempt that allows summary punishment includes, “[o]nly charges of misconduct, in open court, in the presence of the judge, which disturbs the court’s business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent demoralization of the court’s authority before the public.”

*Davila v. State*, 100 So. 3d 262, 263–64 (Fla. 3d DCA 2012) (quoting *Bryant v. State*, 851 So. 2d 823, 824 (Fla. 2d DCA 2003)).



### ***III. Florida Rule of Criminal Procedure 3.830***

Direct criminal contempt proceedings are governed by Florida Rule of Criminal Procedure 3.830, which provides in full as follows:

A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt of contempt shall include a recital of those facts on which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against the defendant and inquire as to whether the defendant has any cause to show why he or she should not be adjudged guilty of contempt by the court and sentenced therefor. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court.

“Rule 3.830 has been broken down into essentially six steps that the trial court must follow pursuant to an adjudication of contempt.” *J.A.H. v. State*, 20 So. 3d 425, 427 (Fla. 1st DCA 2009).

“Before a person may be convicted for direct criminal contempt, rule 3.830 requires the trial court to inform the defendant of the basis for the contempt and inquire whether the defendant has any cause to show why he or she should not be adjudicated guilty and sentenced for contempt.” *State v. Diaz de la Portilla*, 177 So. 3d 965, 972-73 (Fla. 2015). “Additionally, the defendant must be provided with an opportunity to present evidence of excusing or mitigating circumstances.” *Id.* at 973. “Because the contemptuous conduct may well be in the form of

statements or actions that are not part of a court proceeding and that are not recorded, rule 3.830 provides that the ‘judgment of guilty of contempt *shall* include a recital of those facts upon which the adjudication of guilt is based.” *Gidden v. State*, 613 So. 2d 457, 460 (Fla. 1993). The purpose of Rule 3.830’s recital of facts requirement “is to advise the defendant of the basis for the judgment and to permit meaningful appellate review.” *Id.* Finally, the rule provides that the sentence *shall* be pronounced in open court. Fla. R. Crim. P. 3.830.

Indirect criminal contempt proceedings are, by contrast, governed by Florida Rule of Criminal Procedure 3.840 as well as the general precepts of due process afforded to all criminal defendants. *See Elliott*, 59 So. 3d at 1184 (“The defendant in an indirect criminal contempt proceeding is entitled to the constitutional protections afforded to criminal defendants.”). Rule 3.840 is more comprehensive<sup>3</sup> than 3.830 because defendants charged with indirect criminal contempt are afforded full procedural due process rights. *See Gidden*, 613 So. 2d at 460.

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<sup>3</sup> Among other things, Rule 3.840(a) provides that the trial judge must enter an order to show cause, which “stat[es] the essential facts constituting the criminal contempt charged” and “specif[ies] the time and place of the hearing, with a reasonable time allowed for preparation of the defense after service of the order on the defendant.” Furthermore, the rule’s subsection (d) provides that “[t]he defendant is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and testify in his or her own defense.” Finally, the defendant must be given the opportunity to show cause why he or she should not be sentenced and to present mitigating evidence before the court sentences him or her in open court. Fla. R.Crim. P. 3.840(g).

#### ***IV. Due Process in Direct Criminal Contempt Proceedings***

“Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.” *Bloom v. State of Illinois*, 391 U.S. 194, 201 (1968). “Because criminal contempt is ‘a crime in the ordinary sense,’” this Court has explained that “imposition of criminal contempt sanctions requires that a contemnor be afforded the same constitutional due process protections afforded to criminal defendants.” *Parisi v. Broward Cnty.*, 769 So. 2d 359, 364 (Fla. 2000). “These rights include the right of criminal defendants to be represented by counsel, the right to have the State prove the offense beyond a reasonable doubt, and the right not to incriminate oneself.” *Id.*

In analyzing criminal contempt, this Court has recognized “the importance of protecting due process rights, particularly where incarceration [i]s at issue.” *Plank v. State*, 190 So. 3d 594, 605 (Fla. 2016) (plurality opinion). However, because of the summary nature of direct criminal contempt proceedings, several courts have held that such “defendants are not entitled to the full panoply of due process rights typically afforded to criminal defendants.” *Phelps v. State*, 236 So. 3d 1162, 1163 (Fla. 2d DCA 2018); *see also Bryant v. State*, 851 So. 2d 823, 824 (Fla. 2d DCA 2003) (explaining that direct criminal contempt “is a narrow exception to the constitutional requirement that the full panoply of due process rights must be afforded to a person prior to conviction and imprisonment”).

Rather, it is “the provisions of rule 3.830 [that] define the essence of due process in direct criminal contempt proceedings.” *Diaz de la Portilla*, 177 So. 3d at 972; *see also Peters v. State*, 626 So. 2d 1048, 1050 (Fla. 4th DCA 1993). As a result, direct criminal contempt defendants are “entitled to the basic protections of due process, and strict compliance with the procedural requirements of Florida Rule of Criminal Procedure 3.830 is necessary to ensure that those procedural due process rights are safeguarded.” *Searcy v. State*, 971 So. 2d 1008, 1014 (Fla. 3d DCA 2008); *see also Charlemagne v. State*, 114 So. 3d 450, 451 (Fla. 3d DCA 2013) (“Given the unique nature of direct criminal contempt proceedings, the trial court must scrupulously honor the requirements of rule 3.830 to safeguard a contemnor’s right to procedural due process.”).

Because the provisions of Rule 3.830 define the essence of due process, “[s]crupulous compliance with the requirements of [the rule] is mandatory.” *J.A.H. v. State*, 20 So. 3d 425, 427 (Fla. 1st DCA 2009); *see also Rhoads v. State*, 817 So. 2d 1089, 1092 (Fla. 2d DCA 2002). Any failure to strictly adhere to Rule 3.830 constitutes fundamental error. *See, e.g., Phelps*, 236 So. 3d at 1163; *Swain v. State*, 226 So. 3d 250, 251 (Fla. 4th DCA 2017); *Woodson v. State*, 109 So. 3d 866 (Fla. 3d DCA 2013); *Jones v. State*, 54 So. 3d 503 (Fla. 1st DCA 2010).

### ***V. Procedural Rules Related to Transcription***

Although not specific to criminal contempt proceedings, Florida Rule of Criminal Procedure 3.721 places the responsibility upon the trial judge to ensure that transcripts of sentencing hearings can be made, providing as follows:

The sentencing court shall ensure that a record of the entire sentencing proceeding is made and preserved in such a manner that it can be transcribed as needed.

This Court adopted Rule 3.721 in 1972 and the rule has remained unmodified ever since. *See In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (1972).

In tandem, Florida Rule of Administration 2.535(h)(1)—entitled “When Reporting is Required”—provides that “[a]ll proceedings required by law, court rule, or administrative order to be reported shall be reported at public expense.” Specific to this case, the Seventeenth Judicial Circuit promulgated an administrative order concerning the reporting of proceedings required by law or rule of court or at public expense. *See* Fla. Admin. Order No. 2011-22-Gen (Fla. 17th Jud. Cir. Apr. 20, 2011), available at <http://www.17th.flcourts.org/wp-content/uploads/2017/08/2011-22-Gen.pdf>.

Subsection (c)(1)F. of the administrative order defines a “[p]roceeding” as “all criminal proceedings, juvenile proceedings, and any other matter before a judge or magistrate or hearing officer when a verbatim record is required by law or rule of court. ” *Id.* By incorporating the phrase “any other matter,” the

administrative order imparts that preceding portions of the subsection—including criminal proceedings—constitute circumstances “when a verbatim record is required by law or rule of court.” Therefore, the administrative order requires that, in the Seventeenth Judicial Circuit, criminal proceedings be recorded.

#### ***VI. The Conflict Decisions—First and Second District Courts of Appeal***

Applying the above legal principles and procedural rules, the First and Second District Courts of Appeal have held that a trial judge’s failure to ensure an adequate record of direct criminal contempt proceedings constitutes fundamental, reversible error. *See Pole v. State*, 198 So. 3d 961, 965-66 (Fla. 2d DCA 2016); *Higgins v. Higgins*, 945 So. 2d 593, 595 (Fla. 2d DCA 2006); *Chamberlain v. Chamberlain*, 588 So. 2d 20, 23 (Fla. 1st DCA 1991).

These decisions rest on the premise “that to affirm a conviction of direct criminal contempt, ‘there must be evidence in the record that the trial court complied with the procedural requirements of Fla. R. Crim. P. 3.830 . . . . for prosecuting a direct criminal contempt.’” *Pole*, 198 So. 3d at 965 (quoting *Chamberlain*, 588 So. 2d at 23); *Higgins*, 945 So. 2d at 595. The decisions further rely upon Florida Rule of Criminal Procedure 3.721, which places the burden on the trial court to “ensure that a record of the entire sentencing proceeding is made and preserved in such a manner that it can be transcribed as needed.” *Pole*, 198 So. 3d at 965; *Chamberlain*, 588 So. 2d at 23; *Higgins*, 945 So. 2d at 595. Finally, in

*Pole*, the Second District recognized that “the contemnor’s right to due process require[s] that the trial court ensure that a record is made of a criminal contempt proceeding,” meaning that “facially sufficient claims on plenary appeal from an adjudication of contempt . . . which cannot be refuted by the record will invariably mandate vacation of the judgment.” *Pole*, 198 So. 3d at 965 (quoting *Blalock v. Rice*, 707 So. 2d 738, 740 (Fla. 2d DCA 1997)).

In *Chamberlain*, the First District reversed a former wife’s direct criminal contempt conviction for lack of transcription. 588 So. 2d at 23. The trial court had “found that the former wife was to be incarcerated ‘for knowingly testifying falsely to th[e] court.’” *Id.* Applying the above principles and recognizing “[it] appeared that the punishment was intended to be for direct criminal contempt,” the First District reversed the order of contempt because “[b]oth parties state[d] in their briefs that the hearing on the contempt proceedings was not recorded.” *Id.*

Similarly, in *Pole*, the Second District reversed a direct criminal contempt conviction for—among other things—lack of transcription.<sup>4</sup> *Pole*, 198 So. 3d at 965–66. There, the record on appeal “include[d] a transcript of only the beginning

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<sup>4</sup> In a concurring opinion, Judge Casanueva joined the “section of Judge LaRose’s opinion regarding the need for an adequate record in contempt proceedings” and explained that “the burden of providing a record in [contempt proceedings] rests with the trial court” because “[i]t is the trial court which seeks to exercise its authority to punish by depriving the alleged offender of his liberty.” *Pole*, 198 So. 3d at 967 (Casanueva, J., concurring).

of the dissolution hearing,” wherein “[t]he courtroom clerk announced, ‘And per the Judge we don’t need to be on the record.’” *Id.* at 965. “Both parties acknowledge[d in their briefs] that the contempt proceeding was not recorded.” *Id.* Although the contemptuous actions began in civil court, the Second District held that “[b]ecause the trial court went forward with a *criminal* proceeding a different set of rules applied.” *Id.* Without a record of the contempt proceedings, “[o]n this basis, alone, [the Second District was] compelled to reverse.” *Id.*

Finally, in *Higgins*, the Second District reversed a direct criminal contempt conviction that was unreported. 945 So. 2d at 595. The appellate court explained that it was “mindful that a court may summarily punish for direct criminal contempt if the contemptuous conduct is committed in the court’s presence” *Id.* However, “the record must contain evidence that the court complied with the procedures mandated in rule 3.830.” *Id.* “The circuit court’s failure to do so in th[e] case,” the Second District held, required reversal of the contempt order. *Id.*

## ***VII. The Conflict Decisions—Fourth District Court of Appeals***

The Fourth District Court of Appeal has taken a contrary position with transcription, originating from its decision in *Loucks v. State*, 471 So. 2d 131 (Fla. 4th DCA 1985). There, defense counsel requested the presence of a court reporter for jury selection, but was refused by the trial judge. *Id.* at 131. In reversing the conviction, the Fourth District relied upon then-Florida Rule of Judicial



Administration 2.070,<sup>5</sup> which provided as follows:

(a) *When Reporting Required.* All criminal and juvenile proceedings, and any other judicial proceedings required by law or court rule to be reported at public expense, *shall be reported*. Any proceeding shall be reported on the request of any party.

...

(b) *Record.* When trial proceedings are being reported, no part of the proceedings shall be omitted *unless all of the parties agree* to do so and the court approves the agreement.

*Id.* at 131-32. The Fourth District interpreted Rules 2.070(a) and (b) as being “directory in the sense that they do not place an affirmative duty upon a trial judge to undertake responsibility which properly belongs to defense counsel.” *Id.* at 132. Nevertheless, the Fourth District held the trial court reversibly erred because it could not simply “deny [the] defendant’s specific request for a court reporter.” *Id.*

Five years later, in *Rader v. State*, 571 So. 2d 556, 556 (Fla. 4th DCA 1990), a defendant challenged an order holding him in indirect criminal contempt on the grounds “[n]o court reporter covered the contempt hearing.” The Fourth District relied upon *Loucks* to affirm the conviction because the defendant did not request a court reporter, noting that Rules 2.070(a) and (b) did not place an affirmative duty on the trial judge to ensure the court reporter’s presence. *Id.* Nevertheless, Judge Letts—writing for the majority—expressed trepidation in the result, writing:

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<sup>5</sup> Rule 2.070 has since been removed and replaced with Florida Rule of Criminal Procedure 2.535.

Despite affirmance, we are not too comfortable with the *Loucks* rationale. Resort to rule 2.070(a) reveals mandatory language directing that *all* criminal proceedings *shall* be reported. It is true that the instant proceeding is not the classic criminal prosecution. On the other hand, the order to show cause sub judice required the defendant to show cause why he should not be held in indirect *criminal* contempt (emphasis supplied) pursuant to Florida Rule of Criminal Procedure 3.840. Moreover, the defendant was incarcerated as a result.

From all of the above, it would appear to us that the instant proceedings were criminal and the court should have provided a court reporter or an authorized equivalent. Despite this view, we affirm upon the authority of *Loucks*, which, in effect, holds that the requirement can be waived. In so doing, we concede that having to provide a court reporter in every domestic dispute where the trial court's criminal contempt powers are sought to be invoked may involve incalculable increased costs on an already overburdened family law system.

*Id.* at 556-57. Because of these concerns, the Fourth District certified a question of great public importance to this Court<sup>6</sup>; however, the matter was not reviewed.

Subsequently, the Fourth District declined an invitation to revisit *Rader* in *Martin v. State*, 743 So. 2d 591 (Fla. 4th DCA 1999)—an appeal from a direct

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<sup>6</sup> The certified question was as follows:

DOES FLORIDA RULE OF JUDICIAL ADMINISTRATION  
2.070(a) MANDATE THE PRESENCE OF A COURT REPORTER  
OR AN AUTHORIZED EQUIVALENT IN AN INDIRECT  
CRIMINAL CONTEMPT PROCEEDING WHETHER OR NOT  
THE DEFENDANT REQUESTS ONE?

*Rader*, 571 So. 2d at 557.

criminal contempt conviction. Though there was neither a court reporter nor transcripts of the direct criminal contempt proceedings, the Fourth District affirmed the trial court's contempt order. *Id.* at 591. The Fourth District reasoned that Rule 3.830 permits trial courts to summarily punish defendants charged with direct criminal contempt. *Id.* at 592. Furthermore, the defendant did not raise any errors that could not be resolved without the transcripts. *Id.*

Finally, in the instant case, the Fourth District relied upon *Martin* to expressly hold that a court reporter is not required to be present for direct criminal contempt proceedings. (Pet. App. 4). In so ruling, the Fourth District reasoned that “[t]he need to quickly reassert order in the courtroom justifies immediate action, instead of a delay, to ensure the existence of a record of the proceeding. Rule 3.830 accommodates the need for some judicial review of a direct criminal contempt by requiring a judgment of guilt to ‘include a recital of those facts on which the adjudication of guilt is based.’” (Pet. App. 4).

### ***VIII. Resolving the Conflict***

This Court should disapprove of the Fourth District's decision in the instant case for four reasons. First, the decision infringes upon criminal defendants' constitutional right to appeal. Second, it contravenes Florida Rules of Criminal Procedure 3.721 and 2.535, which require transcription of criminal proceedings. Third, it denies direct criminal contempt defendants due process in an area of law

that both this Court and the United States Supreme Court have recognized to be uniquely liable for abuse. And, finally, requiring the trial judge to ensure proper transcription of direct criminal contempt proceedings is not unduly burdensome when counterbalanced with a criminal defendant's right to appeal.

The right implicated by the inadequate record is the denial of Petitioner's right to direct appellate review of her judgment of conviction, which is a necessary ingredient of due process of law and is guaranteed by the constitution of this state. *Simmons v. State*, 200 So. 2d 619 (Fla. 1st DCA 1967). "While [courts have] recognized that criminal defendants have no federal constitutional right to a direct appeal,<sup>7</sup> under article V, section 4(b) of the Florida Constitution, there is constitutional protection of the right to appeal." *Harriel v. State*, 710 So. 2d 102, 103 (Fla. 4th DCA 1998) (en banc) (citations omitted); *see also State v. Jefferson*, 758 So. 2d 661, 664 (Fla. 2000) ("Article V, section 4(b), which grants the district courts' jurisdiction to hear criminal appeals, also grants criminal defendants a constitutional right to an appeal."); *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (Fla. 1996).

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<sup>7</sup> *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial errors."); *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996); *Rinldi v. Yeager*, 384 U.S. 305, 310 (1966).

Defendants convicted of criminal contempt are permitted to appeal their convictions to the appropriate district court of appeal. *See Puleo v. State*, 109 So. 2d 39 (Fla. 2d DCA 1959); *Lewis v. Lewis*, 78 So. 2d 711, 712 (Fla. 1955). Thus, criminal contempt defendants—like all criminal defendants—“are entitled to a direct appeal as a matter of right.” *Sims*, 998 So. 2d at 498; *see also* § 924.05, Fla. Stat. (2016) (“Direct appeals provided for in this chapter are a matter of right.”).

As an indigent criminal defendant, Petitioner “has the right to have an attorney evaluate [her] case and attempt to discern nonfrivolous arguments.” *Maine v. State*, 899 So. 2d 1217, 1219 (Fla. 1st DCA 2005); *see also Smith v. Robbins*, 528 U.S. 259, 278 n.10 (2000). This includes the right to have all proceedings transcribed at public expense that are necessary to support her claims. *See Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that, as a matter of equal protection, the state must provide indigent defendants with the basic tools of an adequate defense or appeal, when those tools are available for a price to other defendants); *Mayer v. City of Chicago*, 404 U.S. 189, 195 (1971) (“[T]he State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way.”); *Smith v. State*, 801 So. 2d 198, 199 (Fla. 4th DCA 2001) (“The right of one convicted of a crime to an appellate review of such judgment of conviction as may be rendered against him is a necessary ingredient of due process

of law and guaranteed by the constitution of this state.” (quotation omitted).

Because criminal defendants have a constitutional right to appeal, this Court has recognized that a complete and accurate transcript of critical criminal proceedings is “necessary to a complete review.” *See Delap v. State*, 350 So. 2d 462 (Fla. 1977); *Darling v. State*, 808 So. 2d 145 (Fla. 2002); *Jones v. State*, 923 So. 2d 486 (Fla. 2006). When portions of an appellate record are incomplete,<sup>8</sup> “[t]he question to be asked is whether the [missing] portions [of the record] are *necessary* for a complete review.” *Velez v. State*, 645 So. 2d 42, 44 (Fla. 4th DCA 1994). Substantial, material omissions necessitate reversal. For example, in *Delap*, this Court reversed a capital conviction<sup>9</sup> for a new trial where the record was missing the transcript of the jury charge conferences, the charge to the jury, voir dire, and closing arguments in the trial and penalty phases. 350 So. 2d at 463.

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<sup>8</sup> *See Lipman v. State*, 428 So. 2d 733, 737 (Fla. 1st DCA 1983) (“It has been recognized that where a full transcript of trial proceedings is requested by a defendant but is not available for review, through no fault of the defendant’s, and the appellate court determines that the missing portions of transcript are necessary for a complete review of the issues raised on appeal, the appellate court has no alternative but to remand the case for a new trial.”) (citation omitted).

<sup>9</sup> Although *Delap* was a capital case, the district courts recognize its holding where an appellant has constitutional or statutory rights to appellate review. *See, e.g., Peretz v State*, 710 So. 2d 754 (Fla. 4th DCA 1998) (*Delap* applied to reverse involuntary commitment where no transcript of hearing existed); *J.W. v. State*, 667 So. 2d 207 (Fla. 1st DCA 1995) (*Delap* applied to juvenile cases); *Lipman*, 429 So. 2d 733 (*Delap* reversal where complete appellate review was not possible due to incomplete record)

This is not to say all failures of recordation mandate reversal. Where transcripts of a jury trial go missing or are lost, this Court has required that the defendant establish some prejudice that resulted from the missing portions of the transcript to be entitled to a new trial. *See, e.g., Johnson v. State*, 442 So. 2d 193, 195 (Fla. 1983); *Darling*, 808 So. 2d at 163; *Armstrong v. State*, 862 So. 2d 705, 721 (Fla. 2003); *Jones*, 923 So. 2d at 490. This requirement inferentially derives from the fact a trial attorney can communicate any errors to appellate counsel. *See Bransford v. Brown*, 806 F.2d 83, 85-86 (6th Cir. 1986).

This Court has never, however, condoned trial courts willfully foregoing transcription of entire criminal proceedings. Such practice would take a particularly dangerous toll upon direct criminal contempt proceedings, where a plurality of this Court has held defendants do not have a right to counsel. *See Plank*, 190 So. 3d at 596 (holding “that a trial court has the discretion, but is not required, to appoint counsel or give the individual an opportunity to seek counsel in a direct criminal contempt proceeding, even if incarceration is imposed as punishment, as long as the period of incarceration does not exceed six months”). It is one thing for pro se defendants to face incarceration; but it is another for pro se defendants to have to do so with no meaningful opportunity for appellate review.<sup>10</sup>

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<sup>10</sup> *Cf. Brown v. State*, 65 So. 3d 629, 632 (Fla. 4th DCA 2011) (“The absence of a voir dire transcript differs from the missing record in this case because in *Jones* the defendant and his lawyer were present during the voir dire, so the defense had the

In the instant case, the trial court failed in its obligations under both Florida Rule of Administration 2.535(h)(1) and a local administrative order, which required all criminal proceedings be recorded. Furthermore, the trial court expressly violated Florida Rule of Criminal Procedure 3.721, which requires transcription of sentencing proceedings. The result of these failures runs counter to Florida Rule of Criminal Procedure 3.830's express wording that sentences for direct criminal contempt must be made in "open court." Fla. R. Crim. P. 3.830.

As a result of the trial court's inaction, there is no transcript whatsoever of the contempt hearing below. The record does not denote that the trial judge scrupulously followed the due process requirements of Florida Rule of Criminal Procedure 3.830. The trial court's contempt order merely provides as follows:

Jennifer Woodward is hereby sentenced to 15 days in the Broward County Jail for repeatedly refusing to answer questions posed to her under oath by attorney Marc Manceri and this Court after repeatedly directed to do so by this Court and her totally disruptive behavior before this Court to the point of making & turning the subject hearing into a circus like atmosphere after repeatedly warned to cease and desist the behavior

...

The 15 day sentences on both the direct criminal contempt (criminal

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ability to specify how the absence of a transcript harmed the appeal. Here, the defense was excluded from the *in camera* hearing, so it had no way of knowing what occurred. None of the other absence-of-transcript cases cited by the state involve *in camera* hearings from which the defense was excluded.").



rule 3.830) and the indirect criminal contempt (rule 3.840) shall run concurrent with one another.

(R. 16). As a result of the trial court's actions, Petitioner has been prejudiced through the complete deprivation of her opportunity for meaningful appellate review of her conviction. *See Smith v. State*, 801 So. 2d 198, 199 (Fla. 4th DCA 2001) ("Omitted portions of the record have been deemed necessary where a defendant demonstrates hardship and prejudicial effect upon his or her appeal.").

Contempt "is a setting without counterpart anywhere else in the law." *Schenck v. State*, 645 So. 2d 71, 73–74 (Fla. 4th DCA 1994). Unlike an appeal taken after a jury trial where the defendant was represented by trial counsel, appellate counsel is left only to confer with a pro se defendant—who has already provoked the trial judge's ire—to discern potential legal issues. Such collaboration would, in most instances, be a futile effort. Petitioner's case demonstrates that it is a near impossible burden for defendants to prove prejudicial error where the transcript of the proceedings—to which the defendant was constitutionally entitled for her direct appeal—was never compiled. Rather than denying criminal defendants due process, the better solution is to simply ensure transcription.

Appellate review of direct criminal contempt convictions is particularly necessary because such proceedings are uniquely liable for abuse. Although "essential to the protection of the courts in the discharge of their functions," the

contempt power is “arbitrary and liable to abuse.”<sup>11</sup> *Ex Parte Terry*, 128 U.S. 289, 313 (1888). This is because “the judge who was the object . . . of the allegedly contemptuous conduct becomes the prosecutor and then sits in judgment over the very defendant who is said to have just assailed the judicial dignity.” *Emanuel v. State*, 601 So. 2d 1273, 1274 (Fla. 4th DCA 1992) (quoting *Fabian v. State*, 585 So. 2d 1158 (Fla. 4th DCA 1991 (Farmer, J., dissenting))); *see also United States v. Neal*, 101 F.3d 993, 997 (4th Cir. 1996) (explaining that “[i]n a summary proceeding for direct criminal contempt, the otherwise inconsistent functions of prosecutor, jury and judge mesh into a single individual”) (quotation omitted).

“Because of their very potency, inherent powers [such as contempt] must be exercised with restraint and discretion.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). However, “[c]ontumacy often strikes at the most vulnerable and human qualities of a judge’s temperament, and its fusion of legislative, executive, and judicial powers summons forth the prospect of the most tyrannical licentiousness.” *Bagwell*, 512 U.S. at 831 (quotations omitted). For these reasons, this Court has held that “a balance must be struck between the recognition that courts are vested

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<sup>11</sup> Several courts have cited as a caution to imposing contempt penalties language in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821), that judges should exercise “the least possible power adequate to the end proposed.” *See, e.g., Spallone v. United States*, 493 U.S. 265, 276 (1990); *United States v. City of Yonkers*, 856 F.2d 444, 454 (2d Cir. 1988).

with contempt powers to vindicate their authority and the necessity of preventing abuse of these broad contempt powers.” *Parisi*, 769 So.2d at 363.

Allowing trial courts to criminally condemn defendants to terms of incarceration without ensuring transcription of the contempt hearing disrupts this balance in favor of abuse. Despite steps set forth by Florida Rule of Criminal Procedure 3.830, examples abound of trial courts committing fundamental error during direct criminal contempt proceedings. These include, but are not limited to:

- Not providing the direct criminal contempt defendant a full opportunity to present evidence to mitigate the conduct. *See Searcy v. State*, 971 So. 2d 1008, 1014 (Fla. 3d DCA 2008) (reversing contempt conviction where trial judge asked the defendant to show cause why he should not be held in contempt and said, “I am giving you an opportunity”); *O’Neal v. State*, 501 So. 2d 98, 100 (Fla. 1st DCA 1987) (finding the trial court’s brief offer, after finding defendant in contempt, to allow the defendant to explain his profanity was insufficient to meet requirements of due process); *Castaneda v. State*, 77 So. 3d 862 (Fla. 3d DCA 2012) (finding of direct criminal contempt reversed on due process grounds where the court asked the defendant “if he could think of any reason why he shouldn’t be put in jail for using the kind of language he used and for his behavior”); *J.A.H. v. State*, 20 So. 3d 425 (Fla. 1st DCA 2009) (direct criminal contempt reversed for lack of sufficient notice where the trial court essentially adjudicated defendant guilty at the outset and merely asked if he had anything to say before the court imposed a sentence); *Woodson v. State*, 109 So. 3d 866 (Fla. 3d DCA 2013) (trial court erred in finding defendant in direct criminal contempt without giving him an opportunity to present mitigating evidence)
- Failing to provide notice of the contempt charge. *See, e.g., J.A.H. v. State*, 20 So. 3d 425 (“[T]he trial court . . . failed to give the appellate notice of the contempt charge . . . .”); *Peters v. State*, 626 So. 2d 1048, 1050 (Fla. 4th DCA 1993) (“Here the trial judge failed to provide appellate with prior notice of the charge of contempt and then failed to give him an opportunity to explain *before* imposing sentence.”).

- Merely asking the defendant if he or she wishes to explain the contemptuous behavior. *See Garrett v. State*, 876 So. 2d 24, 25 (Fla. 1st DCA 2004); *Swain v. State*, 226 So. 3d 250 (Fla. 4th DCA 2017) (trial judge only asked “why shouldn’t I hold you in direct contempt right now?”).
- Adjudicating a defendant guilty of direct criminal contempt but relying upon extraneous evidence from another witness. *See Stavelly v. State*, 473 So. 2d 748, 751 (Fla. 1st DCA 1985) (where trial judge may have relied upon bailiff’s statement of what defendant said); *Payne v. State*, 486 So. 2d 74 (Fla. 4th DCA 1986) (reversing a direct criminal contempt conviction when the judge heard a one-word expletive, not the alleged comment which two witnesses claimed to have heard); *Barr v. State*, 334 So. 2d 636 (Fla. 2d DCA 1976) (reversing contempt conviction where the court did not hear the comments allegedly made by the defendant), *receded from on other grounds*, *Martinez v. State*, 339 So.2d 1133 (Fla. 2d DCA 1976).
- Including an insufficient recital of facts. *See, e.g., J.A.H.*, 20 So. 3d at 527 (contempt order ““based on his statements, demeanor, and behavior during [the] hearing]”” did not comply with Rule 3.830); *A.W. v. State*, 137 So. 2d 521, 523 (Fla. 4th DCA 2014) (reversing where order recited only “for contempt of court for 5 days for being disrespectful to the court when asked why he was late for court”).

In holding that the trial court did not need to ensure transcription of the contempt hearing in this case, the Fourth District reasoned that “[t]he need to quickly reassert order in the courtroom justifies immediate action, instead of a delay, to ensure the existence of a record of the proceeding.” (Pet. App. 4). However, requiring trial courts to ensure that contempt proceedings are recorded is not unduly burdensome when counterbalanced with a defendant’s right to appeal.

“In most cases, . . . the actual contempt hearing does not occur immediately” after the defendant’s contemptuous actions. *Plank*, 190 So. 3d at 612-13 (Pariente, J., concurring in part, dissenting in part). Rather, the defendant is often removed

from the courtroom before being sentenced. *See, e.g., Al-Hakim v. State*, 53 So. 3d 1171, 1172-73 (Fla. 2d DCA 2011) (after a member of the public disturbed the courtroom in response to the public defender's rejection of adopting a pro se motion, the contemnor was taken into custody and the contempt proceeding was set for later that day); *Forbes v. State*, 933 So. 2d 706, 708 (Fla. 4th DCA 2006) (after prospective juror failed to disclose in voir dire that he had a pending criminal charge, the court set his contempt proceeding for a time after jury selection); *Hayes v. State*, 592 So. 2d 327, 327-28 (Fla. 4th DCA 1992) (after a defendant left during a break to bring a witness back to court but arrived to court late, the trial judge required the defendant to appear at a hearing three weeks later).

Moreover, requiring the trial court to ensure that the contempt proceedings are being recorded would have no impact on a judge's ability to immediately stop the misconduct and remove the contemnor from the courtroom. Trial courts maintain the power to remove an actor from their courtroom and later, with the due process protections firmly in place, try them for their contemptuous actions. *See Plank*, 190 So. 3d at 614 (Pariente, J., concurring in part, dissenting in part) (“[T]he court, through its bailiffs, can immediately take the contemnor into custody and remove him or her from the courtroom.”). In fact, the trial court did just that when it ordered Petitioner's removal from the March 2 hearing. Accordingly, protecting a direct criminal contempt defendant's right a meaningful appeal does

not diminish the rights of those in the courtroom disturbed by the alleged contemnor's conduct.

On the other hand, the complete absence of a contempt hearing transcript not only tremendously burdens a defendant's right to meaningful appellate review of the direct criminal contempt conviction but shields potential abuse. For example, in *Pole*, a court reporter was present in the courtroom but the clerk announced when contempt proceedings began, "'And per the Judge we don't need to be on the record.'" 198 So. 3d at 965. Based upon the Fourth District's reasoning in Petitioner's case, there would be no reason for the trial judge in *Pole* to cease such a practice, even if it masks legal injustices while the defendant is sentenced to incarceration. Equally troubling is that, in most circumstances, the defendant taken into custody for direct criminal contempt will have neither the time nor physical ability to procure a court reporter before being adjudicated and sentenced.

The instant case exemplifies the problem. Three months before conducting the *indirect* criminal contempt hearing, the trial court entered a show cause order directing Petitioner to appear in court to testify regarding why she should not be held in indirect criminal contempt for making misrepresentations at the March 2, 2016 hearing. There is no justifiable reason, during this multi-month interlude, why the court could not secure the presence of a court reporter to transcribe the proceedings and facilitate meaningful appellate review.

Despite that case law from this Court requires that indirect criminal contempt proceedings be transcribed, *see Gidden*, 613 So. 2d at 460 (“The entire proceeding is conducted in open court and **made part of the record.**”) (e.a.), the trial court failed in its obligation. Making matters worse, the trial court held Petitioner in indirect criminal contempt and sentenced her to incarceration on a matter clearly refutable by the transcripts of the March 2, 2016 hearing. The attorney for the personal representative pointed out the absence of these statements in a written motion. Thus, the show cause hearing where Petitioner allegedly engaged in the contemptuous acts never should have transpired.

“[B]ecause trial judges exercise their power of criminal contempt to punish, it is extremely important that they protect an offender’s due process rights, particularly when the punishment results in the imprisonment of the offender.” *In re Inquiry Concerning Perry*, 641 So. 2d 366, 368 (Fla. 1994). Without transcription of the contempt hearing, Petitioner retains no meaningful way to determine whether the trial judge’s numerous procedural errors related to indirect criminal contempt extended to her direct criminal contempt conviction—including, but not limited to, the trial judge’s compliance with Rule 3.830. That represents a denial of due process that neither the constitution nor this Court can condone.

### **CONCLUSION**

Based on the foregoing arguments and authorities, Petitioner requests that this Court disapprove of the Fourth District Court of Appeal's decision and reverse Petitioner's direct criminal contempt conviction.

### **CERTIFICATE OF SERVICE AND ELECTRONIC FILING**

I certify that this brief was electronically filed with the Court and a copy of it was served to Heidi L. Bettendorf, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 11th day of September, 2018.

/s/ BENJAMIN EISENBERG  
BENJAMIN EISENBERG

### **CERTIFICATE OF FONT**

I certify that this brief was prepared with 14 point Times New Roman type in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ BENJAMIN EISENBERG  
BENJAMIN EISENBERG