

No. 20-944

In The
Supreme Court of the United States

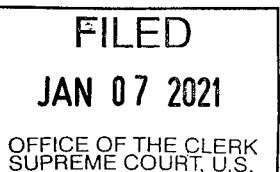
PAMELA DIANE STARK,

Petitioner,

v.

JOE EDWARD STARK,

Respondent.



**On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Tennessee At Jackson**

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state trial court can create a hybrid form of contempt which avoids traditional constitutional and legislative safeguards and prevents appellate review through creating mootness.
2. Whether the application of mootness to a contempt finding allows for a denial of appellate review of the underlying restraining order that constitutes a prior restraint of speech and a disenfranchisement of the right to petition when doing so forecloses any future review as well.

II.
PARTIES TO THE PROCEEDINGS

The parties involved are identified in the style of the case.

III.
RELATED PROCEEDINGS

- *Pamela Diane Stark v. Joe Edward Stark*, W2019-00650-COA-R3-CV, Court of Appeals of Tennessee at Jackson, Judgment entered January 31, 2020.
- *Pamela Diane Stark v. Robert Weiss*, No. 2:19-cv-02406, U.S. District Court for the Western District of Tennessee, Western District, Judgment entered November 27, 2019.
- *Pamela Diane Stark v. City of Memphis et al.*, No. 19-cv-2396, U.S. District Court for the Western District of Tennessee, Western District, litigation pending.

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VI.**PETITION FOR WRIT OF CERTIORARI**

Pamela Diane Stark petitions for a writ of certiorari to review the judgment of the Court of Appeals of Tennessee at Jackson in this case.

VII.**OPINION BELOW**

The Court of Appeals of Tennessee at Jackson's opinion is reported as *Pamela Diane Stark v. Joe Edward Stark*, W2019-00650-COA-R3-CV. The Tennessee Supreme Court denied application for permission to appeal on August 20, 2020.

VIII.**JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). The decision of the Court of Appeals of Tennessee at Jackson for which petitioner seeks review was issued on January 31, 2020. The Supreme Court of Tennessee order denying petitioner's timely application for discretionary review was filed on August 10, 2020. This petition is filed within 150 days of the Supreme Court of Tennessee's denial pursuant to this Court's order of March 19, 2020 extending deadlines for writs of certiorari.

IX.**CONSTITUTIONAL PROVISIONS AND
LEGAL PRINCIPLES INVOLVED**

The First Amendment prohibits abridging the freedom of speech or the right to petition the Government for a redress of grievances.

The Due Process Clause of the Fourteenth Amendment prohibits any state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States or from depriving any person life, liberty or property without due process of law.

X.**STATEMENT OF THE CASE**

Pamela Diane Stark was an assistant district attorney assigned as a community prosecutor to the Memphis Police Department (“MPD”) Tillman Police Precinct.¹ App. 45. She was also married to a Memphis police officer, Joe Edward Stark. App. 45. On June 17, 2018, Pamela Stark was assaulted and injured by Joe Stark. App. 72. Following the assault, Pamela Stark filed for divorce.² App. 40. Under Tennessee law, a

¹ Within hours of the court below announcing the restraining order, MPD banned Ms. Stark from all MPD property and MPD officers began not appearing for court proceedings Ms. Stark was handling. This prevented Ms. Stark from performing her duties as an assistant district attorney and she felt ethically obligated to tender her resignation. See Federal Complaint, No. 19-cv-2396.

² The divorce complaint was later amended to include the tort of assault.

mandatory injunction went into effect upon filing of the divorce complaint. Tenn. Code Ann. §36-4-106(d), App. 59-61. This injunction, in relevant part, restrains “both parties from harassing, threatening, assaulting or abusing the other and from making disparaging remarks about the other to or in the presence of any children of the parties or to either party’s employer. App. 59-61.

The Memphis Police Department handled the investigation concerning the allegations of domestic assault. App. 47. In so doing, after initial attempts to suppress the allegations failed, fellow MPD officers entered a report designating Pamela Stark as the sole suspect in a domestic assault and Joe Stark as the sole victim.³ This report further blocked from view all information inconsistent with these designations including the injuries Pamela Stark sustained⁴.

In utter disbelief and out of concern for the effect such designations would have on her future professional prospects, Pamela Stark worked within the system in an attempt to have this addressed.⁵ After almost six months of efforts failed, Pamela Stark posted the following commentary on Facebook on December 14, 2018:

Anyone who knows me, knows I am a staunch supporter of not only MPD, but law enforcement as a whole. That being said,

³ See Federal Complaint, No. 19-cv-2396.

⁴ Ibid.

⁵ Ibid. Also, Letter to Mayor Strickland.

police officers are only human. Further, they are human beings who are specifically trained to rely on each other for their very life. Thus, it is ridiculous to believe that law enforcement, especially from the same specific force, should ever investigate a case where there is potential wrongdoing and/or legal consequences for one of their own.

Being in charge of the investigation, they decide what if anything is done, documented or collected as they investigate one of their own with no one watching over their shoulder.

I speak now as a recent victim of domestic violence at the hands of a Memphis Police Officer. I can attest to exactly how wide “the thin blue line can get.” Do not get me wrong, I understand it. Who among us would want to hang one of our own out to dry. This is even more so for the Brotherhood of Blue. However, it is even more devastating. Who do you turn to when those sworn to serve and protect and enforce the law, don’t.

In addition to the Facebook post, Pamela Stark wrote Memphis Mayor Jim Strickland detailing her concerns and asking him to investigate misconduct within the MPD investigation. App. 48-49.

In an effort to have the Facebook post removed, Joe Stark filed a Petition for Restraining Order within the divorce proceedings. App. 71. This petition sought not only the removal of the post, but also to have Pamela Stark enjoined from any speech “which may jeopardize Husband’s employment and/or which may

impugn Husband's reputation with the Memphis Police Department" alleging "immediate and irreparable injury, loss, and/or damage" to the same. App. 71-73. Pamela Stark defended against the petition questioning the Court's jurisdiction and arguing First Amendment protection. App. 37-38, 55.

Despite the specific averments of the petition, the court allowed Joe Stark to proceed at hearing as a request to 'extend' the breadth of the mandatory injunction already in place.⁶ App. 36. In support thereof, proof was submitted to the court concerning alleged prior harassing behavior. App. 40-51. This proof, in relevant part, included that Pamela Stark had 1) previously filed for divorce, 2) subpoenaed police officers for deposition, and 3) written Memphis Mayor Jim Strickland concerning her allegations of police misconduct. App. 41, 43, 48-49.

Pamela Stark reiterated her jurisdictional and First Amendment arguments at hearing. App. 37, 55. The court was unpersuaded by the jurisdictional argument finding that the mandatory injunction prohibited "any disparaging remarks about either of you to anyone."⁷ App. 38. Additionally, the court found constitutional arguments inapplicable in the divorce proceedings stating:

⁶ Had this been the basis of the petition, Ms. Stark would have challenged the constitutionality of the mandatory injunction and notice the State Attorney General as required by Tennessee law.

⁷ This is contrary to the actual text of the statute.

You are. Notwithstanding that any other – when you filed your Complaint, the restraining order was put into place . . . You can sit there and argue that you have a freedom of speech, and – but the moment you sat there and said in this letter referencing your husband, that changed it. App. 55-56

The court further found that Mayor Strickland qualified as an employer covered within the mandatory injunction. App. 55. The court continued, ruling from the bench:

That [Facebook] post shall be removed today, and a mandatory injunction will go into effect that there will be no communication with employers . . . making further allegations in social media is completely inappropriate and is being enjoined. App. 56.

Pamela Stark, who was acting pro se, in response to the court's ruling and in an attempt to highlight the overbreadth of that ruling, made the following argument to the court:⁸

Well, Your Honor, I will just with all candor to the Court say you might as well take me into custody right now. I have contacted the FBI as well as having contacted the mayor of Memphis to try and get this addressed. I am saying that I am a victim of corruption from the

⁸ In the Order of Contempt, the court indicated that Pamela Stark's statements were made after the hearing, however, the original time stamped transcript shows three seconds elapsed between the court's ruling at Ms. Stark's statements.

Memphis Police Department, and I am going to pursue every course of action I have and . . . App. 56.

Though Pamela Stark had not mentioned the Facebook post, the court interrupted her argument and questioned her as to her intent to remove the Facebook post. App. 56. Pamela Stark replied negatively. App. 56. At this time, the court ordered Pamela Stark to be taken into custody. App. 57. The court then found Ms. Stark to be in “direct contempt of court” for willfully refusing to comply with this Court’s orders and ordered her “held in custody until such time that you change your position, and you apologize to this Court.”⁹ App. 57.

Friends of Pamela Stark summoned an attorney to address the court on her behalf.¹⁰ App. 26. An appeal bond was requested and denied by the court.¹¹ Pamela Stark, after being held in handcuffs for approximately four hours, agreed to remove the Facebook post and was released from custody.¹² App. 26.

⁹ It is unclear whether the court based the contempt finding on the advisory opinion, as memorialized in the Order on Petition for Restraining Order, that Ms. Stark had already violated the mandatory injunction or on a prospective position that she would not remove the post ‘today’ as ordered from the bench.

¹⁰ The court had no part in procuring counsel for Pamela Stark, neither advising of a right to, appointing or summoning.

¹¹ As mootness only became an issue when raise by the court in during oral arguments, those arguments are the only proof within the record of the denial of bail.

¹² The court did not require Ms. Stark to remove the Facebook post at that time, within the presence of the court, but

Initially the court did not enter a separate order on the contempt finding but included within the Order on Petition for Restraining Order that Pamela Stark had intentionally violated the mandatory injunction with 1) the Facebook post, 2) the letter to Mayor Strickland, and 3) subpoenaing Memphis police officers.¹³ App. 29-30. Additionally, this advisory opinion¹⁴ seemingly found harassment as the requisite standard. However, approximately six weeks later the court entered an order finding Pamela Stark in ‘direct civil contempt.’¹⁵ App. 25.

Pamela Stark filed a timely appeal with the Tennessee Court of Appeals seeking review of both the contempt finding and the restraining order. App. 1. While only the contempt order qualified as a final order, Tennessee law allows “upon filing of a single notice of appeal in a civil case, issues may be brought up for review

seemingly allowed, as originally ordered, that the post “come[s] done today.”

¹³ The only proof submitted concerning contact with police officers involved Ms. Stark subpoenaing officers for depositions. These officers were not deposed out of concern for additional contempt findings. See transcript, App. 43.

¹⁴ Neither within the Petition for Restraining Order, nor at hearing were any allegations of violating the mandatory injunction advanced by Mr. Stark.

¹⁵ Joe Stark’s attorneys filed a Motion to Alter/Amend the restraining order entered by the court along with a proposed order attempting to have the court detail Ms. Stark having been taken into custody and to change the narrower language of the restraining order to reflect the broader language of the court’s oral ruling. This motion was denied, but the court did enter an order on contempt.

and relief pursuant to the rules by any party.” Tenn. R. App. P. Rule 3(h). Also see Tenn. R. App. P. Rule 13(a). In response to the appeal, two separate Motions to Dismiss were filed attacking the reviewability of the restraining order. App. 20-24. The Court of Appeals denied each of these motions. App. 20-24. However, upon finding the contempt issue moot, the Court of Appeals then refused to review the restraining order seemingly finding it was not properly before the court. App. 1-19.

In addition to the state court proceedings, Pamela Stark filed a Declaratory Action in the United States Federal District Court for the Western District of Tennessee, Western District. App. 63-70. This case was dismissed on abstention principles. App. 63-70. A civil suit is also currently pending in the same district court concerning the underlying issues of the Facebook post and the actions taken by the City of Memphis following issuance of the restraining order.¹⁶

XI.

REASONS FOR GRANTING THE WRIT

The importance of supervising the threat to constitutional rights within the exercise of judicial contempt authority and judicially imposed prior restraint of First Amendment Rights is apparent by the sheer volume of legal analysis the Court has dedicated to these issues. However, the issues in this case involve whether those prior holdings can be avoided through a

¹⁶ See Federal Complaint, No. 19-cv-2396.

trial court simply altering the traditional nature of the orders, procedures and judgments associated with those firmly established constitutional limitations and create mootness which prevents appellate review in so doing.

The state trial court below utilized what can best be described as hybrid contempt proceedings to impose hybrid sanctions. This hybrid contempt manipulated established law and rendered Pamela Stark's constitutional rights impotent. In the absence of appellate review, a dangerous precedent is created which provides a mechanism through which the prior mandates of the Court, promulgated legislation and the Constitution can be avoided.

The nature of the deprivation of constitutional protections is so egregious that the Court has intimated such would never happen and has singularly given specific assurances of intervention should such an unlikely event occur. Pamela Stark now asks this Court to stand behind those assurances not only for herself, but also for any number of future litigants that may be subject to egregious civil rights violations inflicted by a lone judge.

(A) Contempt Authority

The importance of supervising the exercise of judicial contempt authority on both the federal and state level is best illuminated by the prior decisions of the Court. See *Mine Workers v. Bagwell*, 512 U.S. 821 (1994) discussing *Hicks v. Feiock*, 485 U.S. 624, 631

(1988); Also see *Bridges v. California*, 314 U.S. 252, 260 (1941). The history of contempt authority generally “demonstrates the unwisdom of vesting the judiciary with completely untrammelled power to punish contempt and makes clear the need for effective safeguards against the power’s abuse.” *Bloom v. Illinois*, 391 U.S. 194, 207 (1968). “Contumacy ‘often strikes at the most vulnerable and human qualities of a judge’s temperament’ (*Mineworkers* citing *Bloom* at 202) and its fusion of legislative, executive and judicial powers ‘summons forth . . . the prospects of ‘the most tyrannical licentiousness.’” *Mine Workers* at 831, quoting *Young v. U.S. ex rel. Vuitton et fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring in judgment), quoting *Anderson v. Dunn*, 6 Wheat 204, 228 (1821). Thus, “[o]ur jurisprudence in the contempt area has attempted to balance the competing concerns of necessity and potential arbitrariness by allowing a relatively unencumbered contempt power when its exercise is most essential and requiring progressively greater procedural protections when other considerations come into play.” *Mine Workers* at 832.

1. Summary Contempt Authority

Summary contempt authority, with reduced procedural protections, raise even greater concerns for abuse. “Its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusion.” *Cooke v. United States*, 267 U.S. 517, 539 (1925). As such, “[s]ummary punishment always and rightly is regarded with disfavor and, if imposed in passion or

pettiness, brings discredit to a court as certainly as the conduct it penalizes.” *Sacher v. United States*, 343 U.S. 1, 8. (1952). Thus, summary contempt proceedings are “reserved for exceptional circumstances, such as acts threatening the judge or disrupting a hearing or obstructing court proceedings.” *Harris v. United States*, 382 U.S. 162, 165 (1965). Further, the Court has noted summary sanction should be “to the least possible power adequate to the end proposed” (*In re McConnell*, 370 U.S. 230, 234 (1962)). “Any broader contempt power than this . . . would permit too great of inroads on the procedural safeguards of the Bill of Rights.” *Ibid.*, quoting *In re Michael*, 326 U.S. 224, 227. Thus, if liberty is at issue some measure of due process must be afforded. “For an accused contemnor facing a jail sentence, his ‘liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.’ Its termination calls for some orderly process, however, informal.” *Taylor v Haynes*, 418 U.S. 488, 500 (1974) quoting *Morrisey v. Brewer*, 408 U.S. 471, 482 (1972).

2. Other Contempt Considerations.

As noted in *Mineworkers*, “progressively greater procedural protections [have been afforded] when other considerations come into play.” *Ibid.* at 832. Because contempt sanctions imposed in conjunction with First Amendment Rights or Legal Advocacy raise additional constitutional concerns, the Court has noted particular importance in appellate supervision. “The history of the power to punish for contempt and the unequivocal command of the first amendment serve as

a constant reminder that freedom of speech and of the press should not be impaired through the exercise of that power . . . ” *Craig v. Harney*, 331 U.S. 367 (1947).

Likewise, contempt sanctions within the context of legal advocacy are particularly suspect. “That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir.” *Sacher* at 12. Thus, in singular fashion, the Court has made assurances that such “summary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review.” *Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974). “The profession knows that no lawyer is at the mercy of a single federal judge.” *Sacher* at 12. “Before punishment takes effect he may have appeal on law and fact.” *Ibid.* Not condemned merely by the impulse of one lone and hostile judge.” *Ibid.* “But that there may be no misunderstanding, we make clear that this Court, if its aid be needed will unhesitatingly protect counsel in fearless, vigorous and effective performance.” *Sacher* at 13.

(B) Mootness

Despite the constitutional magnitude of the issues involved, and near universal recognition of the potential for abuse with summary contempt authority (see *State v. Turner*, 914 S.W.2d 951, 956-959 (Tenn. Crim. App. 1995)), Pamela Stark’s appeal was dismissed

without even a cursory review. The state appellate court's dismissal was based upon a finding of mootness. App. 1-18. However, this dismissal is not justified by either the principles underlying mootness or due process considerations. Instead, mootness operates to both compound the constitutional error at issue and to create a precedent through which constitutional protections can be avoided.

1. Underlying Principles and Due Process Consideration

The concept of mootness operates in conjunction with Article III of the Constitution to assure the judiciary remains within the confines afforded by our tripartite system. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Also see *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). Thus, it serves to prevent the creation of law through advisory opinions based on hypothetical or academic scenarios. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). As such, courts are prohibited from rendering opinions in the absence of concrete facts or where any judgment rendered would be ineffectual. *Ibid.* "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 468, 469. (1969). However, the mootness doctrine retains a "flexible character [and] . . . is not a legal concept with a fixed content or susceptible to scientific verification." *Geraghty* at 400.

Over a century ago, the Court recognized that mootness may necessitate drawing a distinction between judgments where “the acts . . . had been completely executed” and cases involving orders that though expired touched upon “broader considerations.” *So. Pac. Terminal Co. v. Int. Comm. Comm.*, 219 U.S. 498, 514-515 (1911). As such, where the judgment continues to potentially affect the legal relations of the parties, the case remains justiciable as in fairness it cannot be considered resolved. *Ibid.* Additionally, mootness is inapplicable when a party continues to suffer collateral effects of the judgment after expiration of the sentence, as a “substantial stake” in the controversy continues. *Carafas v. Lavellee*, 391 U.S. 234, 237 (1968).

The state appellate court found mootness based upon the civil designation of the contempt finding, Pamela Stark having gained her release from incarceration, and the sanction being remedial in nature. App. 11-16. However, this mechanical application of mootness fails to examine the broader consideration of a contempt sanction imposed during an ongoing litigation. Though contempt findings are considered *sui generis* in nature, when the underlying action is still pending, they are not fully executed and continue to affect the legal relations of the parties. Indeed, the Court has recognized the mere threat of potential contempt proceedings is sufficient to create a continuing chilling effect. *Nebraska Press v. Stuart*, 427 U.S. 539, 559 (1976).

The trial court’s contempt sanction was inherently coercive and purposed specifically to affect the ‘legal

relations of the parties' throughout the litigation. The sanction arose contemporaneous to the issuance of the restraining order and was imposed based on Pamela Stark vocalizing concerns over the breadth of the restraint. App. 56-57. The trial court ordered Pamela Stark held in custody until she agreed in advance to comply with that order. App. 57. Thus, the court's intent was clearly not merely remedial but was wielded to ensure future compliance. The restraining order remains in effect to date. If the mere threat of contempt proceedings is sufficient to chill future conduct, how many degrees colder is the effect when sanctions are imposed *sua sponte* to prospectively ensure compliance?

Additionally, the collateral consequences of the contempt finding have not only "survive the satisfaction of the sentence imposed" but they will continue after the restraining order is lifted and for the duration of Pamela Stark's professional career. *Carafas* at 237-240 (1968). The appellate court discounted any collateral effects based on the civil designation of the contempt finding. App. 14-18. Though collateral consequence issues often arise within the context of criminal convictions, nothing inherent within this distinction lessens the existence of a "substantial stake" in the controversy based on "continu[ing] to suffer serious disabilities." *Carafas*. Likewise, this distinction does not lessen the professional consequences of the trial court's contempt finding on Pamela Stark's career.

Appellate court opinion notwithstanding, neither the Tennessee Rules of Professional Conduct nor

character and fitness portions of applications for admission to the bar of other states reference contempt sanctions. See Tenn. S. Ct. R. 8, TRP 8.4(g). Instead, these organizations are concerned with violations of court orders. The trial court not only entered an order finding Pamela Stark in “Direct Civil Contempt”¹⁷ but also specifically opined within the Order on Petition for Restraining Order that she had committed multiple, intentional violations of the mandatory injunction already in effect. These findings were *sua sponte*, never lodged, never litigated and never subject to appellate review. However, these findings operate as proof that Pamela Stark has violated lawful court orders¹⁸ for the duration of her legal career. Thus, it remains a burden by depriving Pamela Stark her best defense – that she was “not properly convicted.” *Fiswick v. United States*, 329 U.S. 211, 221-223 (1946).

2. Compounding of Constitutional Error

In the case at issue, as with *Sibron*, none of the “imperative policies behind the constitutional rule against entertaining moot controversies” are present and “there is nothing abstract, feigned, or hypothetical about it.” *Sibron v. New York*, 392 U.S. 40 at 57. Instead,

¹⁷ The Order on Direct Civil Contempt appears to be limited to the events of February 7, 2019.

¹⁸ The Tennessee Appellate Court dismissed the underlying restraining order as not final upon applying mootness to the contempt findings. However, since the restraining order is not related to the issue within the divorce, the order will never become final.

mootness operates to both compound the constitutional error at issue and to create a precedent through which constitutional protections can be avoided.

“From the beginning [the Court] has disposed of moot cases in the manner ‘most consonant to justice . . . in view of the nature and character of the conditions which have cause the case to become moot . . . The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action.” *Bancorp Mortg. Co. v. Bonner Mall*, 513 U.S. 18, 24 (1994).

Though these statements arose specifically within the context of *vacatur*, the Court’s general holdings regarding mootness have equally rejected mechanical application in favor of fundamental fairness. See *Sibron* at 50-58. [discussing “the vital importance of keeping open avenues of judicial review of deprivations of constitutional rights.”] Also see *Carafas* at 239. [“There is no need in the statute, Constitution or sound jurisprudence for denying petitioner his ultimate day in court.”] Instead, mootness holdings have been consistent with the proposition that “a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.” *Bancorp* at 18-24. These statements suggest that mootness must be consistent with due process, or fundamentally fair.

The state appellate court's mootness finding relied almost exclusively on Pamela Stark purging herself of the contempt thereby securing her release from incarceration. App. 12-14. However, the Court has been clear that "mere release of the prisoner does not mechanically foreclose consideration of the merits." *Sibron* at 51. Indeed, the Court found the suggestion of mootness constitutionally repugnant when based on "a blanket denial of bail" that prevented access to the appeal courts prior to release. *Ibid.*

In the case at issue, the trial court denied Pamela Stark bail and ordered her held indefinitely.¹⁹ Thus, under the appellate court's finding, Pamela Stark was required to either acquiesce to an unlawful judgment or endure months or years of being unlawfully imprisoned until an appeal could be perfected. In *Sibron*, the Court noted disbelief that "people deprived of constitutional rights at this level should be left utterly remediless and defenseless." *Ibid.* However, the vagaries of the circumstances in this case placed Pamela Stark in just such a position. Amid an absolute vacuum of due process, she was deprived the most basic constitutional right – liberty. Hence, to deny review on the merits, leaving Pamela Stark to continue to suffer under the collateral effects of the judgment and the continuing infringement on her First Amendment rights, serves to compound the very errors at issue.

¹⁹ As mootness only became an issue when raise by the court in during oral arguments, those arguments are the only proof within the record of the denial of bail.

The vagaries of the circumstances in the case at issue may be best illuminated by comparing them to the cases cited within the state appellate court opinion. App. 12-16. Unlike each of the contempt related cases, Pamela Stark was not before the court based on a Petition for Contempt or even an accusation of contempt. Pamela Stark's sole accuser was the trial court. Thus, she was not provided any notice of the accusations or opportunity to defend. Indeed, until the trial court entered the Order on Petition for Restraining Order, Pamela Stark was not even aware that she had been adjudged to have "intentionally violated" the mandatory injunction by 1) posting the Facebook commentary, 2) writing Mayor Strickland and 3) subpoenaing police officers for depositions. App. 28-31. Further, unlike the cases cited, there had not been a previously litigated order on which the contempt findings or sanctions were based. Instead, the contempt findings, or intentional violations of the mandatory injunctions, arose from the trial court's non-litigated interpretations. Thus, Pamela Stark had no ability to challenge the court's order(s) through appellate review prior to contempt sanctions being imposed.

Though the trial court eventually designated the contempt findings as "Direct Civil Contempt," the manner in which the sanction was imposed was clearly summary in nature. However, summary proceedings are only available within a subsection of criminal contempt proceedings. See Tenn. R. Crim. P., Rule 42. Also see *Doe v. Bd. of Pro. Responsibility*, 104 S.W.3d 465, 474 (Tenn. 2013) ("Civil contempt occurs when a

person does not comply . . . and an action is brought by a party.”). Thus, the trial court basically created a hybrid proceeding which combined a restraining order hearing with an un-petitioned contempt proceeding. Additionally, the trial court created a hybrid contempt sanction which imposed coercive, civil sanctions to punish conduct summarily. This sanction exceeded the limitations imposed both statutorily and constitutionally. See Tenn. Code. Ann. § 29-9-103 (maximum punishment fifty dollars or imprisonment not exceeding ten days). Though Tennessee allows for the imposition of coercive, indeterminate sentencing for contempt, such sanctions are limited to “an omission to perform an act” (Tenn. Code Ann. § 29-9-104) or “performance of a forbidden act.” Tenn. Code Ann. § 29-9-105. Pamela Stark neither failed to perform nor performed any forbidden act within the presence of the trial court. App. 32-58. To the extent that the Facebook commentary violated the trial courts interpretation of the mandatory injunction, the actual posting occurred almost two months prior to the hearing. App. 46, 71-76. The trial court did not order Pamela Stark to remove the post within its presence, but that the post would be removed that day. App. 56. Further, nothing within the proceedings indicated that incarceration was “the least possible power adequate” or that imposition of a continuing, daily fine would not have equally accomplished “the ends proposed.” *In re McConnell* at 234.

(C) Restraining Order

Upon determining the contempt finding was moot, the state appellate court refused to review the jurisdictional and constitutional challenges to the restraining order. App. 10-11. This refusal was based upon a finding that the restraining order was not a final order and appeal of that matter was not perfected. App. 10-11. Though the state appellate court found only the contempt order qualified as a final order, Tennessee law allows “upon filing of a single notice of appeal in a civil case, issues may be brought up for review and relief pursuant to the rules by any party.” Tenn. R. App. P. Rule 3(h). Also see Tenn. R. App. P. Rule 13(a). In response to the appeal, two separate Motions to Dismiss were filed attacking the reviewability of the restraining order. App. 20-24. The state appellate court denied each of these motions. App. 20-24. As the issue of mootness was not raised by a party but was a *sua sponte* finding of the state appellate court, Pamela Stark had no reason to pursue a separate notice of appeal. Absent the mootness finding, review of the restraining order was inherent to review of the contempt finding. See *Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 249 S.W.3d 346, 354-55 (Tenn. 2008) (reviewing elements of contempt).

State appellate court finding notwithstanding, the restraining order was as final of a judgment as it ever could be. Traditionally, ancillary jurisdiction to issue restraining orders is premised on providing the trial court the authority necessary to prevent conduct from basically rendering judgment ineffective prior to

adjudication on the merits. Tenn. R. Civ. P. 65.04. However, the conduct and concerns associated with the restraining order simply were not pending before the trial court or any other state court. App. 71-75. As such, those issues will never be adjudicated, and the order will never become a final judgment. Thus, as with the contempt finding, it will forever escape review.

Though Tennessee law would have allowed review of the restraining order to proceed, the appellate court's refusal to consider forecloses any future avenues of review of this order due to the vagaries of the circumstances. Presumably, at some point the restraining order will be resolved; however, there is no termination date within the order itself. App. 18-21. Thus, Pamela Stark continues to suffer the enjoinder of her First Amendment Rights and remains subject to additional contempt sanctions. Indeed, a Petition for Civil and Criminal Contempt is currently pending based upon conduct alleged to have violated the restraining order. App. 76-82. Pamela Stark denies the conduct alleged violates the restraining order; however, should the trial court disagree, she again faces incarceration which will again become moot before an appeal could be perfected.

While the refusal to review the challenges to the restraining order compounds the effect mootness has on Pamela Stark, it also creates a horrific precedent. This precedent allows trial courts to usurp subject matter jurisdiction over issues not before them to restrict the constitutional rights of parties based on personal jurisdiction on unrelated, pending litigation. In the case at issue, neither Mr. Stark or the Memphis

Police Department could have brought and independent suit against Pamela Stark for posting the Facebook commentary. Yet, the trial court, used ancillary jurisdiction to accomplish what an independent lawsuit would have been constitutionally prohibited from doing. Thus, the trial court became a vehicle for the very civil rights violations they are sworn to defend against. In the case at issue, this is not even consistent with the mandatory injunction. Whether a Facebook post can fairly be considered “in the presence of . . . [a] party’s employer” aside, Pamela Stark was not divulging information that was not already known by the employer. App. 60. As MPD was in charge of the investigation, they were well aware of the accusations. App. 47. It was only the public that was unaware.

Further, the contempt finding creates a precedent which allows trial courts to imprison summarily without the requisite showing of misconduct. Though within the contempt order, the trial court characterized Pamela Stark’s statements as having occurred after the hearing, the official, time-stamped transcript establishes that her statements were uttered within three seconds of the trial court’s ruling. If men, and presumably women who exhibit “vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir” still make their way to the bench, then they have a road map for imposing contempt outside the traditional limits. *Sacher* at 12. Litigants who argue that they will not be able to pay the support order, are subject to being incarcerated prospectively until they agree that they will pay what is ordered

irrespective of having missed any actual payment or a contempt petition being filed.

XII.

CONCLUSION

Neither the contempt finding nor the application of mootness in this case serve the ends for which they were developed. However, this case raises all of the concerns associated with their use. Despite over a century of legal opinions and legislative restrictions to ensure that safeguards are established to protect against abuse within the wielding of judicial contempt authority, Tennessee eviscerated these efforts in one fell swoop. The contempt proceeding and sanction at issue is the pinnacle of associated constitutional concerns. The sanction was imposed in a summary proceeding, before a magistrate embroiled in the proceedings, devoid of procedural safeguards and resulted in a loss of liberty. Further, the contempt arose within the context of First Amendment Rights and legal advocacy. However, the record does not support that Pamela Stark committed any misconduct which necessitated the immediate actions of the trial court, much less incarceration. There are no allegations that her words were uttered in a loud or boisterous tone or in any way interrupted any court proceedings. Though the trial court had issued its ruling, Pamela Stark is certainly not the first legal advocate to attempt to continue legal argument after the tribunal has ruled.

Likewise, the application of mootness is not required based on the rendering of an advisory opinion on hypothetical facts which would result in an ineffectual judgment. Further, as the case solely involves independent acts of the judiciary, powers delegated to other governmental branches are not being usurped. Instead, this case involves constitutional issues specifically delegated to the judiciary. Despite the repeated holdings by this Court of the importance of appellate supervision in such circumstances, the state appellate court refused to review the merits of Pamela Stark's constitutional challenges. This refusal arose from the nature of the trial courts sanction and not any lack of diligence by Pamela Stark. Further, Pamela Stark will continue to labor under the collateral consequences of the trial court's rulings. This perhaps makes Pamela Stark's now infamous Facebook commentary particularly apropos: "who do you turn to when those sworn to serve and protect and enforce the law, don't?"

Respectfully submitted,

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