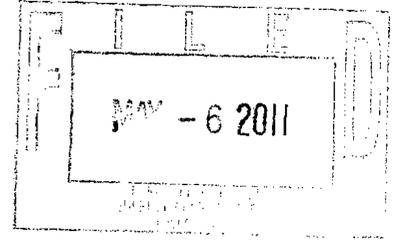


ARGUMENT DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 110693



STATE ex rel. LARRY F. PARSONS,
Executive Director of the Regional Jail
and Correctional Facility Authority,
Petitioner

v.

THE HONORABLE MICHAEL THORNSBURY,
Judge of the Circuit Court of Mingo County,
Respondent

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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I. QUESTION PRESENTED

The question presented in this case is whether a circuit court has the authority to hold those who willfully disobey a valid court order in contempt when such disobedience interferes with the court's lawful process and delays the prompt administration of justice.

II. STATEMENT OF THE CASE

The petitioner in this case is Larry F. Parsons, Executive Director of the Regional Jail and Correctional Facility Authority ("Mr. Parsons"). Mr. Parsons was not the subject of any proceedings below and it is not apparent how Mr. Parsons has standing to challenge orders not directed at him.¹

The respondent in this case is the Honorable Michael Thornsby, Judge of the Circuit Court of Mingo County ("Judge Thornsby"). Judge Thornsby issued contempt orders against Anthony Elkins, Zachary Bassham, and Richard Powers, employees of the Regional Jail and Correctional Facility Authority ("Authority"), in "contempt of Court for appearing late which is a violation of the Courts [sic] transportation order and delaying the Judicial Process." Exhibit A.

The orderly and timely processing of criminal defendants by Judge Thornsby has been repeatedly frustrated by the failure of Authority personnel to comply with court orders. Prisoners arrive late for scheduled hearings or, occasionally, do not arrive at all.

¹ This case amply demonstrates the importance of standing. Although subject to no order of Judge Thornsby, Mr. Parsons is the sole petitioner. Mr. Parsons obviously has no personal knowledge of what transpired. Moreover, Mr. Parsons does not even verify his own petition indicating that he has any knowledge of the false assertions contained therein. Rather, the petition is verified by John L. King, II, the Authority's Chief of Operations.

Judge Thornsbery have previously sought to gain Authority compliance with court orders, without success, by informal action with Authority management and individual transportation officers.

On September 23, 2010, for example, the Authority's failure to comply with Judge Thornsbery's orders, including the Transport Docket, led to Sergeant Richard Powers ("Sgt. Powers") being directed to show cause why he should be held in contempt. Exhibit B. Judge Thornsbery conducted a lengthy discussion, on the record, with Sgt. Powers, including the following:

SGT. POWERS: What I really want to say is since I'm personally responsible for getting these people here on time –

THE COURT: You are, sir.

SGT. POWERS: I am sorry personally.

THE COURT: Let me tell you, they threw you to the wolves, because I called over there. I was going to the top. I wanted the administrator. I was told there wasn't one, and everybody that I got on the phone mentioned your name. You're the guy that made the decision today not to get my people here on time. That's why you're here and they're not here, and if they're wrong and somebody else made this decision, speak up and tell me because I'll apologize to you, but an hour later they're going to be talking to me.

SGT. POWERS: The ultimate decision didn't end up being mine.

THE COURT: What is the problem? Can you tell me what the problem is? I'll help you try to fix it if I can. I'm just not going to tolerate what we're doing. If it takes me going to the Board, if it takes me going to the Governor, I'll do that. Trust me, I'll do that. I'll do that in the next five minutes and I'll tell them it's broke, our system is broke, and it ain't working. We got to fix it. If you'll tell me who is giving these orders and if they're limiting your vehicles, if they're limiting your employees I'll stand up and kick a trash can for

you, and if that's the problem – it's a sad day that they create the problem and put you here in the lion's den, frankly, but whatever the case may be I don't know where these other folks went. I guarantee there were transport vans taking people to misdemeanor hearings. Felonies come first, arraignments come first, trials come first. It's a matter of using good judgment as to where you transport and when you transport them and if you can't get them here on time Maw Bell still makes telephones. You call up and say we got this problem and it's impossible, doing everything within my power. I don't get the courtesy of a phone call. I don't get the courtesy of be able to say okay, I'll reset them for you. I just sit here and wait, along with all these other good people and call names of people that are not here and that is intolerable. I've interrupted you. If you'll tell me what the problem is I will go up the chain in order to try to eliminate whatever your problem is and whatever it takes for me to do I'm going to do it. Tell me what the problem is.

SGT. POWERS: Well, as far as the problem, you stated the problem. . . .

THE COURT: All right, I'm not going to hold you in contempt. Frankly, I'm not going to do anything to draw the ire of your supervisors toward you, but you can guarantee that I'm going to be on the phone with the Governor in ten minutes and I'm going to be on the phone with your Board in about 30 minutes and this problem is going to get fixed or I'll bring that whole Regional Jail Board here, line them up in the first row and send them away. That's what I intend on doing and we'll make statewide news. That's a promise. I would appreciate it if you would go back and spread my message that I'm not going to tolerate them not giving you adequate men and adequate resources to get my people here on time and if you'll tell them that – because they're going to hear it from me, too, and from now on with all that surplus they're sitting there counting the change and counting the interest on that they utilize it for the right purpose, that is to hire men, pay them appropriately and get you decent vehicles that you can get people over here, and if they don't we'll see what we can do about doing something different.

Exhibit B at 5-7 (emphasis supplied).

Mr. Parsons and the Authority know about the problems in Mingo and other counties with non-compliance with court orders. They simply choose to ignore it and, instead, when Judge Thornsby took action, filed a petition with this Court blatantly misrepresenting what occurred.

The instability of the position of administrator at the regional jail serving Mingo County has resulted in a lack of organization, leaving the employees who remain to pick up the pieces and absorb the consequences. In September 2010, the position of administrator was vacant and, currently, it is vacant.

John L. King, II, the Authority's operations chief, to whom Judge Thornsby has addressed these organizational and operational issues, has been arrogant, haughty, and non-responsive.²

Terry Miller, who preceded Mr. Parsons as the Authority's executive director, was suspended in September 2010 and fired in October 2010 after two Authority employees made sexual harassment complaints against him.³

Unfortunately for Sgt. Powers, the disarray in the management of the Authority has left Sgt. Powers as the ranking officer at the regional jail serving Mingo County in charge of the transportation of prisoners. Moreover, the refusal of the Authority to

² Mr. King's recent arrest for DUI, with a BAC of .239, resulting in his incarceration of one of the Authority's facilities, <http://wvgazette.com/News/201104240738>, may shed some light on issues that impaired his ability to respond in a reasonable fashion to Judge Thornsby's reasonable requests. Judge Thornsby also notes that Mr. King verified the petition in this action on April 21, 2011; was arrested for aggravated DUI on April 24, 2011; and was suspended without pay pending the outcome of the criminal investigation on April 25, 2011, with Joe DeLong, representative of the Department of Public Safety stating, "they have a strict code of conduct and high ranking officials are held to a higher standard." http://www.wchstv.com/newsroom/eyewitness/110424_5012.shtml.

³ <http://wvgazette.com/News/201103140145>.

provide sufficient resources to the regional jail has resulted in the failure of Authority personnel to transport prisoners in a timely manner; the misidentification of prisoners being transported; and the failure to deliver prisoners at all for scheduled hearings. The September 23, 2010, show cause hearing was a result of the Authority's personnel failing to timely transport prisoners for their court appearances.

Judge Thornsby had a full docket of arraignments, in which he was attempting to promptly arraign the prisoners following their indictment and/or arrest. After Authority personnel delivered the prisoners over seventy-five minutes late, Judge Thornsby called the jail to ascertain the cause of the impediment to his ability to manage his docket and hold the arraignments in a timely fashion. Once jail personnel indicated that Sgt. Powers was responsible for the transportation of prisoners in the absence of an administrator, Judge Thornsby issued a rule to show cause, resulting in the hearing previously discussed. At the conclusion of the hearing, Judge Thornsby did not hold Sgt. Powers in contempt, but directed him to report to Sgt. Powers' superiors that further contempt of lawful orders would not be tolerated.

Unfortunately, despite the guarantees and assurances of compliance from jail officials, Judge Thornsby inexplicably did not receive prisoners in a timely manner following the September 23, 2010, show cause hearing and specifically for the April 21, 2011, arraignments. Despite sending a Transport Docket to the jail ordering the prisoners to be transported at 8:15 a.m., Exhibit C, jail personnel did not arrive with all of the prisoners until 10:40 a.m. With a gallery full of spectators, over a dozen attorneys, and various court personnel awaiting the prisoners' arrival for the continuation of

arraignments, Judge Thorsbury was forced to suspend the docket and recess until the prisoners arrived.

When the jail employees, Anthony Elkins (“Mr. Elkins”) and Anthony Bassham (“Mr. Bassham”), finally arrived, they were informed that they were to appear to show cause why they should be held in contempt. Despite Mr. Parsons’ misrepresentations to the contrary, these jail employees were never arrested, handcuffed, detained, or led to believe that they were. See Exhibit D (videotape footage from courthouse surveillance cameras (“videotape footage”)) and Exhibit E (bailiff’s statement).

Rather, as a security measure, the jail employees were requested to temporarily surrender their weapons before entry into the courtroom. As the videotape footage shows, the jail employees were shown to the courtroom absent handcuffs and in a non-hostile manner, and presented to Judge Thorsbury in the same manner. See Exhibit D.

The jail employees were informed that they were in contempt of court and given an opportunity to show cause. Mr. Elkins stated “we come in get orders what to do” and indicated that they had not been to any other circuit that morning. See Exhibit F at at 3. This frankly made their non-compliance ever more inexplicable.

Mr. Elkins reiterated that Sgt. Powers was the official in charge of transportation and responsible for the delay. Id. at 4. Judge Thorsbury then informed the jail employees that they were in contempt and fined each fifty dollars. Id.

As further proof that Judge Thorsbury did not detain the employees, he stated that “if you show up late with my prisoners again it’s ten (10) days each.” Id. at 4

(emphasis added).⁴ The two jail employees are shown on the videotape footage resuming their duties, including carrying prisoner's shackles. Exhibit D.

In light of the jail employees indicating that Sgt. Powers was responsible for the late transportation of prisoners, Sgt. Powers was also held in contempt and directed to appear before Judge Thornsbery to show cause.⁵ Exhibit F at 6-10.

Upon his appearance, Sgt. Powers was reminded of the previous show cause hearing in which he was admonished and provided assurances that the prisoners would be timely transported in the future. *Id.* at 6-7.

Rather than offer a valid reason for the tardiness, however, Sgt. Powers shifted the blame to his officers showing up to work late, not having all the prisoners properly processed, and having four transportation vans. *Id.* at 8. Judge Thornsbery reminded Sgt. Powers of his previous offers of accommodation, specifically, the option to bring the prisoners as early as necessary. *Id.* at 6.

Ultimately, because of his responsibility of ensuring that prisoners are delivered in accordance with his lawful orders, Judge Thornsbery found Sgt. Powers in contempt and ordered him to pay a fine of fifty dollars. *Id.* at 9.

⁴ Immediately following the contempt citation, Mr. Bassham went to the hallway of the court and began performing his duties, i.e. attending to the prisoners and removing their shackles. The videotape footage also shows the jail employees walking with, at times behind, Judge Thornsbery's bailiff. The jail employees were not been restrained or treated as a detainee in any manner.

⁵ It is important to note, that Mr. Parsons' counsel, Mr. Cardinal, contacted Judge Thornsbery's office via telephone attempting to speak off the record. After being informed by Judge Thornsbery's staff that he could appear in person, on the record, Mr. Cardinal declined to do so, instead allowing the jail employees to proceed without representation. Respectfully, this placed a heightened duty on Mr. Cardinal to ensure that the allegations in a prohibition petition he filed was factually accurate, which obviously did not occur.

As with the other two jail employees, Judge Thornsbery informed Sgt. Powers that “if you violate my order again you will spend ten days in your own Regional Jail.” *Id.* at 9 (emphasis added). As with the other jail employees, Sgt. Powers was not handcuffed, arrested, detained, or informed that he was. See Exhibit D. Rather, Sgt. Powers, like the other two jail employees, was fined fifty dollars and advised that, if it happened again, confinement was a possibility.

After being free to leave, and outside of the knowledge of Judge Thornsbery, who was still on the bench, the jail employees remained in the courthouse in an area referred to as the holding area, which is located in the basement of the courthouse.⁶

The jail employees socialized with the civilian bailiffs and various other Mingo County employees, drank coffee, and enjoyed uninhibited freedom of movement. Sgt. Powers was even answering the holding cell telephone. Judge Thornsbery’s staff repeatedly informed the jail employees that they were free to leave.

Despite not being held, restrained, or otherwise detained, the jail employees chose not to vacate the courthouse. Rather, the jail employees informed the circuit court’s staff that they were awaiting direction of the Authority’s attorney before leaving. Apparently, the Authority’s attorney decided to use the events of the day to retaliate against Judge Thornsbery for daring to expect the Authority to comply with his orders and filed an “EMERGENY [sic] WRIT OF PROHIBITION WRIT OF HABEAS CORPUS” with this

⁶ Although the area is referred to as the holding area, the jail employees were with courthouse employees and not in holding cells. This is the area where jail employees commonly socialize while waiting for the prisoners’ hearings to conclude for transportation back to the jail.

Court, claiming that “Judge Michael Thornsby abused his digression⁷ [sic] when he summarily arrested and fined Regional Jail Transportation Correctional Officers when it required two transportation runs to deliver inmates.” Petition at 1 (emphasis supplied). Obviously, Judge Thornsby “arrested” no one and fined no one because it took two transportation runs to deliver inmates; rather, after issuing a rule to show cause, Judge Thornsby fined three jail employees the sum of fifty dollars each after none could demonstrate good cause for failing to comply with the order that the prisoners be produced for hearings commencing at 8:15 a.m. Many of the defendants had been arrested on sealed grand jury indictments and all of the defendants were entitled to prompt presentment.

Accompanying Mr. Parsons’ “emergen^y” petition was a motion for expedited relief which sought “release of officers Anthony Elkins, Zachary Bassham and Richard Powers,” Motion at 1, but the jail employees were already in transit back to the jail with the prisoners at the time both the petition and motion were filed with this Court. Later, Mr. Parsons filed a supplemental pleading with this Court falsely stating that Mr. Elkins and Mr. Bassham were “ordered handcuffed and detained by Judge Thornsby,” but acknowledging that by 3:00 pm, all three jail employees were no longer at the courthouse. Supplemental Pleading at 1.

As Judge Thornsby entered orders on April 21, 2011, merely fining each of the employees the sum of fifty dollars for direct contempt of his order requiring the timely

⁷ Improper use of this word appears to arise from a vocabulary problem rather than a typographical problem as its misuse appears on two other occasions in the petition: “The Courts [sic] abuse of digression and authority disrupts the public safety It is a flagrant abuse of digression to personally fine these officers” Petition at 2.

transportation of prisoners, **Exhibit G**, and this Court issued a rule to show cause on April 22, 2011, to show cause as to why a writ of prohibition should not be awarded, the only legal issue appears to be whether a circuit court has the authority to hold those who willfully disobey a valid court order in contempt when such disobedience interferes with the court's lawful process and delays the prompt administration of justice.

Judge Thornsbery respectfully submits that when a jail employee, without reasonable justification, fails to produce a prisoner in a timely manner for a previously scheduled hearing, such jail employee is subject to the contempt power of the court, including but not limited to imposition of a fine not exceeding fifty dollars.

III. SUMMARY OF ARGUMENT

W. Va. Code § 61-5-26 provides, in relevant part, that "The courts and the judges thereof may issue attachment for contempt and punish them summarily only in the following cases . . . misbehavior of an officer of the court, in his official character . . . disobedience to or resistance of any . . . person, to any lawful . . . order of the said court."

As previously noted, despite sending a Transport Docket to the jail ordering the prisoners to be transported to arrive at 8:15 a.m. for arraignments, jail personnel did not arrive with all of the prisoners until 10:40 a.m. With a gallery full of spectators, over a dozen attorneys, and various court personnel awaiting the prisoners' arrival for the continuation of arraignments, Judge Thornsbery was forced to suspend the docket and recess until the prisoners arrived.

Consequently, pursuant to statute and his inherent authority, Judge Thornsbery issued attachments to each of the jail employees for contempt; affording them an

opportunity to show cause why they should not be held in contempt for violating his lawful order to produce the prisoners for timely arraignments; and after they failed to demonstrate good cause, fined them the sum of fifty dollars each.

Clearly, this was within Judge Thornsby's jurisdiction and he did not abuse his discretion in doing so. Consequently, Judge Thornsby requests that the Court refuse to issue a writ of prohibition and confirm the authority of circuit courts to use their powers of summary contempt for the violation of lawful orders.

IV. ARGUMENT

A. PETITIONER HAS NO STANDING TO CONTEST, BY PETITION FOR WRIT OF PROHIBITION, ORDERS TO WHICH HE WAS NOT A PARTY.

In Syllabus Point 15 of *Myers v. Frazier*, 173 W. Va. 658, 319 S.E.2d 786 (1984), this Court held that:

“As a general rule any person who will be affected or injured by the proceeding which he seeks to prohibit is entitled to apply for a writ of prohibition; but a person who has no interest in such proceeding and whose rights will not be affected or injured by it can not do so.” Syllabus Point 6, *State ex rel. Linger v. County Court of Upshur County*, 150 W. Va. 207, 144 S.E.2d 689 (1965).

(emphasis supplied). See also Syl. pt. 3, *State ex rel. Glass Blowers Ass'n v. Silver*, 151 W. Va. 749, 155 S.E.2d 564 (1967); Syl. pt. 2, *State ex rel. Gordon Memorial Hospital v. West Virginia State Board of Examiners for Registered Nurses*, 136 W. Va. 88, 66 S.E.2d 1 (1951). Here, Mr. Parsons will not be "affected or injured by" Judge Thornsby's ordering fines in the amount of fifty dollars each to three jail employees.

This Court has stated, “standing is defined as ‘[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” *Findley v. State Farm Mut. Auto.*

Ins. Co., 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002)(quoting BLACK'S LAW DICTIONARY 1413 (7th ed. 1999)). "[T]he question of standing," the United States Supreme Court has observed, "is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "Standing is a jurisdictional requirement that cannot be waived, and may be brought up at any time in a proceeding." Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 3D at § 12(b). So fundamental is the issue of standing that, "The decisions of this Court and other jurisdictions have pointed out that an appellate court has the inherent authority and duty to sua sponte address the issue of standing, even when the parties have failed to raise the issue at the trial court level or during a proceeding before the appellate court." *State ex rel. Abraham Linc Corp. v. Bedell*, 216 W. Va. 99, 111, 602 S.E.2d 542, 554 (2004) (Davis, J., concurring).

Here, as Mr. Parsons will not be "affected or injured by" Judge Thornsbury's ordering fines in the amount of fifty dollars each to three jail employees, he lacks standing to file and petition for writ of prohibition and, consequently, this Court's rule to show cause in prohibition should be dismissed as improvidently granted.

B. ISSUANCE OF A WRIT OF PROHIBITION IS INAPPROPRIATE BECAUSE PETITIONER HAD THE ADEQUATE, ALTERNATE REMEDY OF APPEAL, AND BECAUSE PROHIBITION IS NOT AVAILABLE TO ADDRESS SIMPLE ABUSES OF DISCRETION.

In Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), this Court held:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction

but only where it is claimed that the lower court tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

(emphasis supplied).

Moreover, in Syllabus Point 1 of *State ex rel. W. Va. Dept. of Military Affairs and Public Safety v. Berger*, 203 W. Va. 468, 508 S.E.2d 628 (1998), this Court held, "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." (citation omitted); See also Syl. Pt. 2, in part, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977) ("A writ of prohibition will not issue to prevent a simple abuse of discretion.").

Here, the remedy of appeal was available and the three employees were not directed to immediately pay the fifty dollars fines, but were given a reasonable time to do so, and had the remedy of stay pending appeal.

Indeed, much of this Court's jurisprudence involving contempt has developed not through exercise of its prohibition jurisdiction, but through exercise of its appellate jurisdiction. See *Carpenter v. Carpenter*, ___ W. Va. ___, 707 S.E.2d 41 (2011)(appeal of

contempt order); *Watson v. Sunset Addition Property Owners Ass'n, Inc.*, 222 W. Va. 233, 664 S.E.2d 118 (2008)(appeal of contempt order); *Deitz v. Deitz*, 222 W. Va. 46, 659 S.E.2d 331 (2008)(appeal of contempt order); *Chapman v. Catron*, 220 W. Va. 393, 647 S.E.2d 829 (2007)(appeal of contempt order); *Truman v. Auxier*, 220 W. Va. 358, 647 S.E.2d 794 (2007)(appeal of contempt order); *Donahoe v. Donahoe*, 219 W. Va. 102, 632 S.E.2d 42 (2006)(appeal of contempt order); *Guido v. Guido*, 202 W. Va. 198, 503 S.E.2d 511 (1998)(appeal of contempt order).

Because either Mr. Parsons, assuming he has standing, or the three employees could have prosecuted an appeal from the contempt orders, the remedy of a writ of prohibition in this case is inappropriate.

Moreover, Mr. Parsons' petition alleges that Judge Thornsberry "abused his digression," Emergency Petition at 1, which Judge Thornsberry assumes means an abuse of "discretion." Where only an "abuse of discretion" is involved and not an order outside a court's jurisdiction or exceeding its legitimate powers a writ of prohibition is inappropriate. See, e.g., *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 2011 WL 1486100 (W. Va.); *State ex rel. Tristen K. v. Janes*, 227 W. Va. 62, 705 S.E.2d 569 (2010); *State ex rel. Nationwide Mut. Ins. Co. v. Marks*, 223 W. Va. 452, 676 S.E.2d 156 (2009); *State ex rel. Nationwide Mut. Ins. Co. v. Karl*, 222 W. Va. 326, 664 S.E.2d 667 (2008); *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008).

Obviously, the decision whether to summarily impose punishment for disobedience of a court's order is inherently discretionary and, accordingly, should not be the subject of a prohibition proceeding.

Accordingly, because Mr. Parsons and/or the three jail employees had the adequate, alternative remedy of appeal; because any error in the imposition of summary criminal contempt was correctable on appeal; and because alleged abuses of discretion are not the province of prohibition proceedings, Judge Thornsbury requests that the rule to show cause be dismissed as improvidently awarded.

C. THE STANDARD OF REVIEW FOR SUMMARY CRIMINAL CONTEMPT REQUIRES THE REVIEWING COURT TO VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO SUSTAINING THE JUDGMENT BECAUSE A COURT MUST BE ITS OWN JUDGE OF CONTEMPTS COMMITTED IN ITS PRESENCE.

“In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order,” this Court has held, “we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review.” Syl. pt. 1, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

In the instant case, however, a summary, criminal contempt order is involved, which has an even more deferential standard of review:

The standards of review for civil and criminal contempt are different. In reviewing a finding of civil contempt, we decide whether the circuit court's finding is clearly against the preponderance of the evidence. *Holifield v. Mullenax Financial & Tax Advisory Group, Inc.*, 2009 Ark. App. 280, at 2, 307 S.W.3d 608, 610. In reviewing a finding of criminal contempt, however, we determine whether the circuit court's decision is supported by substantial evidence, viewing the record in the light most favorable to the circuit court's decision. *Id.* Indeed, there are significant (and much written about) differences in the nature of the two types of contempt. See, e.g., *Applegate v. Applegate*, 101 Ark. App. 289, 275 S.W.3d 682 (2008).

Bundy v. Moody, 2011 WL 833901 at *1 (Ark. Ct. App.)(emphasis supplied); see also *Banks v. United States*, 926 A.2d 158, 164 (D.C. 2007)(“On appeal of a finding of criminal contempt, we must view the evidence in the light most favorable to sustaining the judgment.” *In re Vance*, 697 A.2d 42, 44 (D.C.1997) (citing *Bethard v. District of Columbia*, 650 A.2d 651, 654 (D.C. 1994) (per curiam)). The trial court's findings may not be disturbed ‘unless they are “without evidentiary support or plainly wrong.”’ *Id.* (quoting *Bethard*, *supra*, 650 A.2d at 654.)”(emphasis supplied); *Freeman v. Stewart*, 2004 WL 1669566 at *7 (Tenn. Ct. App. 2004)(“The difference between civil and criminal contempt involves not only the availability of constitutional safeguards, but also affects this Court's standard of review. See, e.g., *Barber v. Chapman*, No. M2003-00378-COA-R3-CV, 2004 Tenn. App. LEXIS 111, at *8 (Tenn. Ct. App. Feb. 23, 2004), no appl. perm appeal filed (“[O]n appeal, individuals convicted of criminal contempt lose their presumption of innocence and must overcome the presumption of guilt.”)(emphasis supplied); *Brown v. Regan*, 84 Conn. App. 100, 103, 851 A.2d 1249, 1251 (2004)(“the court ‘exercises considerable discretion in dealing with contemptuous conduct occurring in its presence, and its summary adjudication is accorded a presumption of finality.’ (Internal quotation marks omitted.) *Id.* In other words, the court ‘must be its own judge of contempts committed within its presence.’ (Internal quotation marks omitted.) *Id.*”); *H.J. Russell & Co. v. Manuel*, 264 Ga. App. 273, 276, 590 S.E.2d 250, 253 (2003)(“On appeal, the standard of review of a criminal contempt conviction is whether, after reviewing the evidence in the light most favorable to the finding of contempt, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.”)(emphasis supplied and citation omitted).

Here, viewing the evidence in the light most favorable to the finding of contempt, it is clear that the imposition of a fifty dollar fine on each of the three jail employees was warranted where the jail had been directed, by order, to present the criminal defendants for arraignment at 8:15 a.m. on April 21, 2011, and the three jail employees willfully failed to comply with the order.

D. THE CIRCUIT COURT WAS STATUTORILY VESTED WITH AUTHORITY TO HOLD THE JAIL EMPLOYEES IN CONTEMPT PURSUANT TO WEST VIRGINIA CODE §61-5-26.

Necessary in a circuit court's prompt and effective administration of justice is the ability to manage its docket, maintain order, and require the adherence to its lawful orders. In recognition of this, the West Virginia Legislature has provided circuit courts the power to summarily punish contempt pursuant to W. Va. Code § 61-5-26.

Additionally, various courts, including this Court and the United States Supreme Court, have long recognized an inherent authority and need to punish contempt. In fact, at the inception of the court system it was recognized that court's need to punish contempt was fundamental and essential to the court. Since that time, trial courts, and specifically our circuit courts, have maintained the authority to punish contempt and maintain court decorum.

- 1. By its Plain Language, W. Va. Code § 61-5-26 Provides Circuit Courts with the Discretionary Authority To Punish Through Summary Criminal Contempt Proceedings All Persons, Including Governmental Employees, Who Disobey Lawful Orders.**

As previously noted, W. Va. Code § 61-5-26 provides, in relevant part, that "The courts and the judges thereof may issue attachment for contempt and punish them summarily only in the following cases . . . misbehavior of an officer of the court, in his

official character . . . disobedience to or resistance of any . . . person, to any lawful . . . order of the said court.”

Here, the facts are clear: (1) Judge Thornsbury issued a “Transport Docket” to the jail directing that 22 inmates be produced at his courtroom at 8:15 a.m. on April 21, 2011, **Exhibit C**; (2) the inmates were not produced at his courtroom until 10:40 a.m. on April 21, 2011, **Exhibit F**; (3) the jail had established a pattern and practice of failing to produce inmates in accordance with the court’s orders, **Exhibit B**; (4) a previous contempt hearing had been conducted at which Sgt. Powers, an officer of the court, had been ordered to communicate to his superiors that continued violation of transport orders would not be tolerated, **Exhibit B**; and (5) none of the three jail employees, who were all officers of the court, were able to establish good cause for their failure to comply with Judge Thornsbury’s transport order on April 21, 2011, **Exhibit F**. Consequently, it was perfectly proper for Judge Thornsbury to hold the non-compliant jail employees in contempt and to fine each of them the sum of fifty dollars.

In *State ex rel. Dodrill v. Scott*, 177 W. Va. 452, 352 S.E.2d 741 (1986), for example, correction officials and employees sought a petition for writ of prohibition from this Court challenging a circuit court order holding them in contempt for failing to comply with lawful court orders regarding overcrowding at Huttonsville Correctional Center. Specifically, the circuit court “ordered that: 1) the petitioners were in willful and contumacious contempt of court; 2) the petitioners must accept custody of inmates Redman, Spencer, Boggess and Stanley by 12:00 noon on August 22, 1986, in default of which petitioners must surrender themselves to the Sheriff of Jackson County, to be held in the Jackson County Jail until such time as they complied with the orders of the circuit

court respecting the commitment of these inmates to state institutions; and 3) if the petitioners refused to comply with the orders of the court as set forth above, the clerk must issue a warrant for the arrest of petitioners.” *Id.* at 455, 352 S.E.2d at 743.

Rejecting reliance by the corrections officials and employees on an executive order essentially directing them to ignore court orders, this Court addressed the circuit court’s contempt powers as follows:

W.Va. Code 61-5-26 [1923] provides: “The courts and the judges thereof may issue attachment for contempt and punish them summarily only in the following cases: . . . (d) disobedience to or resistance of any officer of the court, juror, witness, or other person, to any lawful process, judgment, decree or order of the said court.” This section clearly grants to courts the authority to hold in contempt any person who disobeys a lawful order of the court. The petitioners do not contend that the Circuit Court of Jackson County did not have jurisdiction over the four criminal cases out of which these contempt proceedings arose. Nor do the petitioners contend that the court’s orders of commitment were unlawful.

Id. at 459, 352 S.E.2d at 748 (emphasis supplied). Likewise, in this instant case, Mr. Parsons does not challenge Judge Thornsby’s jurisdiction over the criminal cases out of which the contempt proceedings arose nor does Mr. Parsons contend that Judge Thornsby’s order directing that the criminal defendants be produced for arraignment at 8:15 a.m. on April 21, 2011, was unlawful.

This Court also rejected the petitioners’ argument in *Dodrill* that venue for contempt proceedings against state officials and/or employees lies only in the Circuit Court of Kanawha County: “these contempt proceedings are not original proceedings brought against a state officer. The proceedings were ancillary to a criminal action over which the Circuit Court of Jackson County had jurisdiction and for which that court was

the proper venue.” *Id.* at 459-60, 352 S.E.2d at 748. Here, of course, all three jail employees work in Mingo County and, again, the contempt proceedings were merely ancillary to the Mingo County criminal proceedings.

Finally, this Court rejected the argument that state officials and/or employees are somehow shielded from liability for contempt from lawful orders issued by circuit courts: “Petitioners have thus been aware of Judge Scott’s invalidation of Executive Order No. 11-86 for over three months. Petitioners therefore have not been denied the lack of adequate notice against which W. Va. Code 61-5-18 [1923] seeks to shield state officials.” *Id.* at 460, 352 S.E.2d at 748-49; see also *Syl. pt. 2, Flanigan v. West Virginia Public Employees’ Retirement System*, 177 W. Va. 331, 352 S.E.2d 81 (1986) (“Every functionary of state government,⁸ whose action is essential to the execution of official process in the administration of justice, is bound to respond to and implement orders of this Court of which he has knowledge regardless of whether such functionary is personally named in such order.”). Clearly, the fact that the three contemnors are state employees does not shield them when they violate the lawful orders of a circuit court.

Consequently, when the three jail employees failed to obey the lawful order of Judge Thornsby to transport a list of prisoners to arraignment proceedings to

⁸ It is for this reason, among others, that Sgt. Powers was subject to Judge Thornsby’s contempt power, even though he was not directly involved in the transportation of the prisoners on April 21, 2011. See, e.g., *Flanigan*, *supra* (executive secretary of board of trustees of Public Employees Retirement System was in contempt of order that petitioner be enrolled in PERS, where secretary had actual knowledge of order and was functionary charged with expediting statutory procedure through which recipients received their due); *Hendershot v. Handlan*, 162 W. Va. 175, 248 S.E.2d 273 (1978) (person though not a party to a proceeding may nevertheless be subject to contempt order if he or she had actual knowledge of the order and was acting in concert or privity with a party).

commence at 8:15 a.m. on April 21, 2011, they were subject to summary contempt under W. Va. Code § 61-5-26 like any other person.

2. **By its Plain Language, W. Va. Code § 61-5-26 Provides Circuit Courts with the Discretionary Authority To Punish Through Summary Criminal Contempt “Misbehavior of an Officer of the Court,” Including a Correctional Officer.**

In addition to the propriety of punishing them through summary criminal contempt proceedings as a result of their disobedience of a lawful court order, the conduct of the three jail employees constituted “misbehavior of an officer of the court” warranting the imposition of criminal contempt.

As noted, W. Va. Code § 61-5-26 provides, in relevant part, that “The courts and the judges thereof may issue attachment for contempt and punish them summarily only in the following cases . . . misbehavior of an officer of the court, in his official character”

It is well-established that jail employees serving as correctional officers having custody over prisoners subject to a court’s criminal jurisdiction are officers of the court subject to contempt power.

In *Fanning v. United States*, 72 F.2d 929 (4th Cir. 1934), for example, a West Virginia sheriff was held in contempt after allowing two federal prisoners to escape. Affirming the trial judge’s right to hold the sheriff in contempt, as an officer of the court, the Fourth Circuit stated:

The right of a court to have the sentences imposed by it executed is inherent and is necessary to the administration of justice. Without this right and without the power to punish, and have the punishment carried out, courts would be impotent and could not function. If officers of the law to whom the custody of prisoners sentenced to imprisonment

are negligent in the performance of their duties and through such negligence the prisoners are permitted to escape, then the negligent officers are clearly guilty of contempt of the court that committed the prisoners to their charge for safe keeping.

Id. at 932. See also *Welch v. Spangler*, 939 F.2d 570 (8th Cir. 1991)(affirming imposition of \$500 contempt fine against correctional officials and officer who violated consent decree); *Moran v. Rhode Island Broth. of Correctional Officers*, 506 A.2d 542 (R.I. 1986)(affirming imposition of contempt sanctions against correctional officers who violated order requiring them to report for duty at a time certain); 15A CYCLOPEDIA OF FEDERAL PROCEDURE § 87:23 (3rd ed.) (2010)(“A second class of contempts which under statute a federal court is empowered to punish is that of misbehavior by any officer of the court in the officer's official transactions.”)(citing case).

Unfortunately, problems with the transportation of criminal defendants for hearings resulting in contempt proceedings are not unique to West Virginia.

In *In re Bowens*, 308 Ga. App. 241, 706 S.E.2d 694 (2011), for example, the court recently described the circumstances as follows:

Sheriff Bowens was cited for contempt for disobeying a written order of the Terrell County Superior Court entered by Judge Ronnie Joe Lane on the afternoon of February 16, 2010, and delivered the same afternoon to Sheriff Bowens's office. The order directed Sheriff Bowens to transport to the Terrell County Courthouse, not later than 9:00 a.m. on February 17, 2010, four named criminal defendants imprisoned at the Terrell County jail, for the purpose of hearings in criminal cases before the Court. At the hearing on the contempt citation, evidence showed that Judge Lane issued the order to Sheriff Bowens because, at the previous scheduled date for criminal hearings, Judge Lane was unable to complete the Court's business, and was forced to adjourn early, because Sheriff Bowens failed to timely transport all of the scheduled defendants from the jail to the courthouse.

Evidence further showed that Sheriff Bowens operated the county jail and had the responsibility to transport criminal defendants from the jail to the county courthouse for hearings and trials. . . . In explanation of his decision not to comply with the court order, Sheriff Bowens testified that, on February 17, 2010, he was working in his patrol car to answer calls, and that he had only two deputies working, one in the courtroom at all times, and one transporting prisoners from the jail to the courthouse. But Sheriff Bowens also testified that he employed ten deputies (each with a patrol car), an investigator with a car, fifteen full-time jailors, two part-time jailors, a jail administrator, and two office assistants. Part of Sheriff Bowens's defense was that Terrell County had not adequately funded his office to allow him to safely carry out his responsibilities. Sheriff Bowens explained that he did not wilfully disobey the court order, but that he was not able to comply with the order "because of a lack of personnel that I had that day." According to Sheriff Bowens, it would have been unsafe to comply with the court order because it required him to send one deputy with four prisoners. Judge Lane testified that Sheriff Bowens's failure to comply with the order interfered with the Court's ability to conduct the scheduled hearings.

Id. at ___, 706 S.E.2d at 696-97. In affirming an order fining the sheriff \$500 and sentencing him to five days in jail, which were the statutory maximums for this form of contempt proceeding under Georgia law, the court held:

Since evidence showed that Sheriff Bowens had notice of and disobeyed the court order, his sole defense to the contempt citation was that he did not do so wilfully because he lacked the ability to comply. The evidence, especially evidence that Sheriff Bowens had ample deputies and resources under his control to comply with the court order, was sufficient to prove beyond a reasonable doubt that he wilfully violated the order and was guilty of criminal contempt.

Id. at ___, 706 S.E.2d at 697.

In *Trombi v. Donahoe*, 223 Ariz. 261, 222 P.3d 284 (Ariz. Ct. App. 2009), the court affirmed the power of a trial judge to hold a sheriff in contempt for failing to transport prisoners to court proceedings in a timely manner:

[[I]t is the sheriff's duty under A.R.S. § 11-441(A)(4) to attend the court, not the sheriff's power under A.R.S. § 11-441(A)(5) to operate the jails, that is at issue. No court order instructed MCSO to manage the jails or inmate transportation in any particular manner. Judge Baca's order did not "micromanage" the means-it merely directed a simple result: the timely appearance of inmates. The management of the jails and methods of achieving compliance with the court's statutorily authorized order were left where they belonged - in the sole control of the sheriff. In A.R.S. § 11-441(A)(4), the Legislature (1) expressly granted to the judiciary the authority to require the sheriff to attend the court, and (2) required the sheriff to "obey lawful orders and directions issued by the judge." As we noted in *Baca*, the sheriff acts as an officer of the court in carrying out that duty. 217 Ariz. at 579, ¶ 27, 177 P.3d at 321; see also *Clark v. Campbell*, 219 Ariz. 66, 72, 193 P.3d 320, 326 (App. 2008). The court has jurisdiction to control and discipline acts that the sheriff commits while acting as an officer of the court. . . .

Judge Donahoe, as the criminal presiding judge, had inherent and statutory authority to conduct a consolidated hearing on orders to show cause regarding contempt that were issued in multiple cases by criminal department judges. The orders to show cause were based on MCSO's failure to timely transport in-custody defendants to their scheduled court appearances as ordered by the court pursuant to its express statutory authority under A.R.S. § 11-441(A)(4). We therefore conclude that the order compelling timely transport and the orders to show cause were valid.

Id. at 267-70, 222 P.3d at 290-93 (emphasis supplied).

Likewise, in the instant case, Judge Thornsby's "Transport Docket" order, which was the form order requested by the Authority and utilized as transportation orders for years, directed that 22 prisoners be transported to court for arraignment beginning at

8:15 a.m. on April 21, 2011; his orders for the jail employees to show cause why they did not comply with such orders; and his orders holding each of them in contempt and fining them fifty dollars each were valid.

E. A CIRCUIT COURT HAS INHERENT POWER TO SUMMARILY PUNISH THOSE WHO WILLFULLY DISOBEY ITS ORDERS.

Even in the absence of statutory authority, courts have the inherent right to punish disobedience of their orders. “The right of this court to punish for [contempt] is inherent and essential,” it has noted, “for its protection and existence.” *State ex rel. Robinson v. Michael*, 166 W. Va. 660, 662 n.1, 276 S.E.2d 812, 814 n.1 (1981) (alternation in original and citation omitted).

For example, this Court has held, “When this Court acts within its jurisdiction, its orders shall be promptly obeyed, or contempt is a proper sanction.” Syl. pt. 1, *United Mine Workers of America v. Faerber*, 179 W. Va. 73, 365 S.E.2d 353 (1986).⁹ Indeed, it

⁹ See also Syl. pt. 1, *Office of Lawyer Disciplinary Counsel v. Cunningham*, 200 W. Va. 339, 489 S.E.2d 496 (1997); *Interstate Commerce Commission v. Brimson*, 155 U.S. 3, 5 (1894) (“The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgment, orders, and writs of the courts, and consequently to the due administration of justice. The moments the courts of the United States were called into existence, and invested with jurisdiction over any subject, they became possessed of this power. The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied because it is necessary to the exercise of all other powers.”)(citations omitted); *Fisher v. Pace*, 336 U.S. 155, 159-60 (1949) (“Historically and rationally the inherent power of the courts to punish contempts in the face of the court without further proof and facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of the law.”); 4A M.J. *Contempt* § 5, at 660-61 (1990) (“The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity, implied because it is necessary to the exercise of all other powers. Without such power, the administration of law would be in continual danger of being thwarted.”) (emphasis added).

has exercised its inherent contempt powers over jail employees in circumstances not entirely dissimilar from those presented in this case.

In *State ex rel. Walker v. Giardina*, 170 W. Va. 483, 294 S.E.2d 900 (1982), this Court had entered an order staying execution of an extradition order. The Court's Clerk contacted the jail and notified it that the stay had been awarded. *Id.* at 485-86, 294 S.E.2d at 902-03. After being advised by the circuit judge to ignore this Court's stay, two jail employees released the prisoner to Florida officials. *Id.* at 486, 294 S.E.2d at 903.

After rejecting the two jail employees' arguments that they should not be held in contempt because they had been advised to ignore this Court's order by the circuit judge and because no written order had been received by the jail, this Court described its inherent criminal contempt power as follows:

We have traditionally held, as have other courts, that this Court possesses the power to punish a party for contempt of an order executed by this Court. In *State ex rel. Mason*, *supra*, in Syllabus Point 3 we spoke of our contempt power as:

"The Supreme Court of Appeals may punish a party summarily for such a contempt. Its right to do so is inherent and essential to the existence of the court; and the discretion involved in this power is in a great measure arbitrary and undefinable, and for a contempt of this character it has been in no degree restricted by our statute-law. This court may order, that that which has been done in disobedience of its lawful process shall be undone, where justice to any person requires this course to be adopted. When the contempt is willful, it may imprison the party; and when merely inadvertent and reckless, it may impose a fine on the party. If a fine be imposed, the court may imprison the party, if such fine be not paid in the time prescribed by the court."

See also, *State v. Frew & Hart*, 24 W.Va. 416 (1884); *Hutton v. Lockridge*, 21 W.Va. 254 (1883).

Id. at 488, 294 S.E.2d at 905 (emphasis supplied and footnote omitted).

As in the present case, because there was no way to turn back the clock prior to the time this Court's order staying extradition had been entered, this Court recognized that criminal contempt was the appropriate remedy:

Also recognized in *State ex rel. Robinson*, supra, was the usefulness of formulating some general rules that might assist judges in determining whether to proceed by way of civil or criminal contempt. Of particular importance to the present case is Syllabus Point 4 as previously stated and Syllabus Point 5 of *State ex rel. Robinson*:

“The appropriate sanction in a criminal contempt case is an order sentencing the contemner to a definite term of imprisonment or an order requiring the contemner to pay a fine in a determined amount.”

The events in the present case clearly constitute acts of criminal contempt in that they were directed against the stay order of this Court. As in the case of *United States v. Shipp*, 214 U.S. 386, 29 S. Ct. 637, 53 L. Ed. 1041 (1909), there is no relief that can be accorded to the other party since the petitioner has now been removed beyond the jurisdiction of this Court.

Id. at 490, 294 S.E.2d at 907 (emphasis supplied).

Here, there was nothing Judge Thornsbery could do to turn back the clock and have the criminal defendants produced for arraignment at the time ordered so that the court, attorneys, staff, family members, and others would not be inconvenienced and justice would not be delayed. Accordingly, as in *Walker*, Judge Thornsbery properly

exercised his inherent power¹⁰ of criminal contempt to punish the three jail employees the meager sum of fifty dollars each.

F. THE EVIDENCE IN THIS CASE IS MORE THAN SUFFICIENT, PARTICULARLY WHEN CONSIDERED IN A LIGHT MOST FAVORABLE TO THE JUDGMENT, TO SUPPORT IMPOSITION OF A FINE OF FIFTY DOLLARS EACH ON THE THREE JAIL EMPLOYEES WHO FAILED TO COMPLY WITH JUDGE THORNSBURY'S ORDER.

“Contempt is an act in disrespect of the court or its processes, or which obstructs the administration of justice, or tends to bring the court into disrepute.” *State v. Hansford*, 43 W. Va. 773, 776, 28 S.E. 791, 792 (1897); see also 17 C.J.S. *Contempt* § 2 (“Contempt of court may be generally defined as a disobedience to the court, by acting in opposition to the authority, justice and dignity thereof.”).

“From the very beginning of this Nation and throughout its history the power to convict for criminal contempt has been deemed an essential and inherent aspect of the very existence of our courts. The First Congress, out of whose 95 members 20, among them some of the most distinguished lawyers, had been members of the Philadelphia Convention, explicitly conferred the power of contempt upon the federal courts.” *Levine v. United States*, 362 U.S. 610, 615 (1960).

¹⁰ Although there is some authority to the effect that W. Va. Code § 61-5-26 somehow limits a circuit court's ability to punish for summary contempt, see Syl. pt. 2, *State v. Porter*, 105 W. Va. 441, 143 S.E. 93 (1928) (“Notwithstanding the common-law right of courts to punish for contempt, a circuit court may not proceed and punish summarily for acts other than those enumerated in section 27 of chapter 147 of the Code.”); Syl. pt. 1, *State v. Hansford*, 43 W. Va. 773, 28 S.E. 791 (1897), that authority was decided before the Judicial Reorganization Amendment of 1974, and did not address whether legislative restrictions upon a court's inherent right to summarily punish contempt violates separation of powers. Thus, in *State v. Boyd*, 166 W. Va. 690, 694, 276 S.E.2d 829, 832 (1981), this Court observed, “we have not considered W. Va. Code, 61-5-26, as solely defining the substantive grounds for all contempt,” and noted that even in *Hansford*, the Court went outside the statutory definition in determining whether “summary contempt could be exercised.” Thus, all courts, including circuit courts, have the inherent right to summarily punish contempt when their orders are willfully disobeyed.

In *State v. Smarr*, 187 W. Va. 278, 280, 418 S.E.2d 592, 593 (1992), this Court confirmed the right of a circuit court to summarily punish for criminal contempt, “While this Court has been vigilant in requiring jury trials and due process of law in criminal contempt proceedings, it is also recognized that in the specific instances enumerated in W. Va. Code, 61-5-26, jury trials are not required and that a trial court may punish summarily.” (emphasis supplied and citation omitted).

With specific reference to the circumstances presented in *Smarr*, where an attorney was fined the sum of \$500, this Court stated:

In *State v. Boyd*, *supra*, the Court examined at some length what constitutes misbehavior of an officer of the court in his official character under W. Va. Code, 61-5-26. In that case, the Court reviewed with approval principles set forth by the Supreme Court of the United States in *In re McConnell*, 370 U.S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962), and *Ex parte Hudgings*, 249 U.S. 378, 39 S. Ct. 337, 63 L. Ed. 656 (1919). In those cases, the Supreme Court of the United States essentially found that for conduct to be misbehavior, it must be something which would obstruct or interrupt the administration of justice and that it must be something done in the presence of the court.

In the present case, in addressing the issue of the potential contempt of the appellant, Mr. Cowgill, the trial court read into the record repeated instances of where the appellant, who was officially representing Jackie Lee Smarr in the felony case pending against Mr. Smarr, in response to direct and clear questions addressed to him by the court, misrepresented the status of Mr. Smarr's case and, in effect, indicated that he was prosecuting an appeal in that case when, in fact, he had not taken an appeal.

This Court believes that in this matter the appellant was an officer of the court, since he was an attorney-at-law practicing before the Bar of the court. It is apparent from reading the transcript relating to the questions posed to him that one of the concerns of the court in questioning him relating to the status of Mr. Smarr's case was a desire by the court to see that

the lawful sentence of the court relating to Mr. Smarr be carried out and that justice be administered in accordance with the law. By misrepresenting the status of Mr. Smarr's appeal, the appellant effectively delayed the execution of that sentence.

In this Court's view, by intentionally making misrepresentations which delayed the execution of the lawful sentence imposed by the circuit court, the appellant effectively obstructed or interrupted the administration of justice under the principles discussed in *State v. Boyd*, supra.

Id. (emphasis supplied).

Likewise, in the instant case, by failing to transport the criminal defendants for appearance at their arraignments beginning at 8:15 a.m. on April 21, 2011, the three jail employees, as officers of the court, “effectively obstructed or interrupted the administration of justice,” more than warranting the imposition of a penalty of fifty dollars each for their violation.¹¹

Judge Thornsby was required to recess and suspend his complete docket, leaving numerous court personnel, attorneys, and spectators waiting, in violation of the defendants' right to prompt presentment on a sealed grand jury indictment and at considerable expense to the State, as well as inconvenience to all those present who timely appeared.

¹¹ Aside from the fact that W. Va. Code 61-5-26 expressly references the sum of fifty dollars as an available punishment, fifty dollars, which is not even enough to fill most gas tanks, is a trivial amount that Judge Thornsby could have imposed summarily without such statutory authority. See *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 215, 220 S.E.2d 672, 682 (1975) (“Where the punishment is trivial a summary disposition may be made without a jury by the judge who issued the original order. . . . A monetary fine is presumed to be trivial and does not usually require the elaborate due process requirements of a criminal trial . . .”).

If Judge Thornsbery or any circuit judge for that matter lacks the ability to summarily impose a meager fine of fifty dollars when parties, attorneys, witnesses, jurors, jail employees, or others fail to timely appear, without substantial justification,¹² for proceedings previously scheduled by order, the orderly administration of justice will be compromised.

The three jail employees involved, one of whom had previously been the subject of a show cause order in similar circumstances, offered no evidence at the hearing that their failure comply with Judge Thornsbery's order was because it was indefinite or that compliance was impossible. The court's bailiffs were on duty at 7:00 a.m. and ready to assist if the defendants had been timely delivered at 8:15 a.m. No one contacted Judge Thornsbery's office, as he had previously requested of Sgt. Powers, to indicate that delivery of the defendants would be delayed on the morning of April 21, 2011. No one contacted Judge Thornsbery's office to request that the arraignments be conducted by video transmission. Instead, the jail employees disregarded the order and the reliance of others on that order and transported the defendants at their convenience.

In the present case, the defendants were being transported for their first appearance before a neutral and detached judicial officer. Conducting these

¹² It has been noted that, "good faith is only a defense to the offense of contempt where the defendant has made a reasonable effort to comply with the Court's order but has failed because of the indefiniteness of the order or some other inability to do so. It is not a defense where the defendant has refused to comply with order" *United States v. Heard*, 952 F. Supp. 329, 335 (N.D. W. Va. 1996). Likewise, this Court has found that "[w]henver the party charged with a contempt is manifestly unable to perform the action or obey the order for a disobedience to which he is proceeded against, he may successfully interpose, as a defense in such proceedings, said inability to obey." *Ex parte Beavers*, 80 W. Va. 34, 38, 91 S.E.3d 1076, 1078 (1917). Here, viewing the evidence in the light most favorable to the judgments, there was no reasonable effort to comply and certainly no inability to perform by the three jail employees.

arraignments in a timely manner is imperative to the fundamental fairness to which these defendants were entitled. Having the defendants transported over two hours late was unfortunate enough, however, without contempt authority the Authority would have no discouragement from failing to transport the prisoner at all, which incidentally has previously occurred on many occasions. Thus, it is imperative that circuit courts retain the power to summarily hold those who fail to adhere to its order and respect its lawful process in contempt.

If Judge Thornsby or other circuit courts do not have the power to summarily punish with nominal fines of fifty dollars the violation of orders requiring the transportation of criminal defendants for scheduled hearings, they will be left at the mercy of the Authority, which as demonstrated by the history of this case, has been less than responsive to the needs of circuit courts and others participating in the processing of criminal cases.

V. CONCLUSION

Judge Thornsby submits that because (1) Mr. Parsons lacks standing to challenge contempt orders issued against other parties; (2) there is an adequate, alternative remedy from the contempt orders by way of appeal; (3) any error in issuance of the contempt orders are correctable on appeal; and (4) any abuse of discretion in the issuance of contempt orders is not the proper province of a prohibition proceeding, the rule in prohibition should be dismissed as improvidently awarded.

Alternatively, Judge Thornsby submits that (1) the standard of review for summary criminal contempt requires the reviewing court to view the evidence in a light most favorable to sustaining the judgment because a court must be its own judge of

contempt committed in its presence; (2) circuit courts have jurisdiction under W. Va. Code § 61-5-6 to summarily punish for contempt by any person, including governmental employees, who disobey lawful orders; (3) circuit courts have jurisdiction under W. Va. Code § 61-5-6 to summarily punish for contempt misbehavior by officers of the court, including jail officials and employees; (4) circuit courts have inherent power to summarily punish those who willfully disobey their orders; and (5) the evidence in this case is more than sufficient, particularly when considered in a light most favorable to the judgment, to support a fine of fifty dollars each on the three jail employees who failed to comply with the transport order, and therefore, this Court should deny Mr. Parsons' request for a writ of prohibition.¹³

¹³ Judge Thornsby also requests that this Court consider the imposition of sanctions on Mr. Parsons and/or his counsel for the blatant mischaracterization of facts in the petition filed by Mr. Parsons, verified by Mr. King, and signed by Mr. Cardinal. Despite the assertions contained therein and as demonstrated by the videotape evidence submitted herewith, the three jail employees were never arrested, detained, handcuffed, or taken into custody. Unless asking attorneys and/or parties to wait in a conference room while a judge considers a ruling is an arrest, detention, and/or custodial situation, the allegations in the complaint are both preposterous and outrageous.

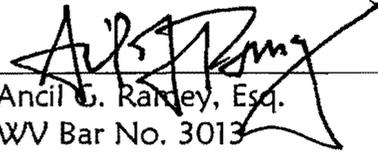
This Court has held that, "A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." *Syl., Daily Gazette Co., Inc. v. Canady*, 175 W. Va. 249, 332 S.E.2d 262 (1985).

Moreover, this Court has held, "As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement except when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Syl. pt. 9, Helmick v. Potomac Edison Company*, 185 W. Va. 269, 406 S.E.2d 700 (1991), cert. denied, 502 U.S. 908 (1991).

Pursuant to this authority, Judge Thornsby requests and Mr. Parsons and/or his counsel be ordered to bear Judge Thornsby's fees and/costs incurred in responding to a petition for writ of prohibition that made false allegations in bad faith, vexatiously, wantonly and/or for oppressive reasons.

THE HONORABLE MICHAEL THORNSBURY,
Judge of the Circuit Court of Mingo County

By Counsel

A handwritten signature in black ink, appearing to read "Ancil G. Ramey", is written over a horizontal line.

Ancil G. Ramey, Esq.

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on May 6, 2011, I served the foregoing "Response to Petition for Writ of Prohibition" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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EXHIBITS
ON
FILE IN THE
CLERK'S OFFICE