IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 2008-P-0018
	:	
v.	:	M. Ct. Case No. 2007 CRB
	:	1550K
BRIAN JONES,	:	
	:	
Contemnor-Appellant.	:	

BRIEF OF EIGHT ETHICS, CRIMINAL DEFENSE AND PUBLIC INTEREST INSTITUTIONS AND ASSOCIATIONS AS *AMICI CURIAE* SUPPORTING CONTEMNOR-APPELLANT'S APPEAL OF THE MUNICIPAL COURT'S CONTEMPT CONVICTION

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INTEREST OF AMICI CURIAE

The eight *amici curiae* which have filed this brief in support of Brian Jones' appeal from his criminal contempt conviction include institutions and associations that together represent the interests—and reflect the knowledge and experience—of thousands of criminal defense lawyers in private and public practice, legal academics with expertise in ethics and professional responsibility, and association members dedicated to the vindication of the Constitution (the "*Amici*"). The *Amici* include both Ohio-based and national organizations because the criminal contempt conviction of Brian Jones, a public defender who violated the Municipal Court's order to commence a trial solely because he believed he was obligated to do so to uphold his ethical responsibilities to his client, raises the stakes for criminal defense lawyers both inside and outside of Ohio, and threatens to chill lawyers' good faith discharge of their ethical duties and depress the quality of representation provided to the indigent.

Statements of interest for each of the *Amici* are included in Appendix A.

SUMMARY OF CONTEMPT PROCEEDINGS BELOW

On August 15, 2007, attorney Brian Jones was appointed to represent a criminal defendant, Jordan Scott, in Portage County Municipal Court, Kent Division. The next day, August 16, 2007, the Honorable John J. Plough summarily found Mr. Jones in direct criminal contempt of court under Ohio Revised Code § 2705.01 for his refusal to participate unprepared in Mr. Scott's trial. For his refusal, Mr. Jones was taken into custody and paid a bond that Judge Plough set at a hearing later that day. After an August 24, 2007 hearing, Judge Plough sentenced Mr. Jones to three days in jail, imposed a $250 fine, and ordered Mr. Jones to pay court costs. The court suspended $150 of the fine and the jail sentence on the condition that Mr. Jones pay $100 and the witnesses' lost

wages of $48.50. The Municipal Court's findings were memorialized in an order dated August 24, 2007 and filed on January 7, 2008. *In re Contempt of Brian Jones*, 2007 CRB 1550, Judgment Entry/Order dated Aug. 24, 2007 (filed Jan. 7, 2008) (the "Contempt Order"). The Contempt Order is now before the Court on appeal.

SUMMARY OF ARGUMENT

The record shows that the Municipal Court punished public defender Brian Jones with a criminal contempt conviction because of his good faith refusal to proceed with trial attributable solely to his commitment to the professional obligations he owed his client. Mr. Jones had not been appointed to the matter until the previous day, did not know trial was set until the morning of trial, and had been given only a two-hour lunch break by the Municipal Court to prepare. Mr. Jones understood correctly that he could not participate in trial without breaching his ethical duties to his indigent client. The Municipal Court's contempt ruling, premised on an effort to compel Mr. Jones to take action that would have resulted in such a breach, was thus improper.

Amici intervene in this case motivated by their concern that the Municipal Court's actions, if not corrected, jeopardize the fairness and reliability of the criminal justice system. One of the most fundamental tenets of our profession is the ethical requirement that no lawyer shall take a case when unable to provide competent and diligent representation—a requirement from which public defenders are not exempt. The use of the court's contempt power, as it was used against Mr. Jones, to coerce lawyers to violate the obligation to provide competent representation runs counter to the most fundamental principles of justice in this country. Moreover, forcing a defense lawyer to proceed unprepared hampers the court system's ability to complete its truth-seeking mission.

When the defense is ill-prepared and incapable of exposing the weaknesses in the prosecution's case, erroneous convictions occur.

Consistent with *Amici*'s concerns, and recognizing the importance of defense counsel's ethical obligation to provide effective representation, Ohio appellate courts have reversed trial court contempt findings resting on counsel's refusal to proceed to trial unprepared. *See, e.g., In re Sherlock* (1987), 37 Ohio App.3d 204, 204-05, 525 N.E.2d 512, 513. Indeed, this Court has stated that "defense counsel is not required to violate his duty to his client to avoid punishment for contempt." *City of Hubbard v. Cawley* (Nov. 21, 2001), Trumbull App. No. 2000-T-0031, unreported (2001 WL 1497198, at *2).

The Municipal Court's criminal conviction of Mr. Jones thus suffers from three fundamental flaws. *First*, the Municipal Court failed to recognize and accord any weight to Mr. Jones' ethical obligations and instead issued its order to proceed with the mistaken belief that its order somehow cured the ethical dilemma. To the contrary, the ethical obligations remained unaffected by the Municipal Court's order, notwithstanding the impact the order might have in mitigating any professional discipline.

Second, the Municipal Court abused its discretion in elevating its legitimate administrative objective of controlling the court calendar above its supervisory imperative of facilitating effective representation and a fair criminal trial. By resorting to the imposition of criminal contempt—a power that is to be exercised with restraint—instead of the lesser remedies that were readily available, the Municipal Court took action that, if upheld, improperly burdens criminal defense attorneys' ability to adhere to their ethical commitments. This consequence deeply concerns the *Amici*.

Third, in denying a continuance, the Municipal Court explicitly relied on the appellate process to correct the likely deprivation of the defendant's constitutional right

to effective assistance of counsel. But direct appeal is not a reliable remedy for ineffective assistance of counsel, especially given the difficulty of demonstrating prejudice with a very limited trial record. Further, commencing a trial that the Municipal Court knew was likely to be constitutionally defective, to be followed by an appeals process and possible retrial, undermined any efficiency the Municipal Court temporarily achieved in forcing an immediate trial.

Accordingly, the contempt judgment should be reversed.

STATEMENT OF FACTS

A. Mr. Jones is Assigned the *Scott* Matter the Day Before a Hearing

On June 18, 2007,[1] an individual named Jordan Scott was arraigned, without counsel, on a misdemeanor assault charge. Unable to afford an attorney, Mr. Scott was told by the Honorable John J. Plough of the Portage County Municipal Court, Kent Division, that "We'll refer you to a public defender" and that he could "go to the public defender's office when the representative comes in." June 18, 2007 Hearing Tr. at 2-3.

On July 25, Mr. Scott appeared in Municipal Court before Judge Plough for a pre-trial conference on the misdemeanor assault charge, again without counsel. The report from that hearing indicated that Mr. Scott was to apply for assignment of a public defender. An August 16 trial date was set. *In re Contempt of Brian Jones*, 2007 CRB 1550, Judgment Entry/Order (Filed Jan. 7, 2008) (the "Contempt Order") at 2.

On August 9, Mr. Scott was arraigned and incarcerated on an unrelated felony charge. At that time, Mr. Scott had still not connected with any staff from the Office of

[1] Unless otherwise noted, all dates referenced in this Statement of Facts are in the year 2007.

the Portage County Public Defender (the "Public Defender Office") for his June misdemeanor charge.

On August 15, Mr. Scott, still in jail, was interviewed by a Public Defender Office staff member regarding his misdemeanor charge. Affidavit of Brian Jones dated Aug. 24, 2007 ("Jones Aff.") ¶ 4. That afternoon, Brian Jones, at all relevant times an attorney with the Public Defender Office, was told for the first time that he was assigned a new client whom he never met named Jordan Scott. Jones Aff. ¶¶ 1-4. Later that day, Mr. Jones learned that he had a court hearing with Mr. Scott of an unspecified nature scheduled for the next day. *Id.* ¶ 5.

Although it is not clear why there was a two month delay in Mr. Scott's engagement of the Public Defender Office, it is clear that there is nothing Mr. Jones could have done to obtain the case assignment any earlier.

B. Mr. Jones Meets His Client and Learns Trial is Set For That Morning

Apart from Mr. Scott's matter, which was scheduled for 11:30 a.m., Mr. Jones had six court hearings on the morning of August 16. *Id.* ¶ 6. At 11:00 a.m., after attending to those six other hearings, Mr. Jones obtained his first discovery on the *Scott* matter from the prosecutor and learned the scheduled hearing was actually a trial. *Id.* ¶ 7-8. Mr. Jones then met for the first time with Mr. Scott, who was in a holding cell, and discussed over roughly twenty minutes the charges against Mr. Scott, the possible penalties, Mr. Scott's rights, his account of the matter underlying the charges against him, and possible defense witnesses. *Id.* ¶ 9-10. Mr. Scott indicated his wish to proceed to trial rather than accept a plea offer. *Id.* ¶ 13. Mr. Jones concluded that he needed to interview several witnesses identified in the police report to learn if they possessed information relevant to his client's defense. *Id.* ¶ 11.

C. The Morning Hearing

At the hearing late that morning, Mr. Jones immediately advised Judge Plough that he had been appointed only the day before, to which Judge Plough responded trial would nonetheless go forward because the state's three witnesses, including the complainant, were present. *See* Transcript of Aug. 16, 2007 Morning Hearing (the "Aug. 16 Morning Hearing Tr.") at 2. Mr. Jones then asserted that he was "completely unprepared" and that he "wouldn't feel comfortable representing this client in a trial" as he did not believe he "would be effective as counsel." *Id.* at 3. In particular, Mr. Jones had already ascertained that he "certainly" needed time to interview the witnesses subpoenaed by the state as well as other witnesses not subpoenaed. *Id.* at 4. Mr. Jones felt that these other witnesses "would likely have a . . . version of the facts" different from the state's witnesses. Jones Aff. ¶ 15. Notably, the prosecution did not object to adjourning the trial to another day. Nevertheless, Judge Plough responded, "I can't work it out," and gave Mr. Jones two hours to prepare for trial. Aug. 16 Morning Hearing Tr. at 5. Additionally, although Mr. Jones wished to file a jury demand, Judge Plough stated "[w]e can't find a jury today" because a demand had not been made with the requisite ten days' notice. *Id.* at 2.

D. The First Afternoon Hearing

When the hearing resumed at 2:00 p.m. that afternoon, Mr. Jones attempted to advise Judge Plough of a letter from his supervisor previously sent to the Municipal Court, which explained the Public Defender Office's need for sufficient trial preparation time. *See* Transcript of Aug. 16, 2007 First Afternoon Hearing (the First Afternoon

Hearing Tr.") at 4-5. The Municipal Court did not allow Mr. Jones to describe the letter, nor did it accept a copy. The Municipal Court also refused to consider persuasive appellate authority offered by Mr. Jones (*In re Sherlock*, discussed *infra*), which counsels against proceeding to trial when doing so compromises an attorney's ethical duty to a client. *Id.* at 6-7. Instead, the court moved ahead toward trial. *Id.* at 7. When Mr. Jones repeated that he would not be able to try the case, Judge Plough held him in direct contempt of court and ordered him taken into custody. *Id.* at 7-8. Additionally, Judge Plough admonished Mr. Scott for "wait[ing] until the last second" to engage counsel, and adjourned Mr. Scott's trial for one week. *Id.* at 9.

E. The Second Afternoon Hearing

Another hearing to set Mr. Jones' bond was held later that day. *See* Transcript of Aug. 16, 2007 Second Afternoon Hearing (the "Aug. 16 Second Afternoon Hearing Tr."). At the hearing, the Municipal Court stated that Mr. Jones should have participated in trial, and that an appeal could have been lodged had his client been convicted. *See id.* at 2. Had his client been acquitted, "it wouldn't be a problem." *Id.* The Municipal Court noted that had a written continuance motion been filed before trial, "possibly we could have continued the case," sparing the participants inconvenience and expense. *Id.* at 3-4.

The proceeding and Mr. Jones' sentencing were continued to August 24, 2007. *Id.* at 11. Bond was set and subsequently paid by Mr. Jones. *Id.* at 10; Jones Aff. ¶ 31.

F. The Sentencing Hearing

Proceedings continued on August 24, 2007 for the purpose of sentencing Mr. Jones. At the hearing, Judge Plough discussed extensively the nature of an attorney's preparation obligations and Mr. Jones' actions with counsel for Mr. Jones, Ian N. Friedman, Esq. Mr. Friedman also presented on Mr. Jones' behalf the testimony of John

Wesley Hall, an attorney with over thirty years of trial experience and President-Elect of *amicus* National Association of Criminal Defense Lawyers, who was accepted as an expert in the areas of legal ethics, conflict of interest, ineffective assistance and trial preparation.

1. The Level of Preparation Required to Defend Mr. Scott.

Underscoring Mr. Jones' obligation to have prepared adequately for the Scott trial, Mr. Friedman recounted—in response to a question of Judge Plough's implying that a misdemeanor charge required less preparation than a felony—that among the felonies and misdemeanors of all sorts that he has tried, "some of [his] most difficult and complex trials have been in the Municipal Court levels." Transcript of Aug. 24, 2007 Hearing (the "Aug. 24 Hearing Tr.") at 16. Facing up to six months in jail, it was appropriate for Mr. Scott to "not take the misdemeanor [charge] lighter than the felony [charge]." *Id.* at 17.

Mr. Friedman emphasized that even had Mr. Jones learned on August 15 (by accessing the electronic docket) that the next morning's hearing was in fact a trial for which three witnesses had been subpoenaed, Mr. Jones, just assigned to the matter, would not have been able to "find those witnesses and interview them" in any effective manner. *Id.* at 26-27, 30. Mr. Friedman further stated that an appropriate "investigation doesn't end just simply asking the different sides what happened." *Id.* at 34, 141. For example, had Mr. Scott chosen to testify, Mr. Jones would have had to prepare him to testify, which "sometimes is the biggest task of all." *Id.* at 40.

From the Municipal Court's perspective, the break given to Mr. Jones to interview the state's witnesses "would have given him enough time to cross-examine those witnesses" meaningfully. *Id.* at 28. Had the witnesses declined to speak with Mr. Jones, "his preparation wouldn't have been any different than if he would have had two weeks

or two months . . . instead of two hours." *Id.* at 29. And had those witnesses obliged his inquiries, Mr. Jones actually would have been "probably more prepared that particular time than if [he] interviewed them two or three weeks, [or] two or three months earlier, because it's fresh in [his] mind." *Id.* at 42. In response, Mr. Friedman recalled that from his own experience advance rather than last minute preparation is necessary.

John Wesley Hall testified that he could not "prepare for a misdemeanor assault case, or any misdemeanor, even a disorderly conduct trial," in only one day. *Id.* at 77-79. To defend Mr. Scott, certain basic pre-trial defense steps—including (a) properly interviewing the state's witnesses and assessing their credibility; (b) locating and speaking with possible defense witnesses; (c) seeking further discovery from the state; (d) potentially visiting the crime scene; and (e) potentially filing pre-trial motions—required more preparation time than was afforded Mr. Jones, especially in light of his public defender workload. *Id.* at 70-84.

2. Proceeding Unprepared and Appealing the Conviction.

Judge Plough repeated his view that Mr. Jones should have gone forward with the trial and, if a conviction resulted, he could have appealed on the basis of ineffective assistance of counsel. *Id.* at 19, 39, 43-44, 176. Counsel for Mr. Jones responded that such an approach would not have cured the ethical violation committed by Mr. Jones for proceeding through trial wholly unprepared. *Id.* at 44-45, 47-49. Additionally, "by the time an appeal would have been perfected, the [defendant's] sentence would have been expired and likely he would have served some time in jail." *Id.* at 133.

3. The Absence of a Written Motion for a Continuance.

The record shows that Mr. Jones learned late in the morning of August 16, and not the prior day when he acquired the case, that a trial was set. Jones Aff. ¶ 15.

Nevertheless, Judge Plough pointed several times to Mr. Jones' failure to move in writing for a continuance prior to the initial August 16 hearing. *See, e.g.*, Aug. 24 Hearing Tr. at 17. Unlike Mr. Jones' oral request, a "written motion puts people on notice prior to that time." *Id.* at 113. Questioning Mr. Hall, Judge Plough asked: "[W]ouldn't you think that the first thing a public defender should do if he gets appointed before a trial is to file a motion to continue the case?" *Id.* at 89. Mr. Hall responded that he "would try to file one as soon as" he could, but that he had "never encountered a situation where trial is expected to go that fast." *Id.* at 89, 92. Judge Plough observed that failure to make that application could be "ineffective assistance of counsel in that respect, or a failure to at least try to get some more time to prepare for the case." *Id.* at 90.

4. Bifurcating the State and Defense Cases.

Judge Plough suggested for the first time at the sentencing hearing that he would have granted the defense a continuance after the prosecution had presented its case so that the defense could subpoena its own witnesses. *Id.* at 41, 174. However, Mr. Friedman pointed out that Mr. Jones still would have been unable to "effectively cross-examine" the state's witnesses and "challenge the State's case in a way that a Defendant in the United States is entitled to." *Id.* at 42. Judge Plough further suggested—also for the first time—that the "defense certainly would have [had] the right to subpoena [the state's] witnesses back." *Id.* at 107, 169-70. Counsel for Mr. Jones recalled accurately that bifurcation was not offered on August 16. *Id.* at 41, 111.

5. The Impact on the Court and the State's Witnesses.

Judge Plough explained that on August 16 he was "upset" for the inconvenienced witnesses. *Id.* at 135, 174, 184. Presumably at Judge Plough's request, two of these witnesses were present at the entire August 24 hearing, which lasted almost three hours,

and were not questioned until its end. *Id.* at 160-61. One witness said she missed two hours of work on August 16, where she was paid $8.25 an hour. *Id.* at 158. The other witness missed roughly four hours of work that day, where his wages were $8.00 an hour. *Id.* at 159. The state's third witness was not present for the August 24 hearing, and what financial impact, if any, was caused to her is not in the record.

G. The Contempt Order

The written Contempt Order found that: (a) both Mr. Jones and his client "had been in court all morning"; (b) the state's three subpoenaed witnesses were present; (c) during the late morning hearing Mr. Jones was told to be ready to proceed for trial that afternoon and that he was to use the lunch break to prepare and interview the state's witnesses; (d) following the lunch break, Mr. Jones "was not ready to proceed" and that "he had not" during the break "interviewed the three witnesses"; (e) Mr. Jones "had only spoken to [his client] for about five to ten minutes"; and, (f) no written continuance motion was filed. Contempt Order at 1-2.

Mr. Jones was sentenced to three days in jail and fined $250 and ordered to pay court costs. $150 of the fine and the jail sentence were suspended on the condition that Mr. Jones pay $100 and the witnesses' lost wages of $48.50. Community Work Service at the rate of $50 for eight hours was offered in lieu of paying the fine and court costs. The sentence was stayed pending this appeal. *See* Contempt Order at 4.

ARGUMENT

I. THE MUNICIPAL COURT'S CONTEMPT CONVICTION RESTED ON AN IMPROPERLY NARROW UNDERSTANDING OF COUNSEL'S ETHICAL DUTIES

A. An attorney has a constitutionally-rooted ethical obligation to prepare and investigate adequately for trial that cannot be extinguished by court order or threat of contempt

An attorney's ethical obligation to provide effective assistance of counsel helps ensure the criminal defendant's constitutional right to that effective assistance. U.S. Const. amend. VI; *see also, e.g., Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *State v. Smith* (1985), 17 Ohio St. 3d 98, 17 OBR 219, 477 N.E.2d 1128. The ethical obligation is enshrined in the first rule of both the Ohio Code of Professional Responsibility and the American Bar Association ("ABA") Model Rules of Professional Conduct, which enjoin counsel to "provide competent representation to a client," which requires "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." OCPR Rule 1.1; ABA MRPC Rule 1.1; *see* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, § 3.1 (3d ed. 2003) (stating the duty of competent representation holds "the place of honor as the first undertaking in the client-lawyer relationship"). The "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem." OCPR Rule 1.1, Comment 5; ABA MRPC Rule 1.1, Comment 5.

Counsel's duty indisputably "also includes adequate preparation," OCPR Rule 1.1, Comment 5, which "has long been recognized as part of a lawyer's responsibility to provide competent representation." *Attorney Grievance Comm. of Maryland v. Zdravkovich* (2000), 762 A.2d 950, 961, 362 Md. 1, 22. Similarly, counsel has a duty to

"act with reasonable diligence and promptness in representing a client," which entails acting "with commitment and dedication to the interests of the client." OCPR Rule 1.3 & Comment 1; ABA MRPC Rule 1.3; OCPR Rule 1.1.

State and federal courts in Ohio have agreed that defense counsel's professional duties obligate counsel to "investigate the law and the facts relevant to the charges against his client," *State v. Parks* (1990), 60 Ohio App.3d, 150, 156, 590 N.E.2d 300, and "make reasonable investigations or . . . a reasonable decision that makes particular investigations unnecessary." *Vasquez v. Bradshaw* (N.D. Ohio 2007), 522 F.Supp.2d 900, 922 (quotation marks omitted). Counsel's failure to prepare adequately or to fulfill investigatory duties undermines the judicial system's "adversarial testing process." *Id.*

Further, Ohio courts have made clear that trial courts cannot nullify these effective representation duties. Contempt findings founded on counsel's refusal to take actions in direct violation of those duties merit close scrutiny. Indeed, this Court has stated that "defense counsel is not required to violate his duty to his client to avoid punishment for contempt." *City of Hubbard v. Cawley* (Nov. 21, 2001), Trumbull App. No. 2000-T-0031, unreported (2001 WL 1497198, at *2) (citing *In re Sherlock* (1987), 37 Ohio App.3d 204, 205). Accordingly, "a finding of contempt of court may be reversed where it is shown that the attorney is simply endeavoring to meet his or her responsibilities under the Code of Professional Responsibility." *Garfield Heights v. Wolpert* (1997), 122 Ohio App.3d 287, 293, 701 N.E.2d 734, 738.

In *Sherlock*, the Second District Court of Appeals vindicated defense counsel who was held in contempt for refusing to proceed unprepared with a criminal trial. 37 Ohio App.3d at 205-08. As here, the public defender in *Sherlock*, informed of the trial just before it was scheduled to commence (two days), had little time to prepare, and did not

move for a continuance far enough in advance of trial to spare the state's witnesses the trouble of appearing in court. Unlike here, the *Sherlock* trial court offered to continue the defense's case until a later date. *Id.* at 208-09. But counsel refused to proceed, stating the defense had been unable to "subpoena its witnesses, investigate the City's case and prepare its own defense," meaning "participating in any trial would violate [the defendant's] . . . rights under both the Ohio and Federal Constitutions." *Id.* at 207.

The *Sherlock* court agreed that defense counsel would have violated her professional obligation to her client "both under the state and federal Constitutions and the Code of Professional Responsibility" if she had proceeded with the trial unprepared, and ruled that defense counsel "should not have been required to violate her duty to her client as the price of avoiding punishment for contempt." *Id.* at 211-13. The court stressed that counsel could not possibly in a mere two days' time "obtain the names and addresses of [the defendant's] witnesses and subpoena them into court, investigate the case, and prepare for trial." *Id.* at 211. Moreover, the court found that deferral of the defense case would not have cured defense counsel's deficient representation throughout the prosecution's case, including cross-examination of its witnesses. *Id.* at 211-12. Accordingly, the contempt judgment was reversed. *Id.* at 213; *see also State v. Schiewe* (1996), 110 Ohio App.3d 170, 176, 673 N.E.2d 941, 945 (citing contempt orders reversed "because of consideration of the professional responsibilities owed his or her client by an attorney."); *In re Williams* (Aug. 23, 1990), Cuyahoga App. No. 56908, unreported (1990 WL 121498, at *4) (citing *Sherlock* and finding that where defense counsel's "objection to proceeding with trial was based on his obligation to render effective assistance to the defendant," counsel's conduct did not "constitute misbehavior which would obstruct the administration of justice" such that contempt was merited).

The First District Court of Appeals in *State v. Gasen* (1976), 48 Ohio App.2d 191, 356 N.E.2d 505, considered similar circumstances. Two just-appointed public defenders were ordered to proceed with a preliminary hearing. 48 Ohio App.2d at 19. Citing Ohio ethics rules and their client's right to effective counsel, the attorneys refused to proceed and were held in contempt. *Id.* at 193. The Court of Appeals reversed, holding that "the trial court erred as a matter of law in refusing to recognize the appellants' responsibilities under the Code of Professional Responsibility," and concluded that "the finding of contempt rendered below is contrary to the law." *Id.* at 195-96; *see also State v. Christon* (1990), 68 Ohio App.3d 471, 475, 589 N.E.2d 53, 55 (confirming that where "an attorney for a criminal defendant is subject to the potentially inconsistent professional obligations of: (i) obeying lawful orders of the court; and (ii) protecting his client's constitutional rights, we have held it to be a defense to a contempt citation that the order to proceed was, under all of the prevailing circumstances, an abuse of discretion").

Sherlock and *Gasen* show that an attorney's obligation to secure his or her client's right to effective assistance is not displaced by a conflicting court order. Indeed, a trial court's "refus[al] to recognize [counsel's] responsibilities and obligations under the Code of Professional Responsibility, which [were] adopted by the Supreme Court of Ohio . . . in effect, ignore[s] the dictate of *In re Schott* [(1968), 16 Ohio App.2d 72] that '. . . the ground, principle, or reason of a decision made by a higher court is binding as authority on the inferior court.'" *Gasen*, 48 Ohio App.2d at 195 (second ellipsis in original). The Municipal Court erred in disregarding this important principle, mistakenly concluding that Mr. Jones' ethical obligations were satisfied merely because compliance with its order was a likely defense to any disciplinary proceeding that might be brought against Mr. Jones for rendering ineffective assistance at trial. *See* Aug. 24 Hearing Tr. at 92-94.

But Mr. Jones' ethical duties to his client were not terminated by the order to disregard them. As in *Sherlock* and *Gasen*, Mr. Jones was "simply endeavoring to meet his . . . responsibilities under the Code of Professional Responsibility" in refusing to participate in trial utterly unprepared. *Wolpert*, 122 Ohio App.3d at 293. Mr. Jones told the Municipal Court that he "was appointed yesterday to this case," and since he was "completely unprepared for" trial he would not "be effective counsel." Aug. 16 Morning Hearing Tr. at 2-3. Pursuant to his ethical duties—to "provide competent representation to a client," to act with "preparation reasonably necessary for the representation," and to conduct "inquiry into and analysis of the factual and legal elements of the problem" (OCPR Rule 1.1 and Comment 5)—Mr. Jones stated he "would certainly need time to talk to" other witnesses who were not subpoenaed by the prosecution. Aug. 16 Morning Hearing Tr. at 4; *see also* First Afternoon Hearing Tr. at 4-5.

Mr. Jones was thus singularly focused on ensuring compliance with, and motivated only by the need to vindicate his obligations under, the Ohio Code of Professional Responsibility. In accord with *Sherlock* and *Gasen*, the Municipal Court's Contempt Order is ripe for reversal.

B. Due to circumstances that were not his own making, Mr. Jones could not have satisfied his duty to render effective assistance of counsel

Mr. Jones was correct to stand by his conclusion that he should not participate in his client's trial. Although counsel's performance is presumed competent, and counsel's strategic choices ought to be respected, that deference is not warranted in the absence of "'thorough investigation of law and facts relevant to plausible options,'" or where counsel's actions were unreasonable or bereft of tactical justification. *Higgins v. Renico*, (C.A.6 2006) 470 F.3d 624, 632 (*quoting Strickland*, 466 U.S. at 690).

Accordingly, courts have regularly pronounced representation deficient when provided without proper investigation or preparation. For example, the court in *Towns v. Smith* (C.A.6 2005), 395 F.3d 251 "dispel[led] any doubt that a lawyer's [duties of representation] 'includes the obligation to investigate *all* witnesses who may have information concerning his or her client's guilt or innocence.'" *Ramonez v. Berghuis* (C.A.6 2007), 490 F.3d 482, 487 (*quoting Towns*, 395 F.3d at 258) (emphasis added). In *Towns*, the prosecution had intended to call a certain witness, but just before trial decided it would not. Defense counsel then "insisted on having the opportunity to visit" the individual in jail, where he was being held, to assess whether "it would be beneficial to call him as a [defense] witness." 395 F.3d at 254. The opportunity was given, but counsel proceeded through trial without making an effort to speak with him. *Id.*

The *Towns* court found defense counsel's actions constitutionally deficient. Having "made absolutely no attempt to communicate with [the individual], despite requesting that [he] be kept in the county jail so that he could interview him prior to the commencement of trial," and having "simply decided not to call him as a witness," the attorney "'abandoned his investigation at an unreasonable juncture, making a fully informed decision with respect to [whether to call him as a witness] impossible.'" *Id.* at 259 (*quoting Wiggins v. Smith* (2003), 539 U.S. 510, 527-28, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471, 488-89 (last bracket in original)).

Likewise, the court in *Vasquez v. Bradshaw* (N.D. Ohio 2007), 522 F.Supp.2d 900, found that defense counsel, who prior to trial did not adequately pursue several potential defense witnesses, and who at trial put on no affirmative defense, "simply failed in his duty to conduct an objectively reasonable investigation on which to base his conclusions about trial strategy." 522 F.Supp.2d at 923. Counsel's "incomplete

investigation" consisted of a "single telephone call" to "any and all potential witnesses." *Id.* That, according to the court, was "hardly a solid foundation upon which to make the 'strategic' choice to call nary a defense witness." *Id.* Counsel failed "to investigate all witnesses who may have information concerning [his client's] guilt or innocence," as was "unquestionably" his "duty." *Id.* at 924. Additionally, counsel "unreasonably investigated the case when he failed to fully and sufficiently discuss [with his client] the case, and [his client's] prior convictions and allegations." *Id.* at 925. The two "met at most three times . . . for 15-30 minutes each time." *Id.* Counsel's decision to not have his client testify at trial was not in itself problematic; instead, "it was objectively unreasonable for [counsel] to make that decision without first fully investigating the allegations." *Id.* Communicating with his client and potential witnesses prior to trial in only the most limited manner, counsel transgressed his "*professional duty* to learn as much as he could" about matters critical to his client's defense. *Id.* (emphasis added).

Towns and *Vazquez* are but two recent affirmations of counsel's duty to conduct a complete investigation, including through speaking with and investigating potential witnesses, in order to conduct trial adequately prepared. Consistent with these decisions, courts have ruled regularly that a near complete failure to discharge that duty produces constitutionally deficient representation. *See, e.g., Ramonez v. Berghuis* (C.A. 6 2007), 490 F.3d 482 (holding it was unreasonable for counsel to not even attempt to interview three witnesses with potentially beneficial defense testimony); *Bigelow v. Williams* (C.A. 6 2004), 367 F.3d 562, 566 (remanding case for district court to determine if it was ineffective assistance of counsel when, after the emergence of a possible alibi witness, counsel failed to attempt to find additional alibi witnesses, and stating that "the respect

that attorneys' strategic decisions in a criminal trial will receive is proportionate to the extent of the investigation they in fact conducted").[2]

Judge Plough's Contempt Order is premised in large measure on Mr. Jones' inaction during the lunchtime adjournment. *See* Contempt Order at 2. That finding of the Municipal Court, respectfully, misses the point and conceives too narrowly counsel's professional duties of preparation and investigation, which cannot be satisfied with only two hours or so of effort. For example, the court in *State v. Parks* stated that an attorney's investigatory obligations require more than a "mere [single] attempt to discuss the matter [being tried] on the morning of the trial with the complaining witness." 69 Ohio App.3d at 156 (*citing State v. Smith* (1986), 34 Ohio App.3d 180, 517 N.E.2d 933). In *Parks*, defense counsel sought a continuance of trial because the complaining witness's address had been furnished to him "only [two days] before [trial], leaving him inadequate opportunity to interview her and investigate her probable testimony prior to the trial." *Parks*, 69 Ohio App.3d at 153-54. On the morning of trial, the court held the continuance motion in abeyance and gave defense counsel the opportunity to interview the complaining witness. But as the witness refused to speak with defense counsel, the continuance motion was denied and trial commenced. *Id.*

In finding that the trial court abused its discretion in refusing the requested continuance, the *Parks* court agreed that advance knowledge of the complainant's address "was necessary to allow [counsel] to not only interview her but investigate her in order to

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[2] *See also Sims v. Livesay* (C.A.6 1992), 970 F.2d 1575 (cataloguing various ethical breaches by counsel who failed to investigate his client's defense); *Blackburn v. Foltz* (C.A.6 1987), 828 F.2d 1177, 1183 ("Counsel did not make any attempt to investigate this known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary."); *Williams v. Washington*, 59 F.3d 673, 681 (C.A.7 1995) (finding ineffective assistance in part for failure to investigate a crime scene where doing so would have revealed evidence that, "given the layout of the home and the relatively crowded conditions, the alleged assault could not have taken place as claimed").

prepare for trial" and that without the address counsel was "prevented . . . from speaking with her neighbors or associates to determine whether there might be impeaching testimony that could be offered for the benefit of" his client. *Id.* at 156. The court observed that an attorney's incomplete investigation of relevant law and facts "may be a basis to find that counsel's assistance was ineffective and constitutionally defective." *Id.* One lone attempt to secure an interview with a complaining witness on the day of trial does not satisfy counsel's investigatory duties. Indeed, "whether or not the witness then agreed to an interview, counsel would yet be denied the opportunity to investigate." *Id.* Further, "[t]he timing of the interview permitted might also create prejudice by depriving counsel of facts necessary to advise his client whether or not to take the stand." *Id.*

Allotting defense counsel only the most minimal of opportunities to pursue critical case information does not permit satisfaction of counsel's ethical responsibility to supply effective assistance. "[G]enerally speaking, failure to provide defendant with any discovery until the day of trial"—such as the identities of the state's witnesses—is "evidence *per se* of the defendant's inability to effectively present a credible defense." *State v. Smith* (1986), 34 Ohio App.3d 180, 188. And simply "attempting to cure the defect by allowing defendant's counsel a short period of time with the state's surprise witnesses immediately prior to their testifying does not provide defendant a sufficient opportunity to defend against their allegations." *Id.*

Thus, in the time he had, Mr. Jones could not have placed himself in a position to render adequate counsel to his client and fulfill his ethical obligations. Although the level of preparation required to render effective representation varies from case to case, where counsel conscripted for trial has been unable to intelligibly undertake investigatory or preparatory steps because of manifest time constraints, his or her representation cannot

live up to constitutionally and ethically-mandated standards. Here, Mr. Jones did not have the time to carry out the various steps needed to serve effectively.

1. Mr. Jones did not have time to consider pre-trial matters.

Mr. Jones learned of Mr. Scott's trial the morning it was set to begin, and proceeding as scheduled would have meant surrendering any pre-trial motions as Mr. Jones did not have sufficient time to acquaint himself with the factual and legal issues that may have supported such applications. It may well be that no worthy motions existed. But Mr. Jones, only in possession of the case for hours, could not draw that conclusion. Competent counsel's failure to file a deserving pre-trial motion must arise out of strategy, not ignorance. *See Kimmelman v. Morrison* (1986), 477 U.S. 365, 385, 106 S.Ct. 257, 2588, 91 L.Ed.2d 305, 325 (faulting counsel for not filing an important motion "not due to strategic considerations" but unawareness of the issue); *Blackburn v. Foltz* (C.A.6 1987), 828 F.2d 1177, 1182 (finding counsel deficient for failure to file a pretrial suppression motion not out of "strategy, but on mistaken beliefs and a startling ignorance of the law") (quotation marks omitted).

Among other pre-trial matters, Mr. Jones needed to consider whether to seek a jury trial. But the Court insisted on proceeding to trial without a jury. *See* Aug. 16 Morning Hearing Tr. at 2. Additionally, provided the state's discovery only one half hour before trial was scheduled to commence, Mr. Jones did not have adequate time to determine whether any further discovery needed to be requested.[3]

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[3] Again, it may well be that the prosecution dutifully turned over all it was obligated to produce. However, Mr. Jones was not at that time competent to draw that conclusion. To render adequate counsel, an attorney who foregoes a request for available discovery must do so strategically, not unknowingly. *See Kimmelman*, 477 U.S. at 385 ("Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery . . . was not based on 'strategy.'"). Where counsel has "neither investigated, nor made a reasonable decision not to investigate, the State's case through

2. Mr. Jones did not have time to investigate the state's witnesses.

Similarly, the severe time constraints placed on Mr. Jones precluded him from investigating the state's witnesses effectively. According to the Municipal Court, the roughly two hours Mr. Jones was furnished should have been sufficient time to interview the three state witnesses present in court the morning of trial, and as well determine how at trial to use the findings of those interviews. But investigating the state's witnesses, including the complaining witness, requires more than simply interviewing, or attempting to interview, each one once immediately before trial. *See Parks*, 69 Ohio App.3d at 156 (holding that a proper investigation requires more than one attempt to interview a complaining witness, "whether or not the witness then agreed to an interview"); *Smith*, 34 Ohio App.3d 188 (ruling that "allowing defendant's counsel a short period of time with" prosecution witnesses just learned of "immediately prior to their testifying does not provide defendant a sufficient opportunity to defend against their allegations"). Interviewing one witness may elicit follow-up questions for another, and what counsel has learned from the state's witnesses may require consultation with his or her client. *See* 34 Ohio App.3d at 188-89; *see also State v. Holland* (Oct. 17, 2000), Allen App. No. 1-2000-19, unreported (2000 WL 1533896, at *2-*4) (deeming constitutionally deficient performance of attorney who, *inter alia*, did not speak with his client until "immediately prior to trial" and who did not speak with his client "to plan the defense of the case").

Further, counsel frequently must take actions beyond merely interviewing the prosecution's witnesses. It may have made sense for Mr. Jones to visit the scene of the

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discovery," that "complete lack of pretrial preparation puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution and the reliability of the adversarial testing process." *Id.* (quotations marks omitted). Indeed, receipt of any and all discovery the morning of trial is "evidence *per se* of the defendant's inability to effectively present a credible defense." *Smith*, 34 Ohio App.3d at 188.

crime (an assault) to ascertain whether the physical surroundings gave rise to potential impeachment of the prosecution witnesses' testimony. Similarly, it may have been useful for defense counsel to investigate the witnesses' backgrounds "to determine whether there might be impeaching testimony that could be offered for the benefit of" his or her client. *Parks*, 69 Ohio App.3d at 156. This may include speaking with neighbors and other acquaintances, or researching court and other public records. *Id.* These latter steps are especially critical if, as the Municipal Court identified as a possibility, one or more of the prosecution's witnesses refuses to speak with counsel, *see* Aug. 24 Hearing Tr. at 29, as otherwise counsel enters trial with no known means of confronting their testimony or impeaching their credibility. *See Higgins*, 470 F.3d at 633 (finding "no conceivable, tactical justification for [defense counsel's] failure to cross-examine *the* key witness in the case against [his client]," and citing recent cases where "deficient performance" was found for failure "to challenge the credibility of the prosecution's key witness").

Indeed, the Municipal Court at the August 24 sentencing hearing seemed to recognize that Mr. Jones could not have reasonably been expected to cross-examine the state's witnesses. Judge Plough suggested that he would have allowed Mr. Jones to re-subpoena the prosecution's witnesses at a continued date. *See* Aug. 24 Hearing Tr. at 107, 169-70. No continuation apart from the two hour delay was offered to Mr. Jones on the day of trial, let alone the chance to bring back the state's witnesses. *See* Aug. 16 Morning Hearing Tr.; First Afternoon Hearing Tr. And whether Mr. Jones, in recalling the witnesses, would have been allowed to *cross*-examine them (instead of being

permitted only a more controlled direct examination) is unclear. It would have thus been cavalier for Mr. Jones to have proceeded assuming these opportunities were available.[4]

3. Mr. Jones did not have time to fashion a defense.

In addition to not being equipped to confront the prosecution's case, Mr. Jones on the morning of trial did not have any affirmative defense case to present. Mr. Jones had established from the police report received as discovery just before trial that there were witnesses he needed to locate and interview who were not subpoenaed for trial. *See* Jones Affidavit ¶ 11; Aug. 16 Morning Hearing Tr. at 4. Mr. Jones simply did not have time to do that, and therefore could not in the time given "investigate *all* witnesses who may have information concerning his or her client's guilt or innocence." *Towns*, 395 F.3d at 258 (emphasis added); *see also Vazquez*, 522 F.Supp.2d at 923-25 (describing counsel's "professional duty" to conduct a full investigation of pertinent facts). An attorney who fails to prepare and present an available defense at trial for no tactical reason cannot serve competently. *See Matthews v. Abramajtys* (C.A.6 2003), 319 F.3d 780, 789-90 (finding counsel served as a "net negative to the defense" by, *inter alia*, unreasonably preventing his client from using alibi witnesses); *Holland*, 2000 WL 1533896, at *4 (finding deficient counsel who was "utterly unprepared to present any

[4] It would have also been unreasonable for Mr. Jones to believe he would have another chance at cross-examination and presenting a defense given Judge Plough's statements at the August 16 hearings, which left no doubt about his desire to conduct Mr. Scott's trial. *See* Aug. 16 Morning Hearing Tr. at 5 ("I'm going to try it today at 1:30."); Aug. 16 First Afternoon Hearing Tr. at 3 (following recitation of the facts of the representation issues as the Municipal Court perceived them, stating "So we're going to continue here today."); *id.* at 4 ("I'm not going to hear speeches. There is no pre-trial matter . . . The trial has started right now."); *id.* at 5 (stating in response to Mr. Jones again advising that the defense was not prepared, "Well, you're going to start today. You're going to proceed, you're going to proceed, and if you don't, I'm going to do the same thing I did the last time and that is hold the public defender's office in contempt and since you're here representing them, you'll be held in contempt of court if you don't proceed, and you'll be taken to jail today immediately."); *id.* at 6 ("The case was set for trial, Brian, and the case is going to go to trial."); *id.* at 7 (asking for opening statements). Judge Plough also made clear his concern for the three prosecution witnesses who appeared for trial. *See, e.g.,* Aug. 16 Morning Hearing Tr. at 4. Recalling those individuals at a later date so Mr. Jones could conduct his cross-examination would have been an added inconvenience to them.

defense on behalf of" his client and whose failure to present evidence beneficial to his client was not the product of "any tactical decision to omit such evidence"); *see also, e.g., Ramonez*, 490 F.3d at 487-88; *Sims*, 970 F.2d at 1580; *Blackburn*, 828 F.2d at 1183.

Again, at the sentencing hearing, Judge Plough appears to have recognized that Mr. Jones could not have proceeded with a defense case on August 16, stating he would have granted the defense a continuance to subpoena its own witnesses and postpone presentation of its case. *See* Aug. 24 Hearing Tr. at 41. But again, that was not offered to Mr. Jones on August 16, and Judge Plough's insistence on proceeding with trial that day would have made it reckless for Mr. Jones to assume the availability of that course.

Mr. Jones' lack of preparation and unfamiliarity with the relevant factual and legal issues may have also impacted his ability to register proper objections to the introduction of evidence and testimony by the prosecution. An attorney who for no strategic reason allows objectionable matter in evidence does not provide effective assistance. *See Girts v. Yanai* (C.A.6 2007), 501 F.3d 743, 756-57 ("[T]rial counsel's failure to object allowed the prosecutor's improper and prejudicial statements to reach the jury uncontested and without the proper admonition from the trial court. This inaction simply cannot be characterized as litigation strategy. There was no conceivable benefit to be derived from failing to challenge the prosecutor's improper statements.")

4. Mr. Jones did not have time to accomplish all of these tasks.

None of these pre-trial tasks discussed above could have been accomplished properly in the brief period granted by the Municipal Court. Certainly they all could not have been. Although the Municipal Court in its Contempt Order does not fault Mr. Jones for not knowing on the afternoon of August 15 of the next morning's trial, even if he learned of the trial immediately upon being assigned the case, Mr. Jones still would not

have been able to ready himself to render constitutionally and ethically adequate representation on August 16, 2007. *See, e.g., Sherlock*, 37 Ohio App.3d at 211-13.

II. THE MUNICIPAL COURT'S CONTEMPT CONVICTION WAS AN ABUSE OF ITS DISCRETION BECAUSE IT WAS AT ODDS WITH ITS OBLIGATION TO ADMINISTER AND ENSURE A FAIR TRIAL AND LESSER REMEDIES WERE AVAILABLE TO VINDICATE DOCKET CONTROL INTERESTS

A. The Municipal Court's administrative interests did not warrant the threat to constitutional rights and imposition of contempt

In response to Mr. Jones' continuance application and lack of preparation, the Municipal Court should have fashioned a solution that served the ends of administrative efficiency without threatening Mr. Scott's right to effective representation and a fair trial and compelling Mr. Jones to violate his professional duties.

Trial courts have a supervisory obligation to facilitate adequate trial representation and a fair trial. *See Wheat v. United States* (1988), 486 U.S. 153, 160, 108 S.Ct. 1692, 1698, 100 L.Ed.2d 140, 149; *State v. Keenan* (2008), Cuyahoga App. 2008-Ohio-807, at ¶¶ 27-28; Green, *Criminal Neglect: Indigent Defense From a Legal Ethics Perspective*, 52 Emory L.J. 1169, 1194 (2003) (noting that "the judiciary has an institutional responsibility to promote diligent practice by criminal defense lawyers"). That duty serves not only the interests of defendants, but also supports "the institutional interest in the rendition of just verdicts in criminal cases." *Wheat*, 486 U.S. at 160. Thus, trial courts are to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690; *see also* Ohio Code of Judicial Conduct (Proposed) Rule 1.1 ("A judge shall comply with the *law*.").

The Municipal Court should have briefly adjourned the trial date of the Scott matter, which had been pending for less than two months. Although trial courts enjoy wide discretion in considering continuance applications, such applications may not be denied unreasonably, arbitrarily, or unconscionably. *State v. Brown* (2005), 163 Ohio App.3d 222, 2005-Ohio-4590, 837 N.E.2d 429, at ¶ 6 (setting out factors relevant to evaluating continuance motions, including whether request for delay is "dilatory, purposeful, or contrived"); *see also Keenan v. Keenan* (N.Y. App. Div. 2008), 2008 N.Y. Slip Op. 04012, at *2 (noting that trial court's discretion whether to adjourn a matter is not "without limits, particularly when the right to counsel is implicated"). Consideration must be given to "whether appellant had an opportunity to make a reasonable investigation or make a reasonable decision that certain investigations were not necessary." *State v. Allen* (1997), 118 Ohio App.3d 846, 849, 694 N.E.2d 145, 147.

In *Brown*, the trial court's denial of an oral continuance application made immediately before trial was reversed as an abuse of discretion for failing to take into proper consideration the defendant's right to counsel. The defendant, who was charged with a misdemeanor traffic violation and faced no possible jail time, appeared on the morning of her trial with just-retained counsel. The court denied a continuance because the charge was a "minor misdemeanor," she faced no "jail term," and the witnesses were present. 2005-Ohio-4590, at ¶ 2. The court allowed the prosecution to present its case, with the defendant (not her counsel) cross-examining its witnesses. After the prosecution rested, the court suspended trial. When it resumed three weeks later, the defendant's counsel objected to his client being denied assistance of counsel during the state's case. The court explained that it proceeded with trial because "it did not want to risk the chance that the state's witnesses would not come back at a later date." *Id.* ¶ 5.

Reversing the defendant's conviction, the court noted the continuance was denied "solely because of [the trial court's] concern that the state's witnesses . . . would not return for a later scheduled trial," even though the court never asked the witnesses whether that would be the case. *Id.* ¶ 7. Simultaneously, "the trial court appear[ed] to have given little weight to [the defendant's] right to counsel as guaranteed by the Sixth Amendment and Fourteenth Amendment to the United States Constitution, as well as Section 10, Article I of the Ohio Constitution." *Id.* ¶ 8. The trial court "implied" that this right, which "is considered fundamental to our system of jurisprudence, . . . had less significance given the minor nature of the charge and the fact that the [defendant] was not facing incarceration." *Id.* The *Brown* court thus held that "[a]lthough the court's concern for the preservation of testimony was laudable," it was "unreasonable to elevate that concern over [the defendant's] right to have her attorney present during the presentation of the state's case." *Id.* ¶ 10.

Here, as in *Brown*, the Municipal Court accorded too much weight to its administrative concerns at the expense of Mr. Scott's right to prepared counsel. Further, there was no continuance request prior to August 16 and the need for one was plainly not "dilatory, purposeful, or contrived," but instead owed entirely to the appointment of the preceding day, which was not a "circumstance" to which Mr. Jones "contributed." *Id.* ¶ 6. And although "[a] continuance may have been inconvenient for the state and its witnesses . . . the state did not offer an objection to [the] request for a continuance, and the trial court did not bother to determine the extent of any inconvenience." *State v. Bailey* (Nov. 16, 1999), Washington App. No. 98CA42, unreported (1999 WL 1074001, at *2). Nor did Judge Plough inquire about the state's witnesses' availability to return for trial at a later date.

Even if the Municipal Court insisted on sanctioning Mr. Jones or the Public Defender Office in some way while granting a short continuance, the contempt finding was improper. Contempt is to be used "sparingly," *Gompers v. Buck's Stove & Range Co.* (1911), 221 U.S. 418, 450, 31 S.Ct. 492, 501, 55 L.Ed. 797, 809, and the "summary power for direct contempt" courts possess "is an awesome power" that courts "must be cautious in using." *In re Lodico*, Stark App. No. 2005-CA-172, at ¶ 45 (citation omitted). In addition to being exercised sparingly, contempt should be used only absent a less onerous or restrictive means of achieving a court's desired ends. *See In re McConnell* (1962), 370 U.S. 230, 236, 82 S.Ct. 1288, 1292, 8 L.Ed.2d 434, 439 (summary contempt power vested in federal courts has been limited to "the *least possible power* adequate to prevent actual obstruction of justice") (emphasis added). Since "the judicial contempt power is 'shielded from democratic controls,' it should be exercised with restraint and discretion." *In re Brannon*, 2003-Ohio-4423, at ¶ 66 (*quoting Roadway Express Inc. v. Piper* (1980), 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488, 500).

Alternative measures within "the court's inherent power to maintain respect and decorum" and "equitably tailor punishments that appropriately fit the conduct" included "a lecture, a reference to the bar association for a public reprimand, or the imposition of a fine unaccompanied by a formal sanction." *Brannon*, 2003-Ohio-4423, at ¶ 67. Or the Municipal Court could have granted Mr. Jones' oral request for a continuance on the condition that Mr. Jones or the Public Defender Office's compensate the witnesses for any wages lost in attending court on August 16.[5] Any of these methods would have

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[5] In *Sherlock*, the court suggested that trial courts may in circumstances like those here postpone trial and schedule a proceeding to determine if defense counsel may be held in indirect contempt under Ohio R.C. 2705.02. 37 Ohio App.3d at 212; *see also State v. Williams* (1997), 123 Ohio App.3d 233, 704 N.E.2d 12, 14 (finding that "where defense counsel places the trial court on notice that continued representation places

effectively vindicated the court's role in administering its docket without leading to the constitutional deficiencies and administrative inefficiencies that Judge Plough invited when he ordered Mr. Jones to proceed with trial unprepared or face a finding of direct contempt.

B. The Municipal Court was incorrect to rely on appellate courts to cure foreseen and easily avoidable representation deficiencies

Criminal defendants must have the "'guiding hand of counsel *at every step in the proceedings* against [them].'" *Gideon*, 372 U.S. at 345 (*quoting Powell v. Alabama* (1932), 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170) (emphasis added). Yet the Municipal Court justified its order that Mr. Jones proceed with trial unprepared in part by stating that Mr. Scott could remedy his trial's unfairness by claiming ineffective assistance of counsel on direct appeal. *See* Aug. 16 Second Afternoon Hearing Tr. at 4, 13. However, appellate courts should not be used to correct errors of a constitutional magnitude that a trial court has anticipated and expected, especially those best prevented by the trial court. Moreover, Judge Plough's faith in direct appeal as necessarily an effective remedy for defendants like Mr. Scott—who on appeal are constrained by a limited trial record—is mistaken, and disregards the potentially irrevocable harm to defendants tried without adequate representation.

1. Direct appeal would likely not have remedied ineffectiveness.

Under *Strickland*, in order to establish ineffectiveness, a criminal defendant must first show that his or her attorney's performance was deficient as measured by the

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counsel in an ethical dilemma, and counsel raises issues of his client's constitutional rights, the court must conduct a careful and in-depth review into all the facts and circumstances," and "that the trial court should have conducted an evidentiary hearing to determine the exact circumstances, rather than summarily finding appellant in contempt of court"). Although that route is preferable to a summary finding of direct contempt—as it affords the accused written charges and a hearing—it still leaves hanging over unprepared counsel the threat of sanction for refusing to participate in trial on ethical grounds.

reasonableness of the performance under prevailing professional norms. *Strickland*, 466 U.S. at 688. Next, the defendant must establish that counsel's deficient performance was prejudicial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also State v. Sallie* (1998), 81 Ohio St.3d 673, 674, 693 N.E.2d 267, 1998-Ohio-343 (noting application of the *Strickland* in Ohio state cases). Thus, had Mr. Scott been convicted, his right to the presumption of innocence would have been unfairly replaced by a burden on appeal to demonstrate a "reasonable probability" that the result of the proceeding would have been different if Mr. Jones had been prepared, depriving him of one of his most fundamental rights. *See Coffin v. United States* (1895), 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 49 ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

When the trial record is particularly limited, as it would have been in Mr. Scott's case due to defense counsel's inability to cross-examine defense witnesses or present defense evidence, it is especially difficult for an appellate court to answer "whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Indeed, when an attorney proceeds with representation unprepared, it is "well-nigh impossible to demonstrate from the record that cross-examination was inadequate due to lack of opportunity to investigate and prepare." *Sherlock*, 37 Ohio App.3d at 212.[6] This leaves direct appeal "an

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[6] *See also Bell v. Cone* (2002), 535 U.S. 685, 718, 122 S.Ct. 1843, 1862, 152 L.Ed.2d 914, 941 (Stevens, J., dissenting) (observing that "a proper Strickland inquiry is difficult, if not impossible, to conduct when counsel has completely abdicated his role as advocate, because the abdication results in an incomplete trial record from which a court cannot properly evaluate whether a defendant has or has not suffered prejudice

inadequate means of obtaining relief." *Id.*; *see also Hughes v. Superior Court* (1980), 164 Cal.Rptr. 723, 106 Cal. App.3d 1, 4 ("Any lawyer worth his salt recognizes that denial of adequate representation is difficult for appellate courts to assess after the fact.").

And while establishing ineffective assistance of counsel is an onerous burden for defendants generally, it would have been insurmountable in Mr. Scott's case. Direct appeal in Ohio is limited to the trial record. *See State v. James* (March 6, 1997), Hardin App. No. 6-96-16, unreported, at *2. Evidence that counsel could have but did not discover and present at trial will not be considered, except at a post-conviction hearing where evidence outside the trial record is admissible. Petitions for post-conviction relief are heard by the trial and sentencing court, which here would have been the Portage County Municipal Court. *See* Ohio R.C. § 2953.21. But Municipal Courts do not have jurisdiction to hear petitions for post-conviction relief. *See State v. Cowan* (2004), 101 Ohio St.3d 372, 374, 2004-Ohio-1583, 805 N.E.2d 1085, 1087 at ¶ 10.

Thus, despite the Municipal Court's assurance that Mr. Scott's deprivations could have been rectified on appeal, a conviction would have left Mr. Scott in a Catch-22. Since he could not have pursued post-conviction relief, he lacked any means on appeal to supplement the trial court record to show that Mr. Jones was ineffective for, say, not seeking the testimony of a certain valuable witness, or not uncovering certain information to impeach a prosecution witness. So constricted on appeal, Mr. Scott may have found it impossible to demonstrate that counsel's performance was prejudicially deficient.

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from the attorney's conduct."); *United States v. Cronic* (1984), 466 U.S. 648, 652, 657-658, 104 S.Ct. 2039, 2043, 2046, 80 L.Ed.2d 657, 663, 667 (reversing ineffective assistance of counsel finding premised not on "an actual breakdown of the adversarial process during the trial" but instead "the circumstances surrounding the representation," such as the "time afforded for investigation and preparation").

2. Proceeding to trial would likely have caused other serious harms

Further, as counsel for Mr. Jones noted at the sentencing hearing, "by the time an appeal would have been perfected, the [defendant's] sentence would have been expired and likely he would have served some time in jail." Aug. 24 Hearing Tr. at 133. Likewise, a criminal conviction often changes a person's life permanently—even if ultimately reversed—by impacting one's employment, altering relationships with family members, and generally causing considerable anxiety. Judge Plough's asserted remedy for ineffectiveness at trial would not have undone these consequences.

In addition, though Judge Plough premised his order to proceed with trial in part upon the need to maintain an efficient docket, the public's interest in efficiency is not served by going through a constitutionally defective trial followed by a lengthy direct appeal process. *See Sherlock*, 37 Ohio App.3d at 213 (ordering trial of the assault charge to proceed with unprepared counsel would have been inefficient, because "attorney time, judicial time, and public money might well have been expended litigating the [ineffective assistance of counsel] issue in the trial court and appellate court"). That is especially so if the appellate process remedied Judge Plough's errors, necessitating a second trial.

III. MR. JONES' CRIMINAL CONTEMPT CONVICTION RISKS CHILLING DEFENSE ATTORNEYS' DISCHARGE OF THEIR ETHICAL DUTIES

Amici have filed this brief because they are concerned not only with the injustice visited upon Mr. Jones by his criminal contempt conviction, but because that conviction, if not remedied by this Court, has the potential to do serious harm to the criminal justice system.

Permitting courts to overrule the ethical obligations of defense attorneys and pressure them—by threat of criminal contempt—to proceed to trial unprepared will deter

defense attorneys from taking steps to zealously serve their clients in similar circumstances. Defense attorneys, particularly public defenders such as Mr. Jones, often have large caseloads and must manage their multiple client matters efficiently. *See* Green, *supra*, at 1178-85 (describing pressures and excessive caseloads facing public defenders).[7] Mr. Jones, for example, had *six* other hearings the morning of Mr. Scott's trial. Attorneys under such pressure often have powerful incentive to limit the time devoted to each client and "triage" their cases by encouraging the bulk of their clients to plead out early. *Id.* at 1180-81. Trial courts have a supervisory obligation to ensure competent representation, and are to counterbalance, not contribute to, those pressures.

To subject a lawyer who resists those pressures and the temptation to reduce his or her workload to a criminal contempt conviction and its collateral consequences—a stain permanently affecting the attorney's reputation with judges, prospective clients, and the public; a potential complication of *pro hac vice* admissions; an impediment on efforts to work for the government or seek public office—is entirely inappropriate.

It is particularly egregious to punish a lawyer in this way for choosing not to proceed to trial unprepared when the lawyer acted solely out of a conscientious and accurate assessment of his or her ethical responsibilities. The sanction risks leading other

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[7] In a recent report on indigent defense by the American Bar Association, it was noted that "[l]awyers frequently are burdened by overwhelming caseloads and essentially coerced into furnishing representation in defense systems that fail to provide the bare necessities for an adequate defense (*e.g.* sufficient time to prepare, experts, investigators, and other paralegals), resulting in routine violations of the Sixth Amendment obligation to provide effective assistance of counsel. *Gideon's Broken Promise: America's Continuing Quest for Equal* Justice, American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, at 38 (ABA 2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (last visited May 16, 2008). Similarly, a leading expert on indigent defense noted that this is a prevalent problem across the United States: "Every day, defenders try to manage too many clients. Too often, the quality of service suffers. At some point, even the most well-intentioned advocates are overwhelmed, jeopardizing their clients' constitutional right to effective counsel." The Spangenberg Group, *Keeping Defender Workloads Manageable, Indigent Defense Series #4,* Bureau of Justice Assistance Monograph (2001), at 2, *available at* http://www.ncjrs.gov/pdffiles1/bja/185632.pdf (last visited May 16, 2008).

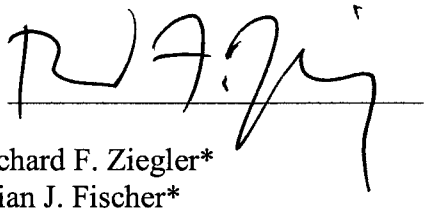
attorneys in similar circumstances to conclude that inadequate preparation will have to suffice, leading to negative consequences for criminal defendants, particularly those who cannot afford to retain counsel. Those negative consequences will also affect the justice system as a whole by making it impossible for defense counsel to fulfill the role of putting the prosecution's case to the crucible of adversarial testing. Indeed, forcing a lawyer to go to trial unprepared is like forcing a doctor to perform surgery before doing the diagnostic tests necessary to determine the illness. Harm is inevitable—the facts will be unclear and evidence will be missed. As a result, innocent people will continue to be found guilty and guilty people will remain at large in our communities.

Reversal of Mr. Jones' conviction is warranted to make clear that courts expect attorneys to take their professional responsibilities as seriously as Brian Jones did below.

CONCLUSION

For the foregoing reasons, the Contempt Order should be vacated.

Dated: May 19, 2008

By: 

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Appendix A—Statements of Interest of the *Amici*

The American Civil Liberties Union of Ohio Foundation ("ACLU of Ohio"), the Ohio entity of the American Civil Liberties Union, is a non-profit, non-partisan membership organization devoted to protecting basic civil rights and civil liberties for all Americans. The ACLU of Ohio frequently files amicus briefs in Ohio and federal courts in support of those rights and liberties. This case, in which Brian Jones was sanctioned for refusing to violate his ethical and constitutional obligation to provide effective assistance to his client charged with a criminal offense, raises just the sort of issues on which the ACLU of Ohio's experience, expertise, and voice may prove useful.

The Hofstra University School of Law's Institute for the Study of Legal Ethics, which was established in 1995, studies national, state, and local rules, practices, and proposed changes in the field of legal ethics. The Institute for the Study of Legal Ethics seeks to improve the rules governing lawyers and the legal profession, to influence courts and bar associations to issue opinions that serve the best interests of the profession and the public, and to identify and correct injustices in the development or application of the rules and principles of legal ethics.

The Jacob Burns Center for Ethics in the Practice of Law sponsors courses, programs, and events that provoke dialogue and critical thought on ethical and moral issues of professional responsibility. The Center helps prepare students to face with integrity the difficult and important questions that arise in all areas of legal practice.

The Louis Stein Center for Law and Ethics is based at Fordham University School of Law (the "Stein Center"). The Stein Center reflects the law school's commitment to teaching, legal scholarship, and professional service that promote the role of ethical perspectives in legal practice, legal institutions, and the historical and contemporary

development of the law itself. In their teaching, scholarship, and academic and continuing legal education programs, the Stein Center and affiliated Fordham Law faculty have spent more than fifteen years examining ethical issues in the administration of criminal justice, including the ethical obligations of criminal prosecutors and defense lawyers. From its inception, the Louis Stein Center for Law and Ethics has endeavored to make ethics and public service integral to the study and practice of law. In the process, it has created and nurtured a legal community of scholars, students, jurists and practitioners dedicated to the exchange of ideas and problem solving in a vital field of inquiry that has grown increasingly more important in today's professional world.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 12,500 attorneys and 35,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to ensuring that the indigent are defended at trial by adequately prepared and zealous counsel. NACDL and its members have a strong interest in ensuring that counsel for the indigent, and in particular public defenders, who carry uniquely heavy caseloads and are often enlisted for representation on a moment's notice, are not forced to choose between protecting their clients' constitutional rights and avoiding penalty for not obeying an improper court order.

The Office of the Ohio Public Defender (the "Ohio Public Defender") is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. Along with these responsibilities, the Ohio Public Defender also plays a key role in the promulgation of Ohio statutory law and procedural rules. By participating in the law making process and by zealously representing the interests of its clients, the Ohio Public Defender endeavors to ensure that the laws of this State protect all who find themselves within its borders: the permanent citizen and the itinerant traveler; the wealthy, as well as the indigent; the corporation and the private person. The Ohio Public Defender is interested in the effect that the instant case will have on those parties who are not yet, but may someday be, involved in similar litigation. Moreover, the Ohio Public Defendant has an enduring interest protecting the integrity of the justice system, ensuring that the interests of defense attorneys and criminal defendants are not in conflict, and ensuring that rights of all criminal defendants are protected. To these ends, the Ohio Public Defender supports the fair, just, and correct application of the United States Constitution, the Ohio Constitution, and applicable precedents of the Supreme Court of the United States and Ohio state courts.

The Ohio Association of Criminal Defense Lawyers (the "OACDL") is a statewide association of over 600 public defenders and private attorneys who practice primarily in the field of criminal defense law. The Association was formed for charitable, educational, legislative and scientific purposes with the goal of advancing the interests of society and protecting the rights of citizens and other persons accused of crimes under the laws of the State of Ohio and the United States. OACDL seeks to provide the judiciary and the legislature with insights from its members concerning the

day-to-day operation of the criminal justice system and how it affects the citizens of this State. Over the past decade, OACDL has participated as a friend of the court in dozens of cases, including *Ohio v. Robinette* (1996), 519 U.S. 33; *State v. Kinney*, 83 Ohio St.3d 85, 1998-Ohio-425; *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124; *State v. Hochhausler*, 76 Ohio St.3d 455, 1996-Ohio-374; *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452; *State v. Murnahan* (1992), 63 Ohio St.3d 60; *In re Contempt of Morris* (1996), 110 Ohio App.3d 112; and *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500. OACDL has an enduring interest in protecting the rights guaranteed to criminal defendants under the United States and Ohio Constitutions. As this case involves a criminal defendant's Sixth Amendment right to the effective assistance of counsel at trial, both OACDL's membership and the client base served by that membership will be affected by it.

Founded in 1996, the University of Miami School of Law's Center for Ethics and Public Service is an interdisciplinary clinical program devoted to the values of ethical judgment, professional responsibility, and public service in law and society. The Center's in-house clinics and educational programs deliver legal representation to low-income communities in the fields of children's rights, public health entitlements, and nonprofit economic development, and provide ethics education and training to the Law School, University, and Florida business, civic, and legal communities. The Center observes three guiding principles: interdisciplinary collaboration, public-private partnership, and student mentoring and leadership training.

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 2008-P-0018
	:	
v.	:	M. Ct. Case No. 2007 CRB
	:	1550K
BRIAN JONES,	:	
	:	
Contemnor-Appellant.	:	

MOTION OF EIGHT ETHICS, CRIMINAL DEFENSE AND PUBLIC INTEREST INSTITUTIONS AND ASSOCIATIONS TO FILE *AMICUS CURIAE* BRIEF SUPPORTING CONTEMNOR-APPELLANT'S APPEAL OF THE MUNICIPAL COURT'S CONTEMPT CONVICTION

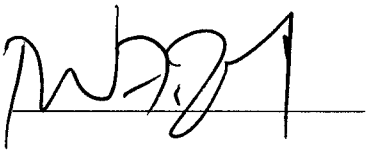
Pursuant to Ohio Rule of Appellate Procedure 17, the American Civil Liberties Union of Ohio Foundation, the Hofstra University School of Law's Institute for the Study of Legal Ethics, the Jacob Burns Center for Ethics in the Practice of Law, the Louis Stein Center for Law and Ethics is based at Fordham University School of Law, the National Association of Criminal Defense Lawyers, the Office of the Ohio Public Defender, the Ohio Association of Criminal Defense Lawyers, and the University of Miami School of Law's Center for Ethics and Public Service move this Court, through the undersigned counsel, for leave to file the attached *amicus curiae* brief in support of contemnor-appellant's appeal of the Municipal Court's contempt conviction.

The *amicus curiae* brief is desirable as it will assist the Court in its consideration of the ruling below, including that ruling's significant impact on

counsel's discharge of his or her ethical responsibilities and the competence and preparedness of criminal defense counsel to the indigent. The eight *amici curiae* which have filed this brief include institutions and associations that together represent the interests—and reflect the knowledge and experience—of thousands of criminal defense lawyers in private and public practice, legal academics with expertise in ethics and professional responsibility, and association members dedicated to the vindication of the Constitution. Statements of interest detailing the experience of *amici curiae* are included as Appendix A to the brief.

Counsel for plaintiff-appellee the State of Ohio and contemnor-appellant Brian Jones have advised that they do not oppose the filing of the brief.

Dated: May 19, 2008

By: 

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