

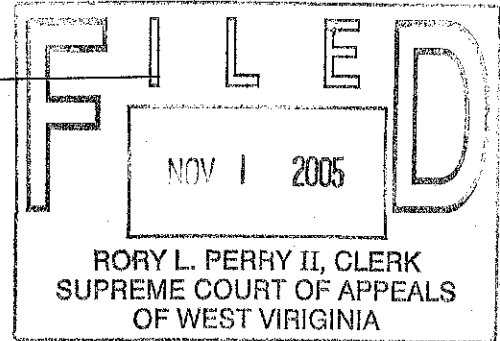
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No. 32722

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

IN RE: MEGAN B., AMBER G.B.,
WILLIAM Z.Q.B., and SHEEHAN B.



FROM THE CIRCUIT COURT OF GRANT COUNTY

**REPLY BRIEF OF APPELLANT
SHERIFF CHARLES KIMBLE**

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I.

INTRODUCTION

Appellant Charles Kimble files this Reply Brief in response to the Brief of Appellee Judge Andrew N. Frye, Jr., and will address: (1) The untimeliness of Appellee's Brief; (2) Appellee's injection into this appeal of matters that are irrelevant and beyond the scope of the record herein; and (3) the principal themes of Appellee's argument.

II.

UNTIMELY FILING OF APPELLEE'S BRIEF

In a separate pleading ("Appellant's Motion to Strike Brief of Appellee Judge Andrew N. Frye, Jr."), Appellant notes that Appellee's Brief was filed more than five weeks after it was due. Appellee, as far as Appellant knows, neither received leave of the Court

for the very late filing nor presented an excuse or reason for it. Appellant urges the Court to strike Appellee's Brief and to deny Appellee the opportunity to present oral argument.

III.

COMMENT ON APPELLEE'S "STATEMENT OF FACTS"

Appellee's "Statement of Facts" attempts to bring into this appeal the facts of the underlying abuse and neglect case. Almost the entirety of Page 4 of Appellee's Brief is a lengthy recitation of facts allegedly reported by the children to social worker Cary Ours. On Page 6 of Appellee's Brief is another detailed account of what one of the children told the social worker. None of this has anything to do with whether Appellant was properly found to be in contempt of the Circuit Court of Grant County. In addition to being irrelevant, it is also inflammatory in its detail.

The facts reported to the social worker, moreover, are not part of the record in this appeal. The designation of the record in this case, which was properly disclosed to Appellee and not objected to by him, is very limited. The record *does* include Magistrate Earle's Order of September 10, 2004, but it *does not* include the Application for Order Ratifying Emergency Custody, to which Appellee cites (Pages 4 and 6 of Appellee's Brief) as the basis for the details of what the children told the social worker.

For the reasons mentioned above, Appellant urges the Court to ignore Appellee's "Statement of Facts" insofar as it relates to information which is irrelevant or derived from a source beyond the record in this appeal.

IV

POINTS AND AUTHORITIES RELIED UPON

<u>CASES</u>	<u>Page</u>
<i>In re Yoho</i> , 171 W.Va. 625, 301 S.E.2d 581 (1983)	4
<i>Schwartz v. United States</i> , 217 F. 866 (4 th Cir. 1947)	4

RULES

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Rule 42(b), <i>West Virginia Rules of Criminal Procedure</i>	4

V.

RESPONSE TO APPELLEE’S PRINCIPAL ARGUMENTS

Appellant will address the two themes that underlie Appellee’s position - -

(1) that Appellant received proper notice of the contempt proceeding; and (2) that the contempt was civil, not criminal [thereby negating Appellant’s claim that he was denied the many rights incident to criminal contempt].

A. APPELLANT CHARLES KIMBLE DID NOT RECEIVE NOTICE SUFFICIENT TO ADVISE HIM THAT HE WAS THE SUBJECT OF A CONTEMPT PROCEEDING.

Appellee argues (Page 7 of Appellee’s Brief) that the Show Cause Order of

September 17, 2004, "expressly notified Sheriff Kimble both of the nature and the factual basis for the hearing", because that Order advised Appellant to "show cause why he failed to discharge his statutorily required duties in this matter." As argued in Appellant's Brief, Appellant was *never advised* that he was involved in a contempt proceeding, and the word *contempt* was first used by Judge Frye only after the show cause hearing was concluded, three lines from the end of the transcript (Transcript of October 6, 2004, show cause hearing [hereinafter, "Tr."], p. 10).

The right to proper notice cannot be shunted aside as facilely as Appellee attempts to do. In *In Re Yoho*, 171 W.Va. 625, 301 S.E.2d 581 (1983), a civil contempt proceeding, it was held that a defendant "must be informed about the contempt"; in *Yoho*, the contemnor, before being held in contempt for refusing to testify before a grand jury, "was warned that his refusal was contempt of court and could result in his incarceration." Rule 42(b), *West Virginia Rules of Criminal Procedure*, is also instructive in requiring, in the case of a non-summary disposition of a criminal contempt charge, notice which "shall state the essential facts constituting the criminal contempt charged and *describe it as such* [emphasis added]." Summary disposition, of course, applies only to "a criminal contempt committed in [the judge's] presence", Rule 42(a), *West Virginia Rules of Criminal Procedure*. See also *Schwartz v. United States*, 217 F. 866 (4th Cir. 1914), wherein the Court stated that a defendant must be "clearly informed of the charges against him, and whether criminal or civil contempt is alleged"

Appellee appears to argue that because Appellant had an opportunity to obtain counsel "or otherwise prepare for the hearing", and that because Judge Frye advised Appellant of his right to counsel, somehow this amounted to notice that Appellant was involved in a contempt proceeding. This argument is obviously specious. In fact, Appellant did not receive notice that he was involved in a contempt proceeding, nor did he have any reason to otherwise conclude that the unnamed proceeding was in reality a contempt proceeding.

B. THE FACTS SHOW CLEARLY THAT THE CONTEMPT PROCEEDING IN ISSUE HERE WAS A CRIMINAL, NOT CIVIL, CONTEMPT PROCEEDING.

Appellee contends that "The Type and Purpose of the Sanctions Identifies (*sic*) this Contempt Matter as Civil in Nature" (Page 9, Appellee's Brief). To the contrary, however, it is the type and purpose of the sanctions which clearly show that this is a criminal contempt case.

Appellee argues correctly that "where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order . . . the contempt is civil" (Page 10, Appellee's Brief). In this case, however, the obvious purpose of the sanction was to punish Appellant, not to force him to comply with a court order. Magistrate Earle's Order was entered on September 10, 2004. Judge Frye's Contempt Order was entered on October 12, 2004. Clearly, it would have been impossible for Appellant to comply, a month later, with Magistrate Earle's Order. Just as clearly, punishment for alleged

non-compliance, *not compliance*, was the effect of the sanction.

Appellee also argues correctly that an "appropriate sanction in a criminal contempt case is an order sentencing the contemnor to a definite term of imprisonment or an order requiring the contemnor to pay a fine in a determined amount" (Page 10, Appellee's Brief). Appellee's argument clearly supports Appellant's contention that this is obviously a criminal contempt sanction because Appellant was, in fact, sentenced to a term of imprisonment; the alternate sentence, 120 hours of community service, was not a means to purge the contempt, but merely a alternative form of punishment. In this regard, it is instructive to note that the Contempt Order provides that if the 120 hours of community service are not completed by the end of Appellant's term as Sheriff (December 31, 2004), "any remaining service hours shall be served incarcerated in the Regional Jail."

Appellee also argues correctly that a civil contempt sanction "involves a jail sentence that may be purged by the performance of a specific act" (Appellee's Brief, Page 11). What is before this Court, however, is not a sentence that may be purged or extinguished by a specific act. Here, the specific act (120 hours of community service) is not a purging (which by definition involves compliance by the contemnor with a court order), but, as noted above, simply an alternative form of punishment.

Appellee also argues that because Judge Frye required Appellant to write letters to the children (which Appellant did) and to write a memorandum to his staff (which Appellant did), those sanctions (the letters and the memorandum) "serve to vindicate the

rights of the children and protect the rights of other children", resulting in "the contempt in this case [being] clearly civil in nature" (Appellee's Brief, Page 11). This argument is just silly; Judge Frye's requirement that Appellant write the letters and memorandum has nothing to do with the punishment which was imposed upon Appellant. Similarly, Appellee's argument that the community service sanction "was to benefit children similarly situated to the children in this case" (Appellee's Brief, Page 12) is way off the mark; the community service sanction (at the Burlington United Methodist Family Services Campus) has nothing to do with whether Appellant was in contempt of Magistrate Earle's Order nor does it purge any alleged contempt committed by Appellant - - it is simply punishment.

Appellee summarily dispatches Appellant's due process concerns by stating that "the rights to a jury trial and prosecution by a prosecuting attorney only attach to criminal contempt proceedings, not to civil contempt proceedings" and that a "limited set of procedural protections applies to civil contempt cases" (Appellee's Brief, Page 12). As shown above, however, and in greater detail in Appellant's Brief, we are not dealing here with a civil contempt. This is a criminal contempt proceeding with all of the due process rights incident thereto, rights which were obviously denied to Appellant.

IV.

CONCLUSION

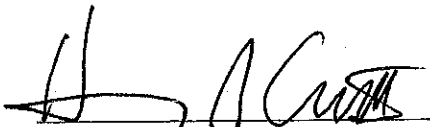
For the reasons stated herein and in Appellant's previously-filed Brief, Appellant prays that the Circuit Court's Contempt Order finding Appellant to be guilty of

criminal contempt be reversed and that this matter be remanded for the entry of an appropriate Order vacating such Contempt Order.

Respectfully submitted,

CHARLES KIMBLE
Appellant

By Counsel



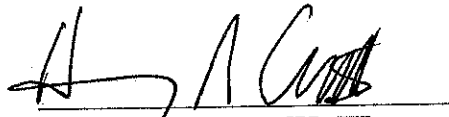
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CERTIFICATE OF SERVICE

I, Harry A. Smith, III, counsel for Charles Kimble, Sheriff of Grant County, do hereby certify that on this date I served a true copy of the attached *Reply Brief of Appellant Sheriff Charles Kimble*, upon John M. Hedges, Esquire and Teresa J. Lyons, Esquire, counsel for Appellee, by depositing a true copy of the same in the United States Mail with sufficient postage attached thereto, addressed as follows:

John M. Hedges, Esquire
Teresa J. Lyons, Esquire
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Dated at Elkins, West Virginia, this the 31st day of October, 2005.



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