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SECTIONS
DISTRICT OF COLUMBIA BAR

TO: Board of Governors
Section Chairpersons
(Designated to Receive Public Statements)

FROM: Carol Ann Cunningham CAC

DATE: July 30, 1992

SUBJECT: EMERGENCY PUBLIC STATEMENT regarding an amicus brief in support of James Holloway in United States v. Rascoe by the Section on Criminal Law and Individual Rights

48-hour expedited consideration requested on behalf of the Criminal Law and Individual Rights Section

Enclosed please find for your immediate review a one-page summary of a public statement prepared by the Criminal Law and Individual Rights Section. Copies of the full text will be provided upon request. If you wish to have this matter placed on the next Board of Governors' agenda on September 8, please call Sarah Lynn at the Sections Office by 12:00 noon on Monday, August 3. Sarah can be reached at (202) 331-4364. (I will be out of the office on vacation until August 10.)

Please note that according to the Guidelines regarding public statements (pp. 38-49) your telephone call "must be supplemented by a written objection lodged within seven days of the oral objection."

Enclosures

cc with full public statement:
Jamie S. Gorelick
Mark H. Tuohey III
Linda E. Perle
Celia A. Roady
Barbara J. Kraft
Katherine A. Mazzaferri
Sarah Lynn

SUMMARY

The Criminal Law and Individual Rights Section seeks approval to file an amicus brief in support of James Holloway, the appellant in United States v. Rascoe, No. 92-9085, in the United States Court of Appeals for the District of Columbia Circuit. The Section is joined on the brief by the Public Defender Service for the District of Columbia and the National Association of Criminal Defense Lawyers.

James Holloway is a federal public defender who was held in summary criminal contempt by Judge Norma Holloway Johnson during a jury trial while he was cross-examining a police officer who was a key government witness. Although the trial court based her contempt citation on Mr. Holloway's perceived failure to confine his examination to the scope of her rulings, the record demonstrates that her rulings were ambiguous and that Mr. Holloway was proceeding in good faith. Mr. Holloway was held in summary criminal contempt absent any warning that the Court deemed his conduct contumacious, absent any inquiry into his intent, and absent any effort to use lesser alternatives to address conduct that resulted from a routine breakdown in communication during trial.

The Section's amicus brief argues that the imposition of summary criminal contempt under these circumstances has a substantial chilling effect on a trial attorney's ability to zealously represent a client, as required by the Rules of Professional Conduct. The brief argues that before a judge exercises his or her summary criminal contempt power against an attorney, he or she must issue a warning, conduct an inquiry into, and make a finding of, contumacious intent, and use the least drastic alternative available.

The attached brief is a nearly final draft, which is submitted in draft form due to the filing deadline of Monday, August 3, 1992. The arguments in the final brief submitted to the Court will not change.

No. 92-3085

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KELVIN EUGENE RASCOE, et. al.,

Defendants,

JAMES R. HOLLOWAY,

Appellant.

On Appeal from the United States
District Court for the
District of Columbia

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT BY THE CRIMINAL LAW AND INDIVIDUAL RIGHTS SECTION OF THE DISTRICT OF COLUMBIA BAR, THE PUBLIC DEFENDER SERVICE OF THE DISTRICT OF COLUMBIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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CERTIFICATE OF AMICI CURIAE
AS TO PARTIES, RULINGS AND RELATED CASES

I. PARTIES AND AMICI

A. Names of Parties Below and on Appeal

All parties, intervenors and Amici appearing below and in this Court are listed in the Brief of Appellant, James R. Holloway.

B. Disclosure of Interests

The Section on Criminal Law and Individual Rights of the District of Columbia Bar (the "Section") is composed of over 800 criminal justice and civil rights practitioners, legal educators and other members of the District of Columbia Bar who have interests in criminal law and individual rights. The views expressed herein represent only those of the Section on Criminal Law and Individual Rights of the District of Columbia Bar, and not those of the District of Columbia Bar or its Board of Governors. The Section Steering Committee is composed of Grace Lopes, Charles Rust-Tierney, Laurie Davis, John Chamble, Jennifer P. Lyman, Cynthia M. Wimer-Lobo and Nkechi Taifa.

The Public Defender Service of the District of Columbia was established pursuant to Chapter 27 of the District of Columbia Code, and its attorneys represent those who are financially unable to obtain adequate representation and are persons charged with an offense punishable by imprisonment for a term of six months or more; persons charged with violating a condition of probation or parole; persons subject to proceedings pursuant to

Chapter 5 of Title 21 of the District of Columbia Code; persons for whom civil commitment is sought pursuant to Title III of the Narcotic Addict Rehabilitation Act of 1966; juveniles alleged to be delinquent; and persons subject to procedures under § 24-527 or 24-301 of the District of Columbia Code.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit membership organization made up of over 7,000 licensed attorneys and 15,000 affiliated members throughout the United States that are concerned about the criminal justice system and the citizens who come before the Court. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice.

This statement is made so that the judges of this Court, inter alia, may evaluate possible disqualification or recusal.

II. RULINGS UNDER REVIEW

References to the rulings below appear in the Brief of Appellant, James R. Holloway.

III. RELATED CASES

The appeals of four of the six criminal defendants in the trial below are pending before this Court, as follows:

No. 91-3338	U.S. v. Larry Logan
No. 91-3339	U.S. v. Tammy D. Felton
No. 91-3340	U.S. v. Corin H. Robinson, a/k/a Robin Jenkins
No. 92-3165	U.S. v. Kelvin Eugene Rascoe

The Court has ordered that these four appeals be consolidated, but has not yet set a briefing schedule.

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* Authorities principally relied upon are marked with an asterisk.

OTHER AUTHORITIES

No. 92-3085

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KELVIN EUGENE RASCOE, et. al.,

Defendants,

JAMES R. HOLLOWAY,

Appellant.

On Appeal from the United States
District Court for the
District of Columbia

BRIEF FOR AMICI CURIAE

ISSUES PRESENTED AND INTEREST OF AMICI

Appellant, James R. Holloway, is an assistant federal public defender for the District of Columbia. Mr. Holloway was summarily found in criminal contempt of court as a result of his efforts during trial to cross-examine a key government witness concerning a document containing a statement of facts photocopied from an arrest report prepared by that witness.

The amici are organizations whose members are trial attorneys who represent criminal defendants and civil rights

plaintiffs. As advocates, the amici want to fulfill their ethical obligations to fight for their clients without fear of arbitrarily imposed sanctions with drastic personal consequences.

Amici are interested in this case because Mr. Holloway was held in summary contempt without any warning that he was risking contempt, without any inquiry into his intent, and without any effort to use less drastic alternatives. Such an arbitrary use of the summary contempt power must inevitably chill aggressive representation.[1/]

Accordingly, Amici urge this Court to establish clear limits on the use of the summary contempt power in order to protect the zealous advocacy that is an ethical duty, and a fundamental basis for our adversary system. In particular, this Court should limit the trial court's summary contempt power by requiring a warning, a specific inquiry into counsel's intent, and the use of the least onerous alternative. The Brief of Amici Curiae addresses the following issue:

> What procedural and substantive safeguards are required to limit the summary contempt

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1/ The views expressed herein represent only the those of the Section on Criminal Law and Individual Rights of the District of Columbia Bar, and not those of the District of Columbia Bar or its Board of Governors. The Section Steering Committee is composed of Grace Lopes, Charles Rust-Tierney, Laurie Davis, John Chamble, Jennifer P. Lyman, Cynthia M. Wimer-Lobo, and Nkechi Taifa. A more complete description of the Amici is contained in Section 1A of the Certificate of Amici Curiae as to Parties, Rulings, and related cases. The interests of the individual amici were explained in their respective Motions for Leave to File Briefs Amicus Curiae in Support of Appellant.

power to the least possible power to the end proposed.

STATUTE AND RULE INVOLVED

The statutes and rules involved are set forth in Appellant's brief, and hereby incorporated by reference.

JURISDICTION

This appeal arises from an adjudication of criminal contempt entered against a defense lawyer in the midst of a jury trial involving six defendants charged with drug-related offenses. The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231. Judge Norma Holloway Johnson presided over the trial.

Appellant James R. Holloway, an assistant federal public defender, served as counsel for one of the defendants, Kelvin Eugene Rascoe. On October 8, 1991, during Mr. Holloway's examination of a police officer witness, the district court summarily adjudicated Mr. Holloway in criminal contempt of court, pursuant to Fed. R. Crim. P. 42(a). On March 10, 1992, the district court sentenced appellant to a $1,000 fine. (The sentence was subsequently stayed pending appeal.) A notice of appeal was timely filed on March 20, 1992. This Court's jurisdiction over this appeal rests on 28 U.S.C. § 1291.

STATEMENT

For purposes of this brief, the Amici adopt the statement of facts set forth in the brief of Appellant, James R. Holloway.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the misuse of the summary contempt power against a federal public defender engaged in cross-examination of a police officer. The case speaks directly to the chilling effect of summary contempt on the zealous advocacy that is both the ethical duty of counsel and the foundation of the adversary system.

Mr. Holloway was held in summary criminal contempt while pursuing the advocacy required by the adversary system -- cross-examination designed to lay the foundation for impeaching the only police officer who was an eyewitness to his client's alleged possession of drugs. [A. 47-53, 72-75].[2/] Mr. Holloway had no notice that the Court considered his advocacy contumacious, and there were none of the typical indicia of contumacious conduct, such as disrespect to the court, vulgar language, or physical disruption. [A. 49-53]. Rather, the court suddenly invoked the summary contempt power to cut off cross-examination without a warning, without any inquiry into Mr. Holloway's intentions, and without any effort to use less onerous means. [A. 53].

Amici fully support Appellant's arguments that this case does not satisfy the elements of summary contempt, and that at

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2/ "A" refers to the Appellant's Appendix.

the very least, the trial court should have used the procedures of Rule 42(b) because there was no compelling need for summary contempt.[3/] But given the chilling impact of using summary contempt in Mr. Holloway's situation, Amici urge this Court to set clear limits on its use so that other counsel are not suddenly held in summary criminal contempt for cross-examinations that advance their client's positions. In particular, this Court should limit summary contempt to the "least possible power adequate to the end proposed" by requiring that unless the court is in physical danger, the trial judge must take the following steps before imposing summary contempt on counsel:

1. Warn counsel that he or she is in danger of contempt;

2. Conduct a specific inquiry as to counsel's intent to actually obstruct justice; and

3. Attempt to use less drastic measures of control.

ARGUMENT

I. The Adversary System Must Accommodate Aggressive Advocacy

Vigorous advocacy is the prime mover in an adversary system, for as the Supreme Court stated:

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the

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[3/] Amici also agree that this matter should have been referred to another judge because a personal animosity had developed between Judge Johnson and Mr. Holloway. See Offut v. United States, 348 U.S. 11 (1954).

> ultimate objective that the guilty be convicted and the innocent go free.

Herring v. New York, 422 U.S. 853, 862 (1975). Indeed, the adversary system requires defense counsel to challenge both the prosecution and the judge, and the Sixth Amendment envisions counsel "playing a role that is critical to the ability of the adversarial system to produce just results." Strickland v. Washington, 466 U.S. 668, 685 (1984).[4/] Thus, it is clear that in a criminal case, nothing must "district counsel from the overriding mission of vigorous advocacy of the defendant's cause." Strickland, 466 U.S. at 689.

The ethical codes of the legal profession also promote the mission of vigorous advocacy, requiring that a lawyer represent "a client zealously and diligently." District of Columbia Rules of Professional Conduct, Rule 1.3 (1991).[5/] Moreover, for the criminal defense lawyer, the American Bar Association has stated:

> The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of

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[4/] See also Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.")

[5/] Rule 1.3 simply continues the requirements of its predecessor, the District of Columbia Code of Professional Responsibility, which stated:

> A lawyer should represent a client zealously within the bounds of the law.

District of Columbia Code of Professional Responsibility, Canon 7 (1983).

> his or her learning and ability and according to the law.

ABA Standards for Criminal Justice, The Defense Function, Standard 4-1.1(b) (2nd ed. 1986).

Translating these standards into action, defense counsel must not only object to evidence, but must put a witness to the test by cross-examination, the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 155, 158 (1970)(quoting 5 Wigmore, § 1367). Such challenges and examination mean that there will be conflict, with each side fighting hard and pursuing the client's rights with all the vigor possible.[6/] In fact, the adversary system relies on this very conflict to produce "just results." Strickland, 466 U.S. at 685.

Because zealous advocacy means that an attorney will be fighting for the client by vigorously examining witnesses, thwarting opposing counsel, and challenging the Court, the system must allow room for advocacy that pushes the limits of examination and argument. For example, the advocate must be allowed to pursue provocative and inflammatory cross-examination that will assist his client. Indeed, as one court has stated, "if lawyers were barred from asking provocative and penetrating questions at trial merely because they may provoke or inflame, then an essential goal of every fact finding process - the

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[6/] A lawyer cannot be "half-hearted in the application of his or her energies to the case." ABA Standards for Criminal Justice, The Defense Function, Standard 4-1.1(b), Commentary at p.4-8 (2nd ed. 1986). Moreover, since our system is inherently contentious, "advocacy is not for the timid, the meek or the retiring." Id.

discovery of truth - would indeed by thwarted." United States ex rel. Robson v. Oliver, 470 F.2d 10, 13 (7th Cir. 1972).

Counsel must also be allowed to challenge the court to limit or reverse its rulings. Such advocacy not only advances the client's position, but professional standards require that "the defense counsel, in protecting the rights of the defendant, may resist the wishes of the judge on some matters...." ABA Standards for Criminal Justice, The Defense Function, Standard 4-1.1, Commentary at p.4-8 (2nd ed. 1986). Although counsel may appear "unyielding and uncooperative ... counsel is not contradicting his or her duty to the administration of justice but is fulfilling a function within the adversary system." Id.

In fact, many courts recognize that attorneys must have latitude to push the limits with aggressive and unyielding advocacy. As one court has stated:

> Attorneys have the right to be persistent, vociferous, contentious, and imposing, even to the point of appearing abusive, when acting in a client's behalf. An attorney may with impunity take full advantage of the range of conduct that the adversary system allows.

In re Dellinger, 461 F.2d 389, 400 (7th Cir. 1972). Furthermore, counsel has a "right to press argument on a court and to direct a line of questioning of a witness that may not at the moment appear relevant to the trial judge." U.S. v. Giovanelli, 897

F.2d 1227, 1231 (2nd Cir. 1990).[7] Thus, the Supreme Court has recognized that:

> the arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his duty.

In Re McConnell, 370 U.S. 230, 236 (1962).

II. Imposition of Summary Contempt, Without Warning, Without Inquiry into Intent, and Without Resort to Less Onerous Forms of Control, Chills Zealous Advocacy

The courts have long recognized the likelihood that use of summary contempt can chill effective advocacy. As one court has stated:

> Using summary contempt proceedings to punish attorneys for over-zealous advocacy is contrary to the important principle of maintaining and independent and assertive bar.

Matter of Contempt of Greenberg, 849 F.2d 1251, 1255 (9th Cir. 1988). Addressing the use of summary contempt to punish an attorney for allegedly "evasive" cross-examination, the same court earlier said:

> Thus suddenly to punish for conduct of doubtful propriety only, where the intent to be insubordinate is not clear, might very well have the result of deterring an attorney

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[7] See also Sacher v. United States, 343 U.S. 1, 9 (1952) ("of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable").

> of less courage and experience from doing his full duty to his client.

Caldwell v. United States, 28 F.2d 684 (9th Cir. 1928).[8/] As a result of this potential chilling effect, the summary contempt procedure is "regarded with disfavor." Sacher v. United States, 343 U.S. 1, 8 (1952).

Moreover, the chill spreads further when, as here, the trial court imposes summary contempt without warning, on conduct that occurs repeatedly in courtrooms without triggering more than admonishment. Mr. Holloway's examination addressed an impeachment problem complicated by the government's use of triple level hearsay in sworn documents supporting detention.[9/] He

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[8/] In the context of a criminal trial, use of the contempt power also implicates the rights of the defendant:

> Where the contemnor is an attorney representing a criminal defendant, there is more at stake than just the attorneys right to speak freely and not to be punished criminally without findings of intent and obstruction . . . .
>
> Thus petitioner's first amendment and due process rights and the sixth amendment rights of his client must be balanced against the need for order in the trial process. The need for judicial order is not fixed but must be considered in the context of each case.

Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978).

[9/] In his affidavit supporting the Motion to Vacate Contempt, Mr. Holloway said, "the testimony of Officers Darrell Young, Robert Condit and Edward Truesdale could be impeached on the basis of the statement of facts pertaining to Mr. Rascoe's arrest written and prepared by Officer Young from information supplied by Officer Truesdale, and adapted by Officer Condit in a sworn affidavit filed in the Superior Court of the District of Columbia." [A.73-74]. Truesdale's initial account of what he

(continued...)

encountered technical difficulties, both with the trial court's rules about the physical use of documents from the court file, and with its application of evidentiary requirements it never fully spelled out.

Mr. Holloway's final question triggering contempt did not simply re-phrase the prohibited question; it represented a new approach to the technical issue. Whereas the trial court had told him he could not ask the witness to compare two documents, he now asked whether the witness recognized the words in the court document. [A. 53] Trial lawyers use this sort of new approach on technical problems every day, without incurring contempt convictions. Mr. Halloway used no disrespectful language, misstated no facts, and caused no physical disruption that might have alerted him to the danger he was courting. In fact, the judge never mentioned contempt, nor gave any other warning that she considered Mr. Halloway's behavior far outside the bounds of propriety. In a precipitous moment, he was accused, tried and convicted.

Such a sudden and apparently arbitrary use of so serious a sanction chills more because counsel never knows when it will strike. The ensuing uncertainty causes those within a rule's ambit "to steer far wider of the unlawful zone . . . than if the

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9/(...continued)
saw during the arrest apparently differed from his trial testimony, but the prosecution had succeeded in insulating his earlier account, by the practice of relaying the report through other officers before anyone swore to its truth. Holloway's effort to pierce this veil exemplified advocacy that promotes and protects the search for truth.

boundaries of the forbidden area were clearly marked." Baggett v. Bullett, 377 U.S. 360, 372 (1964)(discussing the chilling effect of vague prohibitions on speech). The potential for the sudden, unannounced imposition of summary contempt deters counsel from the persistence required of zealous advocates, even when it is not used; "the value of the Sword of Damocles is that it hangs - not that it drops." Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J. dissenting).

Dearth of process, and the resulting unreliability of the outcome, add a deeper chill to the effect of Judge Johnson's actions. The summary contempt procedure is unique in our jurisprudence, for it "represents a significant departure from the accepted standards of due process," by combining "otherwise inconsistent functions of prosecutor, jury and judge . . . in one individual." Matter of Contempt of Greenberg, 849 F.2d 1251, 1254 (9th Cir. 1988)(quoting United States v. Flynt, 756 F.2d 1352, 1363, modified, 764 F.2d 675 (9th Cir. 1965)).[10/] The combination of ordinarily separate and conflicting roles undermines the reliability presumed to flow from the normal balance in the adversary system: zealous representation by competing advocates, mediated by the constant neutrality of the judge. See In Re McConnell, 370 U.S. at 236; ABA Standards for Criminal Justice, The Defense Function, Standard 4-1.1,

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10/ Rule 42(a) dispense with notice and an opportunity to be heard in defense, rights that are rooted in the due process guarantee and that are "basic in our system of jurisprudence." Groppi v. Leslie, 404 U.S. 496, 502 (1972); In re Oliver, 333 U.S. 257, 273, 82 (1948).

Commentary at p.4-8 (2nd ed. 1986). Sometimes, as in this case, the judge plays yet another role, namely that of a witness. In such situations, the judge evaluates his or her own credibility as an observer, with dangerously predictable results.[11/]

In fact, the only role not played by the judge in the summary contempt process, or anyone else in the trial, was the role of defense counsel for Mr. Holloway. The essential balance of the adversary system therefore disappeared, along with its promise of a well tempered result. Moreover, the unreliability inherent in Judge Johnson's assumption of conflicting roles, expanded when she made no inquiry as to Mr. Holloway's state of mind, and cut off his attempts to explain his intent. Yet, as she said at his sentencing, she "necessarily determined the willfulness of his conduct" when she ruled him in contempt. [A. 82]. Quite aside from the violence to the venerable concept of the opportunity to be heard, this "procedure" lacked an essential fact-finding component. Such erosion of reliability in a proceeding leading to serious sanctions inspires concern in any potential target.

11/ The ABA Standards clearly recognize the role conflict where a presiding judge also serves as a witness, providing facts upon which he or she will rule. See e.g., ABA Standards for Criminal Justice, Postconviction Remedies, Standard 22-4.6 (2nd ed. 1986), stating that a judge should not preside over a postconviction hearing in which facts within the judge's personal knowledge will be "adduced by the judge's testimony or otherwise."

III. The Necessary Limits of Summary Contempt

Due to its possible misuse, the summary contempt process is limited as a matter of both substance and procedure. As a matter of substance, 18 U.S.C. § 401 limits contempt to certain defined conduct.[12/] In addition, Rule 42(a) of the Federal Rules of Criminal Procedure limits summary contempt as a procedural matter.[13/] This Court, as others, has further limited exercise

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12/ 18 U.S.C. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at it discretion, such contempt of its authority, and none other, as --
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

18 U.S.C. § 401.

13/ Rule 42(a) provides:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record. F.R. Crim.P. 42(a).

Furthermore, the courts have held that the requirements of Rule 42(a) "must be strictly adhered to lest the drastic power authorized escape the permissible limits of reason and fairness." United States v. Marshall, 451 F.2d 372, 374 (9th Cir. 1971).

of the contempt power under Section 401 and Rule 42 to deliberately wrongful acts:

> [A] degree of intentional wrong-doing is an ingredient of the offense of criminal contempt ... by definition, contempt is a "willful disregard or disobedience of a public authority. Knowledge that one's act is wrongful and a purpose to nevertheless do the acts are prerequisites to criminal contempt, as to most other crimes.

In Re Brown, 147 U.S. App. D.C. 156, 164, 454 F.2d 999, 1007 (1971)(emphasis in original; quoting Sykes v. United States, 144 U.S. App. D.C. 53, 55, 444 F.2d 928, 930 (1971)). Accord United States v. Turner, 812 F.2d 1552, 1565 (11th Cir. 1987); Vaughan v. City of Flint, 752 F.2d 1160, 1169 (6th Cir. 1985).

The contempt power is further limited to "the least possible power adequate to the end proposed." In re McConnell, 370 U.S. 230 (1962); Vaughn v. City of Flint, 752 F.2d 1160, 1169 (6th Cir. 1985); In Re Brown, 454 F.2d at 1006.[14/] Under this limitation, if the trial court has sufficient flexibility to control advocacy without resort to contempt sanctions, contempt is inappropriate.[15/]

[14/] The Court first used this phrase in Anderson v. Dunn, 19 U.S. (6 Wheat) 204, 231 (1821), a case dealing with the congressional contempt power. Moreover, the Supreme Court has explained that 18 U.S.C. § 401 was enacted by Congress "in order to correct serious abuses of the summary contempt power that had grown up . . . revealing a congressional intent to safeguard Constitutional procedures by limiting courts . . . to 'the least possible power adequate to the end proposed'". In re McConnell, 370 U.S. 230, 233-34 (1962).

[15/] This approach comports with the use of the "least drastic means available" in other areas of the law. cf. Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (examination of (continued...)

The Amici believe that these well-established limitations of the criminal contempt power should be translated into clear standards for judges and counsel so that other counsel are not thrust into the same position as Mr. Holloway -- held in contempt without warning during a cross-examination that further advances the client's cause. Amici therefore propose that before counsel engaged in advocacy can be held in summary contempt, there must be a warning, an inquiry into intent, and the use of a less drastic alternative.

A. Warning

By requiring a warning before contempt can be imposed on attorney conduct that constitutes advocacy, this Court will afford advocacy the breathing space necessary for a healthy adversary system. As Justice Powell wrote:

> I place a high premium on the importance of maintaining civility and good order in the courtroom. But before there is resort to the summary remedy of criminal contempt, the court at least owes the party concerned some kind of notice or warning.

Eaton v. City of Tulsa, 415 U.S. 697, 700-01 (per curiam)(Powell, J., concurring). Or as the Seventh Circuit has stated, "an absence of any warning that borderline conduct is regarded as contumacious could be fatal to a contempt citation therefor."

15/(...continued)
Nixon's documents at historical archives upheld as least drastic means of accommodating public need for information therein); Haig v. Agee, 453 U.S. 280 (1981) (revocation of passport of former CIA agent unconstitutional because less restrictive alternatives available to serve governmental interests).

United States v. Seale, 461 F.2d 345, 366 (7th Cir. 1972). Indeed, such a warning is contemplated by the ABA Standards for Criminal Justice, which state that before imposing any sanction other than censure, a trial judge should give a "clear warning that such conduct was impermissible...." ABA Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-4.2 (2nd ed. 1986).

The value of the warning in limiting summary contempt derives from the notice it provides and the dialogue it will likely engender. In particular, a warning will alert counsel as to the court's perception of his advocacy, and counsel will have an opportunity to engage in discussion with the Court concerning the scope of rulings. Such an approach will not only provide counsel room for additional advocacy; it will allow the Court to clarify its ruling.[16/] Indeed, such a requirement would have avoided the situation presented in this case, for Mr. Holloway had already asked the Court for a clarification, and a warning would have prompted a discussion which would have cleared up the miscommunication between Judge Johnson and Mr. Holloway.

B. Inquiry into Wrongful Intent

Before the acts of an attorney engaged in the heat of a trial are found to be a basis for contempt, there must also be a finding of a wrongful intent to cause actual obstruction.

[16/] A clear order is a necessary basis for summary contempt. See e.g., United States v. Turner, 812 F.2d 1552, 1565 (11th Cir. 1987).

In Re Brown, 147 U.S. App. DC 156, 454 F.2d 999, 1007 (D.C. Cir. 1971). There are two components to this wrongful "intent." First, the intent must be proven "beyond a reasonable doubt." Id.[17] In addition, the court must examine whether an attorney has proceeded in "good faith," since:

> Good faith pursuit of a plausible though mistaken alternative is antithetical to contumacious intent, however unimportant it may be in the context of civil contempt.

In re Brown, 454 F.2d at 1007.

It is inherently difficult to ascertain an attorney's intent, because his or her purposes may not be readily apparent to a judge. Such a determination is made even more difficult when the summary contempt process is used, because the trial court is acting in the role of prosecutor, judge and jury. Thus, this Court should require that before holding an attorney in contempt, the trial court must make factual inquiry concerning intent. This requirement advances two purposes: (a) prevention -- by inquiring about intent, the trial court may clear up confusion about rulings and prevent counsel from following a prohibited path; and (b) reliability -- such specific

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[17] This entails resolving all doubts in favor of advocacy, for as the Seventh Circuit recognized:

> where the line between vigorous advocacy and actual obstruction defie[s] strict delineation, doubts should be resolved in favor of vigorous advocacy.

United States ex rel. Robson v. Oliver, 420 F.2d 10, 13 (7th Cir. 1972).

inquiry will enhance the reliability of fact finding when summary contempt is under consideration.

Indeed, the salutary effects of such a requirement are obvious under the facts of this case, for such an action would have allowed Mr. Holloway to explain his actions, and permitted the judge to make a better informed decision on whether contempt is warranted. Indeed, Mr. Holloway's attempts to obtain judicial clarification of the Court's ruling [A. 50] indicates that if the Court had opened an inquiry into Mr. Holloway's intent, the miscommunication between court and counsel would have been quickly resolved and this incident likely would now be long forgotten.

C. Less Drastic Alternatives Must Be Applied and Fail.

Finally, to limit the contempt power to the least possible power adequate to prevent actual obstruction, the Court should require the district court to use less drastic sanctions before using the contempt power. This is consistent with Standard 6-3.3 of the ABA Standards for Criminal Justice, which states that "if the judge determines to impose sanctions for misconduct affecting the trial, the judge should ordinarily impose the least severe sanction appropriate to correct the abuse and deter repetition." ABA Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-3.3 (2nd ed. 1986).[18/]

[18/] This approach is also consistent with the practice under Rule 11 of the Federal Rules of Civil Procedure. In selecting a (continued...)

Indeed, courts have expressed this need to select the least restrictive option in various ways. For example, in United States ex. rel. Robson v. Oliver, 470 F.2d 10 (7th Cir. 1972), the court reversed several contempt convictions of an attorney for asking an allegedly improper question of a witness and making inappropriate remarks in closing argument to the jury. The Seventh Circuit stated, "even if it was evidentially improper, we see no reason why the trial judge could not -- by use of the least power necessary -- have stricken it from the record with an appropriate instruction to the jury to disregard the question." Moreover, if a court does not use less restrictive means at its disposal to protect the court's business from interference, it essentially will have failed to provide sufficient breathing space for advocacy. United States v. Oliver, 470 F.2d at 13-14.

In the instant case, the options available to the court included a direction to counsel to move on or calling a bench

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18/(...continued)
Rule 11 sanction, the Court has the discretion to select from a range of sanctions, including warnings, oral reprimands, written admonitions, or financial penalties. Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3rd Cir. 1987); Lieb v. Topstone Industries, Inc., 788 F.2d 151, 158 (3rd Cir. 1986). The law is clear, however, that in exercising its discretion, the Court must consider the deterrent purpose of rule 11 and impose the least severe sanction that will "serve to adequately deter the undesirable behavior." Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3rd Cir. 1988)(quoting Eastway Const. Corp. v. City of New York, 637 F.Supp. 558, 564 (E.D.N.Y. 1986), modified and remanded, 821 F.2d 121 (2nd Cir.), cert. denied, 484 U.S. 918 (1987).

conference to clarify the ruling.[19] Yet instead of using such alternatives, the Court moved immediately to a drastic sanction that has severe perrsonal consequences.[20] By failing to use a less drastic alternative, the Court imposed a sanction which, if upheld, threatens to chill advocacy throughout the federal courthouse and severely penalize a dedicated public defender for zealously representing a client that the district court appointed him to represent.

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[19] Other options in other possible contempt situations include curative instructions and the use of civil contempt. See e.g. Waste Conversion, Inc. v. Rollins Environmental Services (N.J.), Inc., 893 F.2d 605 (3rd Cir. 1990)(en banc).

[20] Mr. Holloway's contempt citation could have serious personal consequences, in that the contempt conviction could provide a basis for allegations that he violated the D.C. Rules of Professional Conduct. For example, he might be subject to disciplinary action under such provisions of the D.C. Rules of Professional Conduct as Rule 8.4(d) (Conduct that Seriously Interferes with the Administration of Justice), or Rule 3.5(c) (Conduct Intended to Disrupt a Tribunal). Beyond disciplinary sanctions, Mr. Holloway may face stigmatization that could trigger such adverse actions as proceedings at his place of employment, difficulty gaining admission to another state bar, and an increase in his malpractice premiums.

CONCLUSION

For the foregoing reasons, the Amici support the appellant in urging that the adjudication of criminal contempt be reversed and the proceedings dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 1992, I served two copies of the brief of Amicus Curiae by first class mail, postage prepaid, upon each of the following:

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