

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Case Number: 2009-CA-00626

CHARLES B. GRAVES, JR.

APPELLANT

vs.

STATE OF MISSISSIPPI

APPELLEE

Appeal from the
Circuit Court of Tunica County, Mississippi
Case Number 2009-0082

BRIEF OF APPELLANT CHARLES B. GRAVES, JR.

Oral Argument is Requested

STEVEN E. FARESE, JR. (M) 

Attorney for Charles B. Graves, Jr.

Farese, Farese & Farese, P.A.
Post Office Box 98
Ashland, Mississippi 38603
Telephone: 662-224-6211
Facsimile: 662-224-3229

TABLE OF CONTENTS

Certificate of Interested Persons	<i>i</i>
Table of Contents.	<i>iii</i>
Table of Cases, Statutes and Other Authorities	<i>v</i>
Statement Regarding Oral Argument	<i>vii</i>
I. Statement of Issues Presented for Review.	1
II. Statement of the Case.	2
A. The Nature of the Case, the Course of the Proceedings, and the Disposition in the Court below	2
B. Statement of Facts Relevant to the Issues Present for Review.	3
III. Summary of the Argument.	22
IV. Argument	23
A. Standard of Review.	23
B. Direct or Constructive Contempt?	24
C. Procedural and Due Process Requirements In Constructive Contempt Proceedings.	28
D. Assignments of Error	31
Issue 1: Mr. Graves' conduct did not constitute contempt.	
Issue 2: There is no proof beyond a reasonable doubt that Mr. Graves willfully and deliberately violated any orders of Judge Smith.	
Issue 3: There is no proof beyond a reasonable doubt that Mr. Graves committed any act, or failed to commit any act, which rises to the level of contempt.	
Issue 4: The trial court violated Mr. Graves' due process rights.	

V. Conclusion	38
Certificate of Service	41
Certificate of Mailing.	42

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

<i>Cases:</i>	<i>Page(s):</i>
<i>Bolton v. State</i> , 752 So.2d 480 (Miss. App. 1999)	26
<i>Coleman v. State</i> , 482 So.2d 221 (Miss. 1986).	25
<i>Cooper v. Keyes</i> , 510 So.2d 518 (Miss. 1987).	28
<i>Davis v. Davis</i> , No. 2007-CA-01215-COA, So.2d-, 2009 WL 447242	29,36
<i>Dennis v. Dennis</i> , 824 So.2d 604 (Miss. 2002).	23-26, 29, 30, 35, 37
<i>Dunaway v. Busbin</i> , 498 So.2d 1218 (Miss. 1986).	29
<i>In re Brame v. State</i> , 755 So.2d 1099 (Miss. 2000).	28, 30, 37
<i>In re Hampton</i> , 919 So.2d 949 (Miss. 2006).. . . .	30
<i>In the Interest of Holmes</i> , 355 So.2d 677 (Miss. 1978).	25
<i>In re Mizell v. Mizell</i> , 708 So.2d 55 (Miss. 1998)	28
<i>In re Spencer</i> , 985 So.2d 330 (Miss. 2008).	29, 36
<i>In re Smith</i> , 926 So.2d 878 (Miss. 2006.).	28-29
<i>In re Williamson</i> , 838 So.2d 226 (Miss. 2002).	28
<i>Mayberry v. Pennsylvania</i> , 400 U.S. 455 (1971).	25, 30, 37
<i>Melvin v. State</i> , 48 So.2d 856 (1950).	30
<i>Millis v. State</i> , 63 So. 344 (1913).	28
<i>Moulds v. Bradley</i> , 791 So.2d 220 (Miss. 2001).	25, 28
<i>Prestwood v. Hambrick</i> , 308 So.2d 82 (Miss. 1975).. . . .	29, 37
<i>Purvis v. Purvis</i> , 657 So.2d 794 (Miss. 1994)	23, 25, 26, 28, 30, 37
<i>Terry v. State</i> , 718 So.2d 1097 (Miss. 1998).	24, 28-30, 37

Varvaris v. State, 512 So.2d 886 (Miss. 1987). 24, 30, 37

Woods v. State, 227 So.2d 288 (Miss. 1969). 25

Statutes:

Page(s):

Mississippi Code of 1972:

Miss. Code Ann. § 19-23-11 (amended 1985).12

STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Charles B. Graves, Jr., requests oral argument.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Appellant, Charles B. Graves, Jr., who is the County Prosecuting Attorney for Tunica County, was held in criminal contempt in three separate cases involving appeals to circuit court from justice court. A finding of criminal contempt must be based upon evidence establishing the contempt "beyond a reasonable doubt." The record in this case reflects no evidence which can support a finding of contempt against Mr. Graves. Furthermore, Mr. Graves was denied any chance to defend against the contempt charges, which is a violation of well-settled due process procedures for criminal contempt cases.

* * * * *

II. STATEMENT OF THE CASE

A. *THE NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS, AND THE DISPOSITION IN THE COURT BELOW*

This appeal arises from three separate orders entered by Tunica County Circuit Court Judge Albert B. Smith, III, which adjudicated that the Appellant, Charles B. Graves, Jr., who is the County Prosecuting Attorney for Tunica County, was in contempt in three separate cases which were appealed from justice court to the Circuit Court of Tunica County. These three orders were entered in the following cases, to-wit: *State of Mississippi vs. Leslie Murphy*, Tunica County Circuit Court case number 2008-0211; *State of Mississippi vs. Justyna Zylka*, Tunica County Circuit Court case number 2008-0319; and, *State vs. Keith Allen Woods*, Tunica County Circuit Court case number 2008-0360. These orders are found in the Record herein at, respectively, pp. 99-101 (*Murphy*), pp. 165-167 (*Zylka*), and pp. 212-214 (*Woods*).¹ Except for the case style at the top of each of the aforesaid orders, all three of the aforesaid orders are verbatim with each other.

Pursuant to the aforesaid contempt orders, Graves was fined and incarcerated. [R. 99-101.]

Subsequent to the entry of the orders aforesaid, Judge Smith entered three additional orders in the same three cases (which, again, except for the style of the case at the top of each order are verbatim with each other) which reduced the fine and sentence of incarceration. [R. 100, 168, 215; respectively.]

¹In this brief, citations to the Record will be denominated as "R." followed by the appropriate page number.

The Appellant, Charles B. Graves, Jr., filed his notice of appeal on March 12, 2009.

[R. 8.]

* * *

**B. STATEMENT OF FACTS RELEVANT TO THE ISSUES
PRESENT FOR REVIEW**

The Appellant in this appeal is Charles B. Graves, Jr. (who may hereinafter also be referred to as "Mr. Graves"). On March 12, 2009, Tunica County Circuit Court Judge Albert B. Smith, III, signed three separate orders holding Charles B. Graves, Jr., who is the County Prosecuting Attorney for Tunica County, in contempt. The three orders were entered in cases which had been appealed to Tunica County Circuit Court from justice court. The orders were entered in the following cases, to-wit: *State of Mississippi vs. Leslie Murphy*, Tunica County Circuit Court case number 2008-0211; *State of Mississippi vs. Justyna Zylka*, Tunica County Circuit Court case number 2008-0319; and, *State vs. Keith Allen Woods*, Tunica County Circuit Court case number 2008-0360. These orders are found in the Record at, respectively, pp. 99-101 (*Murphy*), pp. 165-167 (*Zylka*), and pp. 212-214 (*Woods*). Except for the case style at the top of each of the aforesaid orders, all three of the aforesaid orders are verbatim with each other.

The case of Leslie Kevin Murphy

Tunica County Sheriff's Deputy Ricky Ray stopped Leslie Kevin Murphy at 2:31 a.m. on December 27, 2007, and charged Murphy with driving under the influence ("DUI"). [R. 77] The record reflects Murphy was charged with refusal to submit to a breath test which was offered by Deputy Ricky Ray. [R. 78-79] Murphy was subsequently found guilty of DUI (first offense) in cause number 142543 in the Justice Court of Tunica County on July

8, 2008. [R. 77, 85] The attorney representing Murphy in the justice court was Robert S. (“Stan”) Little, Jr. (MS # 100579) [R. 63, 77, 81] On July 29, 2008, Murphy (with Little acting as his attorney) appealed his justice court conviction to the Circuit Court of Tunica County. [R. 63, 74]

Murphy’s circuit court appeal case was assigned “Cause No. 08-0211-ABS,” and, after filing the appeal, Murphy also filed a *Motion for Discovery* in which Murphy sought, *inter alia*, production of any “video tapes” relating to the case. [R. 74, 86-92] On November 4, 2008, Judge Smith entered an order of continuance in Murphy’s case. [R. 93-94] The order recited:

Prior to trial, it was brought to the Court’s attention that the State had failed to provide requisite discovery to the Defendant, that being *a videotape of the traffic stop in question*. The State was unable to produce said tape at that time for the Defendant, and the Defendant moved for dismissal. The Court noted that this was the second setting of this matter for trial yet overruled the Defendant’s motion and ordered a general continuance.

Further, the Court ordered the State to comply immediately with the Rules of Discovery and admonished the State and the Affiant to be prepared and ready for trial upon the next Court setting.

[R. 93 (emphasis added)]

Thereafter, an order was entered setting Murphy’s case for trial on March 12, 2009.

[R. 95]

The case of Keith Allen Woods

Deputy Ricky Ray stopped Keith Allen Woods at 9:46 p.m. on August 23, 2008, at a roadblock and issued citations to Woods for failure to have proof of liability insurance, failure to use a seatbelt, and driving under the influence. [R. 191-193] Woods was subsequently found guilty of DUI (first offense) in cause number 150083 in the Justice Court

of Tunica County on December 3, 2008. [R. 200-201] On December 23, 2008, Woods appealed his justice court conviction to the Circuit Court of Tunica County. [R. 210] Woods' circuit court appeal case was assigned "Cause No. 08-0360-ABS," [R. 210] The attorney representing Woods in his appeal to circuit court was Robert S. ("Stan") Little, Jr. (MS # 100579) (Little had not represented Woods in justice court). [R. 210, 236] On January 27, 2009, Judge Smith entered an order setting Woods' case for trial in circuit court on March 12, 2009. [R. 211.]

The case of Justyna Anna Zylka

Deputy Ricky Ray stopped Justyna Anna Zylka at 5:45 a.m. on November 17, 2007, and charged Zylka with driving under the influence. [R. 149] A breath test administered to Zylka by Deputy Pedro Bee indicated that Zylka's "breath alcohol content" was "0.192" at 7:41 a.m. on November 17, 2007. [R. 153, 154, 155, 156] Zylka was found guilty of DUI (first offense) in Tunica County Justice Court cause number 141563 on May 23, 2008. [R. 149, 157] The attorney representing Zylka in justice court was Stacey Spriggs (MS # 9036). [R. 149] Zylka was subsequently granted an appeal to Tunica County Circuit Court. [R. 147, 148] Spriggs also represented Zylka in circuit court. [R. 133, 147] Zylka's circuit court appeal case was assigned "Cause No. 2008-0319-ABS" [R. 132, 147] On January 27, 2009, Judge Smith entered an order setting Zylka's case for trial in circuit court on March 12, 2009. [R. 161]

The Proceedings Conducted in Tunica County Circuit Court on March 12, 2009

On March 12, 2009, at 9:32 a.m., Judge Smith called the case of *State of Mississippi v. Leslie Kevin Murphy* (Tunica County Circuit Court case number 2008-0211).² [R. 114, T.

3] The transcript of the proceedings reflects the following:

THE COURT: This is the Justice Court of Tunica County Mississippi, State of Mississippi v. Leslie Murphy. It looks like 14 –

(Mr. Graves approaches bench.)

MR. GRAVES: Your Honor.

THE COURT: No, get back there, lawyer. You got your case. Get your witnesses and let's go.

MR. GRAVES: Judge, we've got an agreed order in this case.

THE COURT: Agreed order for what?

MR. GRAVES: Dismissal of the DUI; of the charges in that case.

THE COURT: No, you don't. I don't dismiss DU – get back, lawyer!

This Court does not dismiss DUI's.

Let's proceed.

MR. GRAVES: Yes, sir.

LESLIE MURPHY: I'm Leslie Murphy.

²The 18-page transcript of the court proceedings conducted on March 12, 2009, is found at three separate places in the Record, to-wit: pp. 112-129, pp. 170-187, and pp. 227-244. The replication of the transcript in the Record appears to be due to the fact that three separate cases were involved, to-wit: *State of Mississippi vs. Leslie Murphy*, Tunica County Circuit Court case number 2008-0211; *State of Mississippi vs. Justyna Zylka*, Tunica County Circuit Court case number 2008-0319; and, *State vs. Keith Allen Woods*, Tunica County Circuit Court case number 2008-0360. In this brief, citations to the transcript will be to the copy of the transcript found at pp. 112-129. The transcript will also be cited as "T." followed by the appropriate transcript page number.

THE COURT: Do what?

MR. LESLIE MURPHY: I'm Leslie Murphy.

THE COURT: Good for you. Lawyer, put your proof on.

MR. GRAVES: I call Ricky Ray.

[R. 114, T. 3]

At this point, Mr. Graves informed Judge Smith that Murphy's attorney was Robert S. ("Stan") Little, Jr., and that Little was not present in the courtroom. [R. 115, T. 4] The following then occurred:

THE COURT: Call your first witness, lawyer.

MR. GRAVES: Your Honor, do you want the defense counsel to be present?

THE COURT: Well, I tell you, when I set a case and the lawyers don't show up, they have violated the rules. So if he's the lawyer of record and he's not here, he's in contempt of my court. So that's up to him. I'm ready to proceed. I have not continued the case.

So if you are telling me that he's the lawyer of record and he is not in my court ready to proceed at this point in time this morning, then I'll hold him in –

Who is – who is the lawyer?

MR. GRAVES: Stan Little.

THE COURT: Stan Little is in contempt of my court.

MR. GRAVES: Your Honor, he's here. He's been here this morning.

THE COURT: Well, by George, he better get here or I'll send some deputies out to arrest him. I'm not going to play today, I'm here to tell you.

[R. 115-116, T. 4-5]

Mr. Graves then called Deputy Ricky Ray as his first witness and, at approximately the same moment, attorney Stan Little entered the courtroom. [R. 116, T. 5] Previously,

Judge Smith (on November 4, 2008) had entered an order which directed the State to provide discovery of a videotape of the traffic stop of Murphy to Murphy' attorney. [R. 93] Mr. Little advise Judge Smith that he had not received requested discovery (*i.e.*, the videotape) in the case, that he and Mr. Graves had "been in touch just about every day for the last two weeks about this," and that when the videotape in the case was never produced that Mr. Graves had agreed that the case should be dismissed. [R. 116-117, T. 5-6] Judge Smith then stated to Mr. Graves and Mr. Little:

This Court has not dismissed the case; has not rescheduled it for trial. Both of y'all are in contempt. I'll determine that – we'll have a hearing later as to what the sanctions will be.

[R. 117, T. 6]

Judge Smith instructed Mr. Graves to proceed, and Mr. Graves again called Deputy Ricky Ray as the State's first witness. [R. 117-118, T. 6-7] Mr. Little then again addressed Judge Smith:

MR. LITTLE: Your Honor, if I may, we still – we still have not seen the evidence on discovery. I have not viewed this videotape.

THE COURT: No motion for continuance. Nothing was done. You weren't even in court here.

MR. LITTLE: Your Honor, I have been here since 8:30. I was preparing another case for plea that the Court I believe –

THE COURT: You arguing with the Court? Now, I've got a case scheduled for trial. I do not have a motion for continuance in front of the Court. I've got the deputy right there ready to proceed. You know, I don't – I mean, what am I supposed to do?

MR. LITTLE: Your Honor, there is an agreed –

THE COURT: I can't do y'all's job for you.

MR. LITTLE: There is – your Honor, we’ve been trying to get this case ready, Mr. Graves and I, for the last two weeks. For the last two – well, for the last six months, actually, on this, and for the last two weeks we have been talking to each other.

“Have you gotten the tape today?”

“No.”

“Have you gotten the tape today?”

“No.”

Finally yesterday we said we don’t have the tape.

[R. 118-119, T. 7-8]

Mr. Little reminded Judge Smith that the case had previously been continued so that the State could provide Mr. Little and his client with the videotape, and informed Judge Smith that “[t]he tape still isn’t here” and, therefore, “the State agreed with me if the tape hadn’t been provided, that’s enough; it’s time for this case to go.” [R. 119, T. 8] Mr. Little stated to Judge Smith that “we had an agreed order waiting for the Court this morning” and that “the Court’s administrator was advised yesterday afternoon at 4:30 that that was the situation.” [R. 119, T. 8] Mr. Little stated: “*I believe Mr. Graves and I have done everything that we should have done and could have done on this case to be ready*, your Honor.” [R. 119 (emphasis added).] Mr. Little further advised Judge Smith: “I don’t know what I’m up against to defend today because I don’t have the videotape on either of my cases today.” [R. 119-120, T. 8-9]

The hearing on the Murphy case concluded at 9:40 a.m. with Judge Smith stating:

I’m not letting this go. I’ll see both of y’all. I’ve held both of you in contempt.

[R. 120, T. 9] (Judge Smith subsequently entered an order on March 25, 2009, resetting the *Leslie Kevin Murphy* case for trial on June 30, 2009. [R. 130] Judge Smith later entered an order on April 30, 2009, recusing himself from further participation in the *Leslie Kevin Murphy* case. [R. 131])

Immediately upon the conclusion of the hearing in the *Leslie Kevin Murphy* case, described *supra*, Judge Smith (at 9:40 a.m. on March 12, 2009), called the case of *State of Mississippi v. Keith Allen Woods* (Tunica County Circuit Court case number 2008-0360). [R. 121, T. 10] Again, Robert S. (“Stan”) Little, Jr., addressed Judge Smith and stated that the Woods case “is the same situation” as the Murphy case because:

I have never seen the video for the first time. I have been trying to get the video all along, your Honor. ... I don’t know the discovery in this case.

[R. 121, T. 10] The following then occurred:

THE COURT: Mr. Graves, are you ready to proceed?

MR. GRAVES: Yes, sir. I got my witnesses here, your Honor.

THE COURT: Well, I don’t see – I mean, you know, the – there was no – I mean, I’m – I set these things around coming to Tunica, so I get to Tunica and this is – What kind of case? Is this another DUI ?

MR. LITTLE: Yes, sir.

THE COURT: Graves! I –

MR. GRAVES: Sir?

THE COURT: – never see any criminal convictions for DUI up here in Tunica County. I’m not insinuating anything. But it sure – the Court is wondering about it, you know what I’m saying?

MR. GRAVES: Wondering about what, your Honor?

THE COURT: Why we don’t have any criminal convictions up here for DUI and felony; why we keep dismissing DUI’s up here. Now, what are we

wanting to do on this one, Mr. Graves? Mr. Little has said he's talked with you about this one. What do you have to say about that?

MR. GRAVES: Yes, sir. This is the same circumstances as the other case.

THE COURT: What are you wanting to do on this? Are you wanting to dismiss this one, too?

MR. GRAVES: Judge, I think he's entitled to review the tape.

[R. 121-122, T. 10-11]

The Court then asked Deputy Ricky Ray "[h]ow long is that tape" and was informed that the *Murphy* tape and the *Woods* tape each ran approximately five minutes. [R. 122, T. 11] Then Judge Smith asked:

THE COURT: Tell me this, deputy: *When was that tape requested?*

DEPUTY RICKY RAY: Uh, *I guess a couple of months ago.*

THE COURT: Why are you just now giving it to him?

DEPUTY RICKY RAY: It could have been gotten to. All [Graves] had to do was go over to the property room and get the tape, just like I did this morning.

[R. 122-123, T. 11-12 (emphasis added)]

The impropriety of a prosecutor personally taking custody of an original piece of evidence from the sheriff's department property room – and thereby breaking the chain-of-custody for the evidence – obviously never occurred to Deputy Ray, nor did it appear to occur to Judge Smith, who asked Mr. Graves "*why don't you go find your discovery in your cases?*" [R. 123, T. 12 (emphasis added)] The implication from Judge Smith's question is that instead of the investigating law enforcement agency (or officer) being responsible for making evidence available to the county prosecutor, the county prosecutor has an obligation to go to the investigating agency (or officer) and somehow take possession of evidence

personally. Notably, a county prosecutor has no authority whatsoever to direct or order a deputy sheriff to do anything; however, a county prosecutor does have the authority to request dismissal of criminal charges when an investigating agency (or officer) fails or refuses to provide discovery of evidence to a defendant and the defendant's attorney.³

In response to Judge Smith's question, Mr. Graves stated that two weeks earlier he and Mr. Little had been in court together and he had wanted Deputy Ray to show the *Leslie Kevin Murphy* and *Keith Allen Woods* tapes to Mr. Little, but Deputy Ray did not have the tapes with him at that time. [R. 123, T. 12] Judge Smith then declared to both Mr. Graves and Mr. Little:

You are both in contempt of court! You are not ready. Something is wrong in this thing. You better be ready on this thing. That's two contempts you got on the record, two cases.

[R. 124, T. 13]

The hearing on the Woods case concluded at 9:45 a.m. [R. 124, T. 13]

Immediately upon the conclusion of the hearing in the *Keith Allen Woods* case, described *supra*, Judge Smith (at 9:45 a.m. on March 12, 2009), called the case of *State of Mississippi v. Justyna Anna Zylka* (Tunica County Circuit Court case number 2008-0319). [R. 124, T. 13] When the *Zylka* case was called, Mr. Graves advised Judge Smith that Zylka's attorney was Stacey Spriggs, that Spriggs had called him on Monday (*i.e.*, March 9) and had asked Mr. Graves if Graves would agree to a continuance because he (*i.e.*, Spriggs) would be out of town, that Mr. Graves had advised Spriggs he would not object to a

³The duties of the county prosecuting attorney are set out at MISS. CODE ANN. § 19-23-11 (amended 1985).

continuance, that Mr. Graves had advised Spriggs “you need to file a motion,” and that Mr. Graves had not heard from Spriggs again. [R. 124, T. 13] The following then occurred:

THE COURT: You – all right. Now, what? He called you and what?

MR. GRAVES: He called me and said he was going to be out of town. I told him I probably wouldn’t object to it, but he needed to file a motion, and he said he was going to get in touch with the Circuit Clerk. That’s the last time I talked to him.

THE COURT: Are you – call your – you got a witness?

MR. GRAVES: Yes, sir.

THE COURT: Well, let’s see. What’s the – who is the lawyer’s name?

MR. GRAVES: Stacey Spriggs.

THE COURT: Stacey Spriggs, for the record, is in contempt of this court for failing to be present for this case. I’ll have a show cause hearing why I should not throw him – he should not be placed in jail and fined.

And I want to know what he was told; to who. There is no motion to continue in the file. So we’ve got – Let’s see, Becky. ***The County Attorney has three contempts against him.*** We’ve got – let’s see. And Spriggs – let’s see. Little has two. Spriggs has one.

Let’s proceed. Let’s proceed.

MR. GRAVES: We call Pedro Bee.

THE COURT: Trial *absentia*.

[R. 124-125, T. 13-14 (emphasis added)]

Tunica County Deputy Sheriff Pedro Bee was then sworn in as a witness and Mr. Graves commenced presentation of the State’s case-in-chief against Zylka with the direct examination of Deputy Bee. [R. 126, T. 15] During Mr. Grave’s direct examination of Deputy Bee, Judge Smith stopped the proceedings:

THE COURT: Deputy, is all the material that's in this file with regard to her being .19 and all the matters that you've testified in Justice Court true and correct to the best of your knowledge?

THE WITNESS: Yes, sir.

THE COURT: The Court finds that the defense attorney is not present to proceed and failed to follow a – file any motion to continuance. There's no reason why this case should proceed. The Court will dismiss the appeal and remand it to the Justice Court where the original conviction will stand.

So we will dismiss the appeal; reinstate the lower-court conviction.

Let's see. Spriggs is in contempt for failing to be here; failing to file a motion to continue. And I want to hear from him. I'm sure I will.

And that may have a bearing on *the two contempts* I got on you, Graves!

MR. GRAVES: Yes, sir.

THE COURT: This case is dismissed. We got a contempt on Spriggs. I'm going to dismiss this and reinstate the lower-court judgment.

MRS. REBECCA DEAN: Is Mr. Graves going to do the order?

THE COURT: No, don't let Graves do anything for us. We'll do the order.

MRS. REBECCA DEAN: Okay.

THE COURT: Now, I'm not sure – when I get through this after – before the morning is out. I'm going to – I want to see you again, Mr. Graves.

MR. GRAVES: Yes, sir.

THE COURT: And if I don't see you, I will send a deputy. In fact, *I'm going to hold you* – I think I will go ahead and sentence you to a hundred-dollar fine, two days in jail, on each count of contempt of court. *He's got to pay a hundred-dollar fine before he leaves this courtroom – before he leaves this courthouse.* And I will view that sentence. And that will be consecutive days. *So it will be four days in jail.*

It's been going on too long, Graves.

You are dismissed. I'll see you later today!

[R. 126-128, T. 15-17] The *Justyna Anna Zylka* hearing ended at 9:48 a.m. [R. 128, T. 17]

At 11:19 a.m. on March 12, 2009, Judge Smith again called the cases of *Leslie Kevin Murphy* and *Keith Allen Woods*.⁴ [R. 102-103] The following then occurred:

The Court had a session this morning of appeals from Justice Court, Circuit Court sentencings, some revocations; a couple of civil matters.

With regard to the three Justice Court criminal matters that the Court reviewed, two lawyers – or actually, three lawyers were held in contempt of court on three DUI's for failing to ask for continuances, showing up not prepared for trial; quasi-asking for continuances in this Woods case, saying that they didn't have the evidence involved. That's Keith Allen Woods.

The Court left the courtroom, *placed one lawyer in jail*; fined another. The deputy of the – with the Tunica County Sheriff's Department involved in both cases was in the courthouse. The Court talked to him and he is now on the record.

[R. 103-104 (emphasis added)]

Judge Smith then conducted a direct on-the-record examination of Deputy Ricky Ray:

Q. Now, are you aware that this – these cases were set for trial today?

A. Yes, sir.

Q. Were you further aware – and the Court was only made aware this morning – that these cases were either going to be continued or dismissed? I'm not sure really what the two lawyers asked. Once I told them they couldn't continue it without approval of the Court, they said something about having dismissal.

Do you know anything about those cases and continuances or dismissal or failure to have the evidence?

⁴The 10-page transcript of these proceedings is found in the Record twice, at pp. 102-111 and pp. 217-226. Again, this appears to be because two separate cases were involved, to-wit: *State of Mississippi vs. Leslie Murphy*, Tunica County Circuit Court case number 2008-0211; and, *State vs. Keith Allen Woods*, Tunica County Circuit Court case number 2008-0360. In this brief, citations to this transcript will be to the copy of the transcript found at pp. 102-111.

A. Yes, sir.

Q. What's that?

A. Chuck Graves advised me, before the court, that they was going to throw the case out. They had already discussed the case together. Said he was going to dismiss the case for not having the evidence, and not giving him a chance to see the evidence or something.

Q. Not what?

A. Not giving him a chance to see the evidence. He said he was going to throw it out for –

Q. Who said that?

A. Chuck Graves. He was going to dismiss the case. He had already spoke to Stan Little, and they was going to dismiss the case.

[R.104-105]

Ricky Ray further testified:

Q. Okay. Was there any reason why the evidence or the – and I believe it was the tapes in both cases that the lawyers said that they didn't have. Why didn't they have them?

Deputy Ray, did you fail to do something that you were supposed to do?

A. No, sir. They could – the tapes were over at the property room. It don't take – all you got to do is get with the property room clerk and she'll get the tapes for you. Last week when I was in court on them other DUI's, he said something about he wanted to see the tape. He told Mr. Chuck Graves about the tape. And I think –

Q. Who told somebody about the tape?

A. Mr. Stan Little. He wanted to see the tape on Murphy. About these appeals that came up today, he wanted to see the tape.

Q. Where –

A. And all he had to do is, if he wanted to see them, I think they was fixing to go to lunch or something and –

Q. Who was going to go to lunch?

A. The – the clerk was going to go out – the property clerk. And after 1 o'clock. He could have gotten the tapes, after lunch.

[R. 107]

Deputy Ray testified that there were actually two separate videotapes in the *Leslie Kevin Murphy* case and one videotape in the *Keith Allen Woods* case, testifying:

A. Well, I got both tapes. I got one with Woods and one with Murphy. Murphy got two tapes in here on two vehicles, and it's on one vehicle. So we had evidence. *All they had to do was pick it up, you know.*

Q. Are there copies of those tapes?

A. *No, these are the originals.*

Q. Can you make copies?

A. Yeah, we can get them out of the crime lab – investigations.

[R. 108 (emphasis added)] Thus, it was the testimony of Deputy Ray that the way for the county prosecutor and the defendant's attorney to obtain discovery in the *Leslie Kevin Murphy* case and in the *Keith Allen Woods* case was for them to go to the take possession of *the original tapes* from the property room clerk.

During the proceedings earlier in the day (when the case of *Leslie Kevin Murphy* had been called at 9:32 a.m.), Judge Smith had remarked:

It sure is funny all these DUI's up here in Tunica County. I – it sure, sure is funny we can't get the evidence for these dadgum things.

[R. 120, T. 9] Judge Smith had also remarked:

THE COURT: – never see any criminal convictions for DUI up here in Tunica County. *I'm not insinuating anything.* But it sure – *the Court is wondering about it*, you know what I'm saying?

MR. GRAVES: Wondering about what, your honor?

THE COURT: Why we don't have any criminal convictions up here for DUI and felony; why we keep dismissing DUI's up here.

[R. 121-122, T. 10-11 (emphasis added)] Judge Smith had also stated to Graves and Little:

"Something is wrong in this thing." [R. 124, T. 13]

Judge Smith also asked Deputy Ray:

Q. *Did it appear there was double-talk to you, or am I just imagining things, Mr. Ray?*

A. *No, there's something going on.* Like I said, when I came – before you came out, he said the case had already been dismissed.

Q. Who said that?

A. Chuck Graves said that they were going to dismiss the case.

Q. That I was going to dismiss –

A. They had discussed –

Q. Huh?

A. – that they was going to dismiss it.

Q. That he was or I was?

A. No. He said that he already discussed it with Stan Little that he was going to dismiss the case, before you came out.

Q. Okay. Thank you, sir.

[R. 109-110 (emphasis added)] This hearing concluded at 11:29 a.m. on March 12, 2009.

[R. 110]

Later on March 12, 2009, Judge Smith signed three separate orders holding Charles B. Graves, Jr., in contempt. The orders were entered in the *Leslie Kevin Murphy* case, the *Keith Allen Woods* case, and the *Justyna Anna Zylka* case. These orders are found in the Record at, respectively, pp. 99-101 (*Murphy*), pp. 165-167 (*Zylka*), and pp. 212-214 (*Woods*). As previously noted, *supra*, except for the case style at the top of each of the aforesaid orders, all three of the aforesaid orders are verbatim with each other. The orders state, *in toto*, as follows, to-wit:

This citation for contempt arose pursuant to three justice court cases appealed to the Circuit Court and set for March 12, 2009 by its Orders dated January 27, 2009.

The Court appeared and the Honorable Charles B. Graves, Tunica County Prosecutor, approached the bench in State v. Leslie Murphy, Cause No. 2008-0211 and announced that it had an order to dismiss. The Court informed the [sic] Mr. Graves that it would not sign the order of dismissal in a DUI case and informed him that this matter would proceed to trial. The Honorable Stan Little, attorney for the Defendant, was found in the courthouse and asked if he was ready for trial in this matter. He responded that he was not ready because he had not received the tape in the case. The Court had earlier ordered on November 4, 2008, that the State was to comply with the rules of discovery and provide the videotape of the traffic stop in question and admonished the State and Mr. Little to be ready for trial upon the next court setting. The officer was called and indicated that he had the tape and that the Prosecutor could also have obtained the tape as ordered by the Court in its November 4, 2008, order.

This Court hereby finds that both Mr. Graves and Mr. Little failed to adequately prepare for this case wholly [sic] failed to follow this Court's previous order in this matter. Neither attorney requested a continuance as required nor did Mr. Little request a Motion Compel Production of Evidence. It is also noted that the arresting officer stated that either attorney could have obtained or viewed the tape.

Therefore, the Court finds that Mr. Graves and Mr. Little are hereby in contempt of this Court by failing to follow its previous order.

Further, Mr. Little failed to request a continuance as required by Uniform Rules of Circuit and County Court Practice 2.03, nor did he request

a Motion to Compel Production of Evidence, thereby failing to abide by the previous mandate of this Court to be prepared when he has a trial set.

In State v. Keith Allen Woods, Cause No. 2008-0360, both Mr. Little and Mr. Graves again indicated they had an order of dismissal. When the Court refused to sign the order and requested the case to proceed, Mr. Little said he had not reviewed the tape. It was clear to the Court that due diligence was not followed by either attorney in that neither had asked for a continuance as required, nor requested a Motion to Compel Production of Evidence, nor obtained or viewed the tape which the arresting officer said that either attorney could have obtained. The evidence was readily available to both attorneys through the testimony of Deputy Ray of the Tunica County Sheriff's Department. The attorneys expected the court to sign two orders of dismissal rather than try the cases when the evidence was readily available to both. This Court cannot properly clear the docket when its orders are not followed nor when the practicing attorneys fail to follow the rules.

Further, Mr. Graves assumed the Court would continue a third DUI case also set for today, State v. Justyna Zylka, Cause No. 2008-0319. The case was orally continued by Mr. Graves without prior approval of the Court. Mr. Graves failed to be prepared for trial in that matter also.

Accordingly, for said conduct evidencing contempt of this Court, the Court will assess a \$100 fine against both attorneys and additionally assess Mr. Graves two (2) days in jail for failure to follow the November 4, 2008, order in Cause No. 2008-0211, a copy of which is attached hereto.

SO ORDERED this the 12 day of March, 2009.

/s/ Albert B. Smith III
Circuit Court Judge

[R. 97-99.]

After Judge Smith entered the aforesaid orders, Judge Smith signed additional orders which state, *in toto*, as follows:

This matter comes before the Court pursuant to an order of contempt entered this day against Charles B. Graves.

The Court hereby modifies its previous order and sentences Charles B. Graves to time served in the Tunica County Jail, along with the \$100.00 fine.

Mr. Graves is to be released from custody immediately.

SO ORDERED this the 12 day of March, 2009.

/s/ Albert B. Smith, III
Circuit Court Judge

[R. 100.] Again, except for the style of the case at the top of each order, these orders are verbatim with each other, and were filed in the *Leslie Kevin Murphy* case, the *Justyna Anna Zylka* case, and the *Keith Allen Woods* case. [R. 100, 168, 215; respectively.]

Also on March 12, 2009, Judge Smith entered an *Order to Show Cause* in the *Justyna Anna Zylka* case which commanded Zylka's attorney, Stacey A. Spriggs, to appear before Judge Smith on March 31, 2009, "and then and there show cause, if he can, why he should not be held in contempt of this Court" [R. 164.]

Notably, Judge Smith never conducted a hearing in which the Appellant, Charles B. Graves, Jr., was afforded any opportunity to show cause why he should not be held in contempt.

* * * * *

III. SUMMARY OF THE ARGUMENT

- Issue 1:** **Mr. Graves' conduct did not constitute contempt.**
- Issue 2:** **There is no proof beyond a reasonable doubt that Mr. Graves willfully and deliberately violated any orders of Judge Smith.**
- Issue 3:** **There is no proof beyond a reasonable doubt that Mr. Graves committed any act, or failed to commit any act, which rises to the level of contempt.**
- Issue 4:** **The trial court violated Mr. Graves' due process rights.**

The record wholly fails to demonstrate any evidence whatsoever that Mr. Graves, the Appellant, was guilty of contempt with regard to the proceedings in *State of Mississippi vs. Justyna Zylka* (Tunica County Circuit Court case number 2008-0319). Judge Smith's contempt finding in *Zylka* states that Mr. Graves agreed to continue the case without court approval and that Mr. Graves was not prepared for the trial of the case. The record demonstrates that these findings are incorrect, and, therefore, there is no basis for the charge of contempt against Mr. Graves in *Zylka* and the finding of contempt in that matter should be reversed.

The record also fails to demonstrate that Mr. Graves, the Appellant, was guilty of contempt with regard to the proceedings in *State of Mississippi vs. Leslie Murphy* (Tunica County Circuit Court case number 2008-0211) and in *State vs. Keith Allen Woods* (Tunica County Circuit Court case number 2008-0360). While the record indicates that videotapes of the arrests in those cases were never provided to the defense attorney, nothing in the record indicates that Mr. Graves willfully and intentionally violated Judge Smith's order regarding discovery of the videotapes. In fact, the record (through the testimony of Deputy

Ray and through on-the-record statements from the defense attorney) indicates that Mr. Graves attempted to provide the videotapes to the defense but was unable to do so. Thus, proof that Mr. Graves is guilty of contempt “beyond a reasonable doubt” cannot be found in the record, and the finding of contempt in *Leslie Murphy* and in *Keith Allen Woods* should be reversed.

Furthermore, because the contempt, if any, was “constructive criminal contempt,” Mr. Graves was entitled to due process rights which were never afforded to him, and, for this reason, the finding of contempt in *Leslie Murphy* and in *Keith Allen Woods* should be reversed.

* * * * *

IV. ARGUMENT

A. STANDARD OF REVIEW

The standard of review of the case *sub judice* is *ab initio*.

The case *sub judice* involves an appeal of an order holding the Appellant, Charles B. Graves, Jr., in contempt. There are, however, two separate classes of contempt, “civil contempt” and “criminal contempt,” and there are different standards of review for each. For civil contempt, the standard of review is “manifest error.” *Dennis v. Dennis*, No. 2001-CA-01402-SCT, 824 So.2d 604, 608 (¶ 7) (Miss. 2002). For criminal contempt, appellate courts review the record “*ab initio* and determine on the record whether the person in contempt is guilty of contempt beyond a reasonable doubt.” *Dennis*, 824 So.2d at 608 (¶ 7) (citing *Purvis v. Purvis*, 657 So.2d 794, 797 (Miss.1994)).

Civil contempt occurs where “the primary purpose of the contempt order is to enforce the rights of private party litigants or enforce compliance with a court order” *Dennis*, 824

So.2d at 608 (¶ 8). Criminal contempt is “designed to punish the defendant for disobedience of a court order; punishment is for past offenses and does not terminate upon compliance with court order.” *Dennis*, 824 So.2d at 608 (¶ 8).

The order holding the Appellant in contempt recites that “Mr. Graves ... [is] hereby in contempt of this Court by failing to follow its previous order” and assesses a fine against the Appellant as well as a sentence of incarceration in jail for two (2) days. [R. 97-99.] This order, on its face, is “designed to punish the [Mr. Graves] for disobedience of a court order” and the punishment “does not terminate upon compliance with [the] court order.” Therefore, the case *sub judice* is a matter of criminal contempt, and the appropriate standard of review is “*ab initio* and [the appellate court must] determine on the record whether the person in contempt is guilty of contempt beyond a reasonable doubt.” *Dennis*, 824 So.2d at 608 (¶ 7). See also *Terry v. State*, Nos. 94-KA-00528-SCT, 718 So.2d 1097, 1102-1103 (¶¶ 23-24) (Miss. 1998).

* * *

B. DIRECT OR CONSTRUCTIVE CONTEMPT?

There are two forms of criminal contempt, “direct contempt” and “constructive contempt,” and there are different procedural requirements for direct contempt vis-à-vis constructive contempt.

Direct contempt “occurs in the presence of the court and may be dealt with immediately.” *Dennis*, 824 So.2d at 608 (¶ 10). The Mississippi Supreme Court has stated:

There are two forms of criminal contempt: direct and constructive. Direct criminal contempt involves words spoken or actions committed in the presence of the court that are calculated to embarrass or prevent the orderly administration of justice. *Varvaris v. State*, 512 So.2d 886, 887 (Miss.1987). Punishment for direct contempt may be meted out instantly by the judge in

whose presence the offensive conduct was committed, though we have stated that it is wise for a judge faced with personal attacks to wait until the end of the proceedings and have another judge take his place. *Purvis v. Purvis*, 657 So.2d 794, 798 (Miss.1995) (citing *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-64, 91 S.Ct. 499, 504, 27 L.Ed.2d 532 (1971)).

Moulds v. Bradley, No. 1999-CA-00994-SCT, 791 So.2d 220, 224-225 (§ 7) (Miss. 2001).

Constructive contempt, on the other hand, “occurs outside the presence of the court, and the defendant must be provided notice and a hearing.” *Dennis*, 824 So.2d at 608 (§ 10).

The Mississippi Supreme Court has stated:

Unlike direct contempt, constructive contempt involves actions which are committed outside the presence of the court. *Coleman v. State*, 482 So.2d 221, 222 (Miss.1986); *Wood v. State*, 227 So.2d 288 (Miss.1969). ... In the case of constructive criminal contempt, we have held that defendants must be provided with procedural due process safeguards, including a specification of charges, notice, and a hearing. *Purvis*, 657 So.2d at 798 (citing *Wood*, 227 So.2d at 290).

Moulds, 791 So.2d at 225 (§ 8).

Where it is unclear whether the alleged contempt is direct or constructive, the Mississippi Supreme Court has stated “[t]his Court will normally favor finding that the contemnor’s actions involved constructive contempt when there is a legitimate issue as to whether the contemnor has committed constructive or direct contempt *since constructive contempt requires a specification of charges, notice and a hearing*. *Wood*, 227 So.2d at 290.” *Purvis v. Purvis*, 657 So.2d 794, 798 (Miss. 1994) (emphasis added). See also *In Interest of Holmes*, 355 So.2d 677 (Miss. 1978) (“We have previously held that where there is doubt whether the alleged contempt was direct or constructive, it should be regarded as the latter.” (citing *Wood v. State*, 227 So.2d 288 (Miss.1969))).

Mr. Graves, the Appellant, does not believe that the record in the case *sub judice* reflects any conduct which could be described as “direct contempt.” Direct contempt has

been described as “acts directed against the dignity of the court, which may involve ‘words spoken or actions committed in the presence of the court that are calculated to embarrass or prevent the orderly administration of justice.’” *Bolton v. State*, No. 1998-KA-01151-COA, 752 So.2d 480, 488 (¶ 40) (Miss. App.1999) (quoting *Purvis v. Purvis*, 657 So.2d 794, 797 (Miss.1994)). In the case *sub judice* there were no “acts directed against the dignity of the court” and there were no “words spoken or actions committed in the presence of the court” which were “calculated to embarrass or prevent the orderly administration of justice” in matters pending before the Circuit Court of Tunica County.

The record reflects that Mr. Graves, the Appellant, in his official capacity, approached the bench in the *Leslie Murphy* case and tendered an agreed order to dismiss the case and that when Judge Smith stated “This Court does not dismiss DUI’s” and instructed Mr. Graves to proceed and “put on your proof” that Mr. Graves replied “Yes, sir” and called for his first witness and the witness came forward and was sworn. [R. 114-116.] In the *Leslie Murphy* case, Mr. Graves committed no acts and uttered no words in the presence of Judge Smith which fit within the definition of “direct criminal contempt.”

The record reflects that Judge Smith called the *Keith Allen Woods* case and asked: “Mr. Graves, are you ready to proceed?” To which Mr. Graves replied: “Yes, sir. I got my witnesses here, your Honor.” [R. 121.] When Judge Smith queried Mr. Graves whether the videotape of the arrest had been exhibited to the defendant’s attorney, Mr. Graves explained:

Judge, I met with the officer and Mr. Little in court about two weeks ago. He had the tape with him then. We agreed to let him show the tapes at that time, both cases. I didn’t have to have the tapes. The officer was there and the videotape. The plaintiff was there.

[R. 124. T. 13] In the *Keith Allen Woods* case, as in the *Leslie Murphy* case, Mr. Graves committed no acts and uttered no words in the presence of Judge Smith which fit within the definition of “direct criminal contempt.”

The record reflects that Judge Smith called the *Justyna Zylka* case and was informed by Mr. Graves that the defendant’s attorney had asked if there would be any objection to a continuance, to-wit:

MR. GRAVES: ... The attorney on the other side is Stacey Spriggs from Hernando. He called me I think Monday and said he was going to be out of town and asked if I would object to a continuance. I said I didn’t think I would, “But you need to file a motion.” He told me he would be in touch with the Circuit Clerk. I have not heard from him since that time, your Honor.

THE COURT: You – all right. Now, what? He called you and what?

MR. GRAVES: He called me and said he was going to be out of town. I told him I probably wouldn’t object to it, but he needed to file a motion, and he said he was going to get in touch with the Circuit Clerk. That’s the last time I talked to him.

[R. 124-125. T. 13.] Judge Smith then instructed Mr. Graves to continue with presentation of evidence in the *Justyna Zylka* case for a “Trial *absentia*” and Mr. Graves called the State’s first witness and began presentation of the evidence against the defendant. [R. 125-126. T. 14-15.] Again, as in the *Leslie Murphy* case and the *Keith Allen Woods* case, Mr. Graves committed no acts and uttered no words in the presence of Judge Smith which fit within the definition of “direct criminal contempt.”

Mr. Graves, the Appellant, asserts to this Court that because there is no basis in the record to support a finding of “direct criminal contempt” that any contempt which may have occurred in the case *sub judice* falls into the category of “constructive contempt.”

* * *

**C. PROCEDURAL AND DUE PROCESS REQUIREMENTS IN
CONSTRUCTIVE CONTEMPT PROCEEDINGS**

As previously discussed, *supra*, “[p]unishment for direct [criminal] contempt may be meted out instantly by the judge in whose presence the offensive conduct was committed” *Moulds v. Bradley*, No. 1999-CA-00994-SCT, 791 So.2d 220, 224 (¶ 7) (Miss. 2001) (citing *Purvis v. Purvis*, 657 So.2d 794, 798 (Miss.1995)).

“Constructive criminal contempt,” however, may not be summarily punished by the judge because “constructive contempt involves actions which are committed outside the presence of the court” and such acts must, therefore, be proven to have occurred and proven to have been willfully committed by the person who is alleged to be in contempt. *Moulds*, 791 So.2d at 225 (¶ 8). The proof must establish that the person who is cited for constructive criminal contempt “is guilty of contempt beyond a reasonable doubt.” See, *e.g.*, *In re Williamson*, Nos. 2001-IA-00105-SCT, 838 So.2d 226, 237 (¶ 29) (Miss. 2002); *Terry v. State*, No. 94-KA-00528-SCT, 718 So.2d 1097, 1103 (¶ 24) (Miss. 1998) (“In a proceeding for criminal contempt, evidence of guilt must be established beyond a reasonable doubt”); and, *In re Smith*, No. 2005-CP-00415-SCT, 926 So.2d 878, 886 (¶ 9) (Miss. 2006.) (“In a proceeding for criminal contempt, evidence of guilt must be established beyond a reasonable doubt.”). In *Brame v. State*, No. 97-CT-01103-SCT, 755 So.2d 1090, 1094 (¶ 13) (Miss. 2000), the Mississippi Supreme Court stated:

In *Mizell v. Mizell*, 708 So.2d 55 (Miss.1998), we explained:

Contempt can only be willful. “A contempt citation is proper only when the contemner has **wilfully and deliberately** ignored the order of the court.” *Cooper v. Keyes*, 510 So.2d 518, 519 (Miss.1987), citing *Millis v. State*, 106 Miss. 131, 63 So. 344 (1913). It is a defense to a contempt proceeding that the person was not guilty of willful or deliberate violations of

a prior judgment or decree. *Dunaway v. Busbin*, 498 So.2d 1218 (Miss.1986).

Mizell, 708 So.2d at 64 (emphasis added).

See also *Terry v. State*, No. 94-KA-00528-SCT, 718 So.2d 1097, 1103 (¶ 28) (Miss. 1998) (“There is an implication for a requirement of *intentional* defiance of the court or a *willful* act on the part of the contemnor. *Prestwood v. Hambrick*, 308 So.2d 82, 84 (Miss.1975) (emphasis added).”)

A person who is charged with constructive criminal contempt is entitled to constitutional due process protections and safeguards, including being informed of the specific basis for the charge of contempt, notice of the charge, and a hearing wherein a defense to the charges may be offered. See *e.g.*, *Davis v. Davis*, No. 2007-CA-01215-COA, – So.2d –, 2009 WL 447242 (¶ 27) (Miss. App. 2009, *cert. denied* Sept. 17, 2009) (“...in constructive criminal contempt matters, defendants are afforded certain procedural due process safeguards, namely: a specification of the charges, notice, and an opportunity to be heard.”), and *In re Spencer*, No. 2006-CA-00735-SCT, 985 So.2d 330, 340 (¶ 33) (Miss. 2008) (“To hold a contemnor in contempt, the contemnor must be provided a specification of the charges against him, notice, and a hearing.”). See also *Dennis v. Dennis*, No. 2001-CA-01402-SCT, 824 So.2d 604, 609 (¶ 11) (Miss. 2002), to-wit:

A defendant in contempt proceedings is entitled to notice and is entitled to be informed of the nature and cause of the accusation, of his rights to be heard, to counsel, to call witnesses, to an unbiased judge, to a jury trial, and against self-incrimination, and that he is presumed innocent until proven guilty beyond reasonable doubt.

Contempt convictions are carefully examined by the appellate courts of Mississippi.

See, *e.g.*, *In re Smith*, No. 2005-CP-00415-SCT, 926 So.2d 878, 887 (¶ 13) (Miss. 2006)

(citing *Melvin v. State*, 210 Miss. 132, 48 So.2d 856 (1950)). The burden of proof to establish that contempt has occurred is on the party asserting that contempt has been committed. *Terry v. State*, Nos. 94-KA-00528-SCT, 718 So.2d 1097, 1103 (¶ 24) (Miss.1998) (“The burden of proof to establish that contempt has been committed is on the party that is asserting that it has.”) See also *Brame v. State*, No. 97-CT-01103-SCT, 755 So.2d 1090, 1093 (¶ 11) (Miss. 2000) (quoting *Terry v. State*); *In re Hampton*, No. 2004-KM-01089-SCT, 919 So.2d 949, 954 (¶ 13) (Miss. 2006) (citing *Brame v. State*).

Where the judge who is presiding over the matter in which the alleged contempt occurred becomes involved in the prosecution of the contempt, the impartiality of the judge comes into question and, for this reason, the matter should be heard by another judge. See, e.g., *Terry v. State*, No. 94-KA-00528-SCT, 718 So.2d 1097, 1104-11-5 (¶ 37) (Miss. 1998) (“It is necessary for the individual to be tried by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution.”); *Purvis v. Purvis*, 657 So.2d 794 (Miss. 1994) (“It is necessary to try the individual by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution.” (citing *Varvaris v. State*, 512 So.2d 886, 888 (Miss.1987))); and, *Dennis v. Dennis*, No. 2001-CA-01402-SCT, 824 So.2d 604, 609 (¶ 11) (Miss. 2002) (“A defendant in contempt proceedings is entitled to ... an unbiased judge ... and that he is presumed innocent until proven guilty beyond reasonable doubt.”). See also *Mayberry v. Pennsylvania*, 400 U.S. 455, 466, 91 S.Ct. 499, 505, 27 L.Ed.2d 532 (1971) (“... by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.”).

D. *ASSIGNMENTS OF ERROR*

Issue 1: Mr. Graves' conduct did not constitute contempt.

Issue 2: There is no proof beyond a reasonable doubt that Mr. Graves willfully and deliberately violated any orders of Judge Smith.

Issue 3: There is no proof beyond a reasonable doubt that Mr. Graves committed any act, or failed to commit any act, which rises to the level of contempt.

Issue 4: The trial court violated Mr. Graves' due process rights.

Because the contempt charges against Mr. Graves, the Appellant, are intertwined in three separate matters, and because the pertinent part of the record is fairly brief, all of the aforestated assignments of error will be discussed together. As previously discussed, *supra*, this appeal arises from three separate orders entered by Tunica County Circuit Court Judge Albert B. Smith, III, which adjudicated that the Appellant, Charles B. Graves, Jr., who is the County Prosecuting Attorney for Tunica County, was in contempt in three separate cases which were appealed from justice court to the Circuit Court of Tunica County. These three orders were entered in the following cases, to-wit: *State of Mississippi vs. Leslie Murphy*, Tunica County Circuit Court case number 2008-0211; *State of Mississippi vs. Justyna Zylka*, Tunica County Circuit Court case number 2008-0319; and, *State vs. Keith Allen Woods*, Tunica County Circuit Court case number 2008-0360. These orders are found in the Record herein at, respectively, pp. 99-101 (*Murphy*), pp. 165-167 (*Zylka*), and pp. 212-214 (*Woods*).⁵

⁵In this brief, citations to the Record will be denominated as "R." followed by the appropriate page number.

Except for the case style at the top of each of the aforesaid orders, all three of the aforesaid orders are verbatim with each other. Pursuant to the aforesaid contempt orders, Graves was fined and incarcerated.⁶ [R. 99-101.]

The contempt orders state, *in toto*, as follows, to-wit:

This citation for contempt arose pursuant to three justice court cases appealed to the Circuit Court and set for March 12, 2009 by its Orders dated January 27, 2009.

The Court appeared and the Honorable Charles B. Graves, Tunica County Prosecutor, approached the bench in *State v. Leslie Murphy*, Cause No. 2008-0211 and announced that it had an order to dismiss. The Court informed the [sic] Mr. Graves that it would not sign the order of dismissal in a DUI case and informed him that this matter would proceed to trial. The Honorable Stan Little, attorney for the Defendant, was found in the courthouse and asked if he was ready for trial in this matter. He responded that he was not ready because he had not received the tape in the case. The Court had earlier ordered on November 4, 2008, that the State was to comply with the rules of discovery and provide the videotape of the traffic stop in question and admonished the State and Mr. Little to be ready for trial upon the next court setting. The officer was called and indicated that he had the tape and that the Prosecutor could also have obtained the tape as ordered by the Court in its November 4, 2008, order.

This Court hereby finds that both Mr. Graves and Mr. Little failed to adequately prepare for this case wholly [sic] failed to follow this Court's previous order in this matter. Neither attorney requested a continuance as required nor did Mr. Little request a Motion Compel Production of Evidence. It is also noted that the arresting officer stated that either attorney could have obtained or viewed the tape.

Therefore, the Court finds that Mr. Graves and Mr. Little are hereby in contempt of this Court by failing to follow its previous order.

Further, Mr. Little failed to request a continuance as required by Uniform Rules of Circuit and County Court Practice 2.03, nor did he request

⁶Subsequent to the entry of the orders aforesaid, Judge Smith entered three additional orders in the same three cases (which, again, except for the style of the case at the top of each order are verbatim with each other) which reduced the fine and sentence of incarceration. [R. 100, 168, 215; respectively.]

a Motion to Compel Production of Evidence, thereby failing to abide by the previous mandate of this Court to be prepared when he has a trial set.

In State v. Keith Allen Woods, Cause No. 2008-0360, both Mr. Little and Mr. Graves again indicated they had an order of dismissal. When the Court refused to sign the order and requested the case to proceed, Mr. Little said he had not reviewed the tape. It was clear to the Court that due diligence was not followed by either attorney in that neither had asked for a continuance as required, nor requested a Motion to Compel Production of Evidence, nor obtained or viewed the tape which the arresting officer said that either attorney could have obtained. The evidence was readily available to both attorneys through the testimony of Deputy Ray of the Tunica County Sheriff's Department. The attorneys expected the court to sign two orders of dismissal rather than try the cases when the evidence was readily available to both. This Court cannot properly clear the docket when its orders are not followed nor when the practicing attorneys fail to follow the rules.

Further, Mr. Graves assumed the Court would continue a third DUI case also set for today, State v. Justyna Zylka, Cause No. 2008-0319. The case was orally continued by Mr. Graves without prior approval of the Court. Mr. Graves failed to be prepared for trial in that matter also.

Accordingly, for said conduct evidencing contempt of this Court, the Court will assess a \$100 fine against both attorneys and additionally assess Mr. Graves two (2) days in jail for failure to follow the November 4, 2008, order in Cause No. 2008-0211, a copy of which is attached hereto.

SO ORDERED this the 12 day of March, 2009.

/s/ Albert B. Smith III
Circuit Court Judge

[R. 97-99.]

Thus, as is apparent on the face of the orders, the charge of contempt against Mr. Graves, the Appellant, is based upon Judge Smith's finding that "Mr. Graves ... failed to adequately prepare for this case wholly [sic] failed to follow this Court's previous order in this matter" which was the "November 4, 2008, [order directing] that the State was to comply with the rules of discovery and provide the videotape of the traffic stop in question" to the attorney for the defendants in *State of Mississippi vs. Leslie Murphy* (Tunica County Circuit

Court case number 2008-0211) and in *State vs. Keith Allen Woods* (Tunica County Circuit Court case number 2008-0360). Also, again as reflected on the face of the orders, the charge of contempt against Mr. Graves, the Appellant, in *State of Mississippi vs. Justyna Zylka* (Tunica County Circuit Court case number 2008-0319) is based upon Judge Smith finding that:

The case was orally continued by Mr. Graves without prior approval of the Court. Mr. Graves failed to be prepared for trial in that matter also.

With regard to the finding of contempt in *State of Mississippi vs. Justyna Zylka*, the record herein provides no factual basis whatsoever for Judge Smith's ruling. The record reflects that Mr. Graves was contacted by Zylka's attorney, that Zylka's attorney told Mr. Graves he (Spriggs) needed a continuance in the case, that Mr. Graves told Zylka's attorney that he "probably wouldn't object to [the continuance]," and that Mr. Graves told Zylka's attorney that "he needed to file a motion." [R. 124-125. T. 13-14.] The record in the *Zylka* case further reflects that when Judge Smith called the *Zylka* case that Mr. Graves called Deputy Pedro Bell as his first witness and proceeded to present the State's case-in-chief until the proceedings were halted by Judge Smith. [R. 125-126. T. 14-16.] Thus, there is no basis in the record for Judge Smith's finding that the *Zylka* case "was orally continued by Mr. Graves without prior approval of the Court," and there is no basis whatsoever for Judge Smith's finding that "Mr. Graves failed to be prepared for trial" in the *Zylka* case. As previously discussed, *supra*, a finding of criminal contempt must be supported by facts which demonstrate "beyond a reasonable doubt" that the contempt did, in fact, occur. Mr. Graves, the Appellant, would state and show unto this Honorable Court that because there are no

facts to support a finding of criminal contempt against Mr. Graves with regard to the *Zylka* case, Judge Smith's finding of contempt in the *Zylka* case should be reversed.

With regard to Judge Smith's finding of contempt by Mr. Graves in *State of Mississippi vs. Leslie Murphy* and in *State vs. Keith Allen Woods*, the judge's principal complaint is that Mr. Graves may have violated Judge Smith's "November 4, 2008, [order directing] that the State was to comply with the rules of discovery and provide the videotape of the traffic stop in question" to the attorney for the defendants. While the record does reflect that the defendants' attorney (both defendants were represented by Robert S. ("Stan") Little, Jr. (MS # 100579)) was never provided with any videotape in either case, as has been discussed, *supra*, facts must demonstrate "beyond a reasonable doubt" that Mr. Graves 'wilfully and deliberately ignored the order of the court.' However, a proper hearing to determine why the videotapes were never provided to the defendants' attorney was never conducted. As was previously discussed, *supra*:

A defendant in contempt proceedings is entitled to notice and is entitled to be informed of the nature and cause of the accusation, of his rights to be heard, to counsel, to call witnesses, to an unbiased judge, to a jury trial, and against self-incrimination, and that he is presumed innocent until proven guilty beyond reasonable doubt.

Dennis v. Dennis, No. 2001-CA-01402-SCT, 824 So.2d 604, 609 (¶ 11) (Miss. 2002). Mr. Graves was never afforded notice or a hearing in which Mr. Graves could offer a defense.

Judge Smith did convene a hearing in which Judge Smith examined Deputy Ricky Ray under oath concerning the videotapes in the *Leslie Murphy* and *Keith Allen Woods* cases; however, Mr. Graves was not given notice of this proceeding, Mr. Graves was not present for this proceeding, Mr. Graves was afforded no opportunity to question Deputy Ray, and Mr. Graves was afforded no opportunity to present facts or witnesses in his defense. Thus,

the hearing in which Judge Smith elicited testimony from Deputy Ray wholly failed to meet the due process requirements discussed in *Davis v. Davis*, No. 2007-CA-01215-COA, – So.2d –, 2009 WL 447242 (§ 27) (Miss. App. 2009, *cert. denied* Sept. 17, 2009) (“...in constructive criminal contempt matters, defendants are afforded certain procedural due process safeguards, namely: a specification of the charges, notice, and an opportunity to be heard.”), in *In re Spencer*, No. 2006-CA-00735-SCT, 985 So.2d 330, 340 (§ 33) (Miss. 2008) (“To hold a contemnor in contempt, the contemnor must be provided a specification of the charges against him, notice, and a hearing.”), and in *Dennis v. Dennis*, No. 2001-CA-01402-SCT, 824 So.2d 604, 609 (§ 11) (Miss. 2002).

Because of the failure to provide Mr. Graves with due process with regard to the *Leslie Murphy* and *Keith Allen Woods* cases, Judge Smith’s finding of contempt in the *Leslie Murphy* and *Keith Allen Woods* cases should be reversed.

The very fact that Judge Smith had to convene a hearing and receive testimony from Deputy Ricky Ray regarding Mr. Graves’ action (or lack of action) in providing the videotape evidence underscores the fact that the nature of the contempt alleged against Mr. Graves is “constructive contempt” and not “direct contempt” – Judge Smith had to receive evidence concerning events which did not occur within his presence – and, therefore, there should be no question that Mr. Graves was entitled to the full due process rights described in *Davis v. Davis*, in *In re Spencer*, and in *Dennis v. Dennis*. Notably, Deputy Ray testified that Mr. Graves had, in fact, sought to obtain the videotapes and provide them to the defendants’ attorney, but that the videotapes had to be obtained from “the property clerk” who was absent at the time. [R. 107-108. T. 6-7.] Deputy Ray’s testimony, at the very least, suggests that Mr. Graves *is not guilty* of intentional defiance of Judge Smith and *is not guilty* of willfully

violating Judge Smith's order, and, therefore, it was not proper for Mr. Graves to have been held in contempt. See, e.g., In *Brame v. State*, No. 97-CT-01103-SCT, 755 So.2d 1090, 1094 (¶ 13) (Miss. 2000) (quoting *Mizell v. Mizell*, 708 So.2d 55 (Miss.1998)) and *Terry v. State*, No. 94-KA-00528-SCT, 718 So.2d 1097, 1103 (¶ 28) (Miss. 1998) ("There is an implication for a requirement of *intentional* defiance of the court or a *willful* act on the part of the contemnor. *Prestwood v. Hambrick*, 308 So.2d 82, 84 (Miss.1975) (emphasis added).").

Furthermore, for all practical purposes Judge Smith assumed the role of prosecutor during the hearing in which Judge Smith conducted the examination of Deputy Ricky Ray. Thus, Judge Smith engaged in "substantial personal involvement in the prosecution" of the contempt against Mr. Graves. As has been previously discussed, *supra*, due process requires that a judge other than Judge Smith decide the question of contempt with regard to the *Leslie Murphy* and *Keith Allen Woods* cases. See, e.g., *Terry v. State*, No. 94-KA-00528-SCT, 718 So.2d 1097, 1104-11-5 (¶ 37) (Miss. 1998) ("It is necessary for the individual to be tried by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution."); *Purvis v. Purvis*, 657 So.2d 794 (Miss. 1994) ("It is necessary to try the individual by another judge in cases of constructive contempt where the trial judge has substantial personal involvement in the prosecution." (citing *Varvaris v. State*, 512 So.2d 886, 888 (Miss.1987))); and, *Dennis v. Dennis*, No. 2001-CA-01402-SCT, 824 So.2d 604, 609 (¶ 11) (Miss. 2002) ("A defendant in contempt proceedings is entitled to ... an unbiased judge ... and that he is presumed innocent until proven guilty beyond reasonable doubt."). See also *Mayberry v. Pennsylvania*, 400 U.S. 455, 466, 91 S.Ct. 499, 505, 27 L.Ed.2d 532 (1971) ("... by reason of the Due Process Clause of the Fourteenth Amendment

a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.”).

Again, because of the failure to provide Mr. Graves with due process with regard to the *Leslie Murphy* and *Keith Allen Woods* cases, specifically including the failure to have a neutral and detached judge conduct a hearing in which Mr. Graves could present evidence and witnesses in his defense, Judge Smith’s finding of contempt in the *Leslie Murphy* and *Keith Allen Woods* cases should be reversed. Furthermore, because the record reflects no facts upon which guilt of contempt “beyond a reasonable doubt” may be found, this Court should render judgment in favor of Mr. Graves, the Appellant.

* * * * *

V. CONCLUSION

The record wholly fails to demonstrate any evidence whatsoever that Mr. Graves, the Appellant, was guilty of contempt with regard to the proceedings in *State of Mississippi vs. Justyna Zylka* (Tunica County Circuit Court case number 2008-0319). Judge Smith’s contempt finding in *Zylka* states that Mr. Graves agreed to continue the case without court approval and that Mr. Graves was not prepared for the trial of the case. The record demonstrates that these findings are incorrect, and, therefore, there is no basis for the charge of contempt against Mr. Graves in *Zylka* and the finding of contempt in that matter should be reversed.

The record also fails to demonstrate that Mr. Graves, the Appellant, was guilty of contempt with regard to the proceedings in *State of Mississippi vs. Leslie Murphy* (Tunica County Circuit Court case number 2008-0211) and in *State vs. Keith Allen Woods* (Tunica County Circuit Court case number 2008-0360). While the record indicates that videotapes

of the arrests in those cases were never provided to the defense attorney, nothing in the record indicates that Mr. Graves willfully and intentionally violated Judge Smith's order regarding discovery of the videotapes. In fact, the record (through the testimony of Deputy Ray and through on-the-record statements from the defense attorney) indicates that Mr. Graves attempted to provide the videotapes to the defense but was unable to do so. Thus, proof that Mr. Graves is guilty of contempt "beyond a reasonable doubt" cannot be found in the record, and the finding of contempt in *Leslie Murphy* and in *Keith Allen Woods* should be reversed.

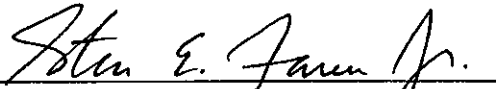
Furthermore, because the contempt, if any, was "constructive criminal contempt," Mr. Graves was entitled to due process rights which were never afforded to him, and, for this reason, the finding of contempt in *Leslie Murphy* and in *Keith Allen Woods* should be reversed.

RESPECTFULLY SUBMITTED, this, the 20 day of OCTOBER,

2009.

CHARLES B. GRAVES, JR., *Appellant*

By: _____



STEVEN E. FARESE (MS #10447)

Attorney for Charles B. Graves, Jr.

Farese, Farese & Farese, P.A.

Post Office Box 98

Ashland, Mississippi 38603

Telephone: 662-224-6211

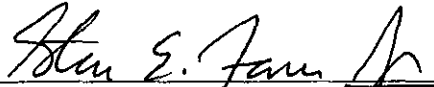
Facsimile: 662-224-3229

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have, this date, pursuant to Rule 31 of the Mississippi Rules of Appellate Procedure, placed the original of the above and foregoing *Brief of Appellant Charles B. Graves, Jr.*, together with three (3) copies of same, in the regular United States Mail, postage pre-paid, addressed to the Clerk as stated below, and I have included therewith a copy of the aforesaid brief on a CD-ROM stored thereon in the Adobe Portable Document Format (PDF) pursuant to the requirements of Rule 28(m):

Honorable Betty W. Sephton
Office of the Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, this 20 day of OCTOBER, 2009.


STEVEN E. FARESE (MS # [REDACTED])
Attorney for Charles B. Graves, Jr., Appellant

Farese, Farese & Farese, P.A.
Post Office Box 98
Ashland, Mississippi 38603
Telephone: 662-224-6211
Facsimile: 662-224-3229