

Judgment rendered April 26, 2006.

No. 40,548-CA

**EN BANC**

**ON REHEARING**

COURT OF APPEAL  
SECOND CIRCUIT  
STATE OF LOUISIANA

\* \* \* \* \*

MIKE LONG

Plaintiff-Respondent

Versus

BEVERLY HUTCHINS

Defendant-Respondent

\* \* \* \* \*

**On Rehearing**

Originally appealed from the  
First Judicial District Court for the  
Parish of Caddo, Louisiana  
Trial Court No. 486935

Honorable Roy L. Brun, Judge

\* \* \* \* \*

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State of Louisiana and  
Charles C. Foti, Jr.

\* \* \* \* \*

Before BROWN, WILLIAMS, STEWART, GASKINS, CARAWAY,  
PEATROSS, DREW, MOORE, and LOLLEY, JJ.

PEATROSS, J., concurs.

BROWN, C.J., concurs with written reasons.

GASKINS, J., concurs for the reasons assigned by J. Brown.

CARAWAY, J., concurs for the reasons assigned by J. Brown.

LOLLEY, J., concurs for the reasons assigned by J. Brown.

STEWART, J.

After being found guilty of contempt in connection with a civil proceeding in which an injunction had been issued, Mike Long was sentenced under La. R.S. 13:4611(1)(b) to 120 days in jail with 100 days suspended. On Long's application for review, this court granted a stay order and writ vacating the conviction and sentence. We found that Long had been subject to a criminal contempt proceeding in which he was denied basic constitutional protections. Thereafter, we granted an application for rehearing filed by the State of Louisiana, which argued that our ruling called into question the constitutionality of certain contempt provisions in our law.<sup>1</sup> Our prior order was vacated, and an appeal was ordered.

The underlying facts are more thoroughly set forth in our original opinion, *Long v. Hutchins*, 40,548 (La. App. 2d Cir. 12/14/05), \_\_\_ So. 2d \_\_\_, in which we determined that this matter was one of criminal contempt and that Long was not afforded basic constitutional protections. He was not allowed to put on a defense after initially invoking the right against self-incrimination, he was not advised of the right to a jury trial, and he was apparently not given the benefit of having every element of the crime proven beyond a reasonable doubt. Having found these deficiencies, we pretermitted discussion of whether Long was entitled to the right of prosecution by an appropriate prosecuting authority.<sup>2</sup>

The matter is now before the court in an *en banc* hearing to again

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<sup>1</sup>Neither our prior writ order nor our original opinion held any provision of Louisiana law to be unconstitutional.

<sup>2</sup>The issue concerning the appropriate prosecuting authority in a criminal contempt proceeding will not be addressed in this opinion. This issue was not raised by Long and is not properly before this court for consideration or review.

consider the scope of rights to be afforded a party in a civil proceeding subject to contempt punishable under La. R.S. 13:4611(1)(b) and whether Long was deprived of such rights.

La. R.S. 13:4611(1)(b) provides a maximum penalty of imprisonment for not more than 12 months in jail and/or a fine of not more than \$1,000 for disobeying or resisting a restraining order or an injunction. Long was subject to punishment under this provision for violating a restraining order prohibiting him from contacting either Beverly Hutchins (now Beverly Drum), with whom he had been involved in both a personal and business relationship, or her daughter. He was also given a determinate sentence of 120 days, 100 of which were suspended.

In *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), the United States Supreme Court recognized that “[c]riminal 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.” Declaring there to be no substantial difference between serious contempts and other serious crimes, the Court held that serious contempts are crimes to which the constitutional right to a jury trial applies. *Id.* The Court further delineated the basic constitutional safeguards applicable in criminal contempt proceedings:

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. (Internal citations omitted.)

This standard has been reaffirmed in our own courts. *State v. Austin*, 374 So. 2d 1252 (La. 1979); *Richey v. Richey*, 98-1195 (La. App. 3d Cir. 3/10/99), 733 So. 2d 618, *writ denied*, 99-2122 (La. 10/29/99), 749 So. 2d 639; *Robards v. Robards*, 01-1100 (La. App. 5<sup>th</sup> Cir. 1/29/02), 807 So. 2d 1111.

In differentiating those serious crimes requiring the right to trial by jury from those violations that are petty, the United States Supreme Court determined that the serious crimes are those carrying a sentence of more than six months and that the petty crimes are those carrying a sentence of six months or less. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *Baldwin v. New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970); *Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974). The potential maximum penalty involved is the factor which determines the right to a jury trial in any criminal proceeding, including criminal contempts. We are directed that where “the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense.” *Bloom v. Illinois*, *supra*.

Our legislature has imposed a maximum penalty under La. R.S. 13:4611(1)(b) of 12 months imprisonment. This categorizes the contempt punishable under that provision as a “serious crime” to which the right to trial by jury attaches. As we noted in our original opinion, the maximum penalty exposure entitles the accused to trial by a jury of six members, all of

whom must concur to render a verdict. La. Const. art. I, §17; La. C. Cr. P. art. 779(A).

In *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988), the Court explained that punishment in a civil contempt proceeding is for the benefit of the complainant and that imprisonment is remedial in nature if the sentence allows the contemnor to obtain release upon his compliance with the previously violated court order. On the other hand, punishment in a criminal contempt proceeding is imposed to vindicate the court's authority and is criminal in nature requiring constitutional protections when imposed for a definite period without conditions or a purge clause. *See also Brown v. Taylor*, 31,352 (La. App. 2d Cir. 2/26/99), 728 So. 2d 1058.

Long's sentence of 120 days with 100 days suspended was a definite sentence imposed without conditions or a purge clause. We note that in *Feiock, supra*, the court rejected the notion that a suspended sentence or probation is equivalent to either a conditional sentence or purge clause, noting that "if the sentence is a determinate one, then the punishment is criminal in nature, and it may not be imposed unless federal constitutional protections are applied in the contempt proceeding." *Feiock*, 108 S. Ct. at 1432.

Long's determinate sentence was clearly criminal in nature. Moreover, he was exposed to a maximum penalty of 12 months imprisonment thereby meeting the threshold for jury trial eligibility as a constitutional right. The sentence was imposed without Long having been

advised of, or provided with, the constitutional safeguards discussed in this opinion and in our original opinion. Due to deficiencies in due process in the lower court proceedings, we reverse the judgment finding Long guilty of contempt and remand for further proceedings consistent with this opinion.

**REVERSED AND REMANDED.**

**BROWN, C.J., Concurring,**

The entire court is in agreement that Long should have been allowed to present a defense and testify. The issue came before the court because of the claim by Long that the summary procedure provided for in La. C.C.P. art. 225 as applied has deprived him of the due process that the constitution guarantees. That Long is entitled to present a defense is in accord with summary proceedings; however, that Long must be tried by a jury and that such contempt claims must be instituted by a district attorney is antithetical to summary procedure. This court should not selectively address some but not all of the requirements for trial of a constructive contempt violation.<sup>1</sup>

This “majority” opinion is a constitutional innovation which emasculates the historic power of the trial judge to summarily punish for contempt.<sup>2</sup> Although denying that it is doing so, this view finds Louisiana’s statutory provisions that allow for such summary proceedings, when punitive penalties are imposed for constructive contempt, to be unconstitutional.

**Right To A Jury Trial**

Mike Long and Beverly Hutchins had been romantically involved and in business together. When the two broke up a lawsuit was filed to obtain business and personal records. Incidental to that action, an injunction issued prohibiting Long from any contact with Ms. Hutchins or her

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<sup>1</sup>In this case before the original three judge panel, two judges took issue with the pretermission of the question of who must institute a contempt rule.

<sup>2</sup>The trial court needs direction; however, in this case four judges are in agreement while four judges disagree and one simply concurs. This leaves the trial court in a quandary.

daughter. Ms. Hutchins filed a rule for contempt claiming that Long had violated the injunction. The trial court found that Ms. Hutchins proved her allegations and sentenced Long to 120 days, suspending all but 20 days of the sentence.

Louisiana Code of Civil Procedure article 225 provides for a rule to show cause why a party should not be adjudged guilty of contempt. This rule may issued on the court's own motion or on motion of a party.

Louisiana Revised Statute 13:4611 provides the punishment for contempt. For disobeying a restraining order, or preliminary or permanent injunction, the court may impose imprisonment for not more than twelve months and/or order payment of a fine of not more than one thousand dollars. For all cases falling under R. S. 13:4611(1)(b), the "majority" opinion would read in a right to a jury trial because the possible sentence could exceed six months. If the actual sentence imposed was more than six months, I would agree; however, as in this case, when the sentence imposed is less than six months there is not a constitutional right to a jury trial.

Among other things, parties to divorce/domestic actions obtain injunctions against violence and harassment and to prohibit the disposing of community property. Domestic violence has been recognized as widespread and there are compelling reasons to swiftly adjudicate these type of cases. To illustrate the issue and bring some perspective, I note the Cherie Shipp case.

In 1996, Cherie Shipp, a resident of Webster Parish, fled from her abusive husband, Dalton. After receiving many threatening phone calls

from Dalton, Cherie then fled to a cousin's home. When Dalton located her, he beat her with his fists and a telephone he ripped from a wall. Dalton pled guilty to two misdemeanors but imposition of sentence was postponed.

Cherie filed an action in the Webster Parish District Court and obtained a temporary restraining order prohibiting Dalton from having any contact with her. Dalton, however, continued to make threatening calls.

Unfortunately, Cherie did not file a contempt rule. Four months later Dalton tracked Cherie to the apartment of another of Cherie's sisters.

Cherie, who was on crutches from a car accident, was forcibly seized and taken by Dalton to his house where she was beaten, raped, and shot in the chest with a shotgun. *See State v. Shipp*, 30,562, (La. App. 2d Cir.

04/08/98), 712 So. 2d 230; *also, see Shipp v. McMahon*, 234 F. 3d 907 (5<sup>th</sup> Cir. (La.) 2000), *cert denied*, 532 U.S. 1052, 121 S. Ct. 2193, 149 L. Ed. 2d 1024 (2001), *on subsequent appeal*, 54 Fed. Appx. 413 (5<sup>th</sup> Cir. (La.) 2002) (not selected for publication in the Federal Reporter, No. 02-30420) (a civil rights suit against Webster officials).

The summary procedures allowed by C.C.P. art 225 would have allowed Cherie to bring Dalton back to court for a contempt charge and the court's intervention at that time might have stopped the escalation of violence. The "majority" view in the present case, by requiring a jury trial, would have delayed any official intervention by a year or more.<sup>3</sup>

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<sup>3</sup>In addition, under the Domestic Abuse Assistance Statute, La. R.S. 46:2131, et seq., upon good cause shown in an ex parte proceeding, the court may issue a TRO (temporary restraining order) to protect a person who shows immediate and present danger of abuse. La. R.S. 46:2135(A). If the TRO is granted without notice, the matter shall be set for a hearing within 20 days, at which time cause must be shown why a protective order should not be issued. At the hearing, the petitioner must prove the allegations of abuse by a preponderance of the evidence. La. R.S. 46:2135(B). Further a

The majority opinion is based solely on a 1968 United States Supreme Court case, *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), in which the court, in fact, considered the actual sentence imposed, not the possible sentence allowed by Illinois law, to find that the defendant was entitled to a jury trial. In *Bloom*, an Illinois court sentenced an attorney to two years for attempting to probate a forged testament. The Illinois Supreme Court found that its law allowed for a two-year sentence. Subsequent United States Supreme Court cases have reaffirmed a commitment to the proposition that a criminal contempt is not a crime of the sort that requires the right to a jury trial regardless of the penalty involved.

In 1974, the United States Supreme Court stated in *Codispoti v. Pennsylvania*, 418 U.S. 506, 512-513, 94 S. Ct. 2687, 2691, 41 L. Ed. 2d 912 (1974):

Since that time, our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes. *Frank v. United States*, 395 U.S. 147, 149-150, 89 S. Ct. 1503, 1505-1506, 23 L. Ed. 2d 162 (1969); *Baldwin v. New York*, 399 U.S. 66, 69, 90 S. Ct. 1886, 1888, 26 L. Ed. 2d 437 (1970). ***Under these cases, we plainly cannot accept petitioners' argument that a contemnor is entitled to a jury trial simply because a strong possibility exists that he will face a substantial term of imprisonment upon conviction, regardless of the punishment actually imposed. See Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897. (Emphasis added).***

The court in *Codispoti* cited *Bloom v. Illinois, supra*. The maximum

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violation of such an order shall be tried within 10 days of a filing of a motion for contempt by a party or on the court's own motion. La. R.S. 46:2137.

sentences in both *Bloom* and *Codispoti* could have surpassed and, in fact, did exceed six months. Louisiana's statute provides a maximum penalty of one year for the violation of an injunction; however, in the case *sub judice*, Long received only a 20-day jail term.

In 1994 the U. S. Supreme Court again expressed its commitment to the principle that it is the punishment imposed that determines the right to a jury trial. In *International Union, United Mine Workers of America v. Bagwell*, 512 U. S. 821, 837-839, 114 S. Ct. 2552, 2562-2563, 129 L. Ed. 2d 642 (1994), the court wrote:

The union's sanctionable conduct did not occur in the court's presence or otherwise implicate the court's ability to maintain order and adjudicate the proceedings before it. Nor did the union's contumacy involve simple, affirmative acts, such as the paradigmatic civil contempts examined in *Gompers*. Instead, the Virginia trial court levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction. In so doing, the court effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed. The union's contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totaling over \$52 million.<sup>FN5</sup> Under such circumstances, disinterested factfinding and evenhanded adjudication were essential, and petitioners were entitled to a criminal jury trial.

FN 5 [P]etty contempt like other petty criminal offenses may be tried without a jury," *Taylor v. Hayes*, 418 U.S. 488, 495, 94 S.Ct. 2697, 2701, 41 L. Ed. 2d 897 (1974), ***and the imposition only of serious criminal contempt fines triggers the right to jury trial. Bloom, 391 U.S., at 210, 88 S. Ct., at 1486. The court to date has not specified what magnitude of contempt fine may constitute a serious criminal sanction, although it has held that a fine of \$10,000 imposed on a union was insufficient to trigger the Sixth Amendment right to jury trial. See Muniz v. Hoffman, 422 U.S. 454, 477, 95 S. Ct. 2178, 2190, 45 L. Ed. 2d 319 (1975). . . . We need not answer today the difficult question where the line between petty and serious contempt fines should be***

drawn, since a \$52 million fine unquestionably is a serious contempt sanction.

...

Our decision concededly imposes some procedural burdens on courts' ability to sanction widespread, indirect contempts of complex injunctions through noncompensatory fines. Our holding, however, leaves unaltered the longstanding authority of judges to adjudicate direct contempts summarily, and to enter broad compensatory awards for all contempts through civil proceedings. *See, e.g., Sheet Metal Workers v. EEOC*, 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344 (1986). ***Because the right to trial by jury applies only to serious criminal sanctions, courts still may impose noncompensatory, petty fines for contempts such as the present ones without conducting a jury trial.*** We also do not disturb a court's ability to levy, albeit through the criminal contempt process, serious fines like those in this case. (Emphasis added).

The 20-day jail term imposed upon Long is clearly not one which would require a jury trial. Domestic violence has become a national scandal. At a time when strengthened enforcement is needed, the imposition of the rigors of a criminal jury trial for simple violations of restraining orders would strangle and shut down the ability to swiftly interdict violations and coerce compliance with lawful orders of the court.

#### **Right to Prosecution by the District Attorney**

Louisiana Constitution Article Five, Section Two provides:

A judge may issue writs of habeas corpus and all other needful writs, orders, and process in aid of the jurisdiction of his court. Exercise of this authority by a judge of the supreme court or of a court of appeal is subject to review by the whole court. The power to punish for contempt of court shall be limited by law.

Louisiana law allows for summary proceedings for both direct and indirect contempt. Louisiana Code of Civil Procedure article 225(A) specifically provides that a rule to show cause why an offender should not

be adjudged guilty of constructive contempt may issue on the court's own motion or on the motion of a party to the action or proceeding and shall state the facts alleged to constitute the contempt. Under this statute, Ms. Hutchins, as a litigant, had standing to move the court to consider whether Long was guilty of contempt as a result of his failure to abide by the prior court order enjoining contact, direct or indirect, with Ms. Hutchins or her daughter. In *Jackson Avenue Foundation, Inc. v. Lassair*, 03-1759 (La. App. 4th Cir. 06/02/04), 876 So. 2d 926, the court specifically upheld the right of a litigant to initiate and prove a punitive contempt charge for the violation of an injunction.

In *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 796, 107 S. Ct. 2124, 2132, 95 L. Ed. 2d 740 (1987), the court observed that the ability to punish disobedience to judicial orders is regarded as essential to ensuring that the judiciary has a means to vindicate its own authority without complete dependence on the whim of other branches of government. "[C]ourts cannot be at the mercy of another branch [of government] in deciding whether such proceedings should be initiated."

The fact that private parties traditionally and naturally prosecute contempt proceedings is the fundamental difference between criminal cases and contempt proceedings. The Fourteenth Amendment's Due Process Clause does not impose upon states the requirement that charges be initiated by an independent state prosecutor.

We all agree that remand is proper but we have not given the trial court direction. Whether this type of contempt must be instituted by the

district attorney and whether a jury trial is required is unclear. I concur in the remand.