SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of DAVID FEIGE on behalf of FREDRICK LYNCH,	:	
Petitioner,	:	MOTION FOR A STAY OF EXECUTION OF A WARRANT OF COMMITMENT FOR CRIMINALCONTEMPT PENDING APPEAL
For an Order Pursuant to Article 78 Of the Civil Practice Law and Rules	:	
-against-	:	
JUSTICE PHYLIS SKLOOT BAMBERGER	:	No. 7-A-1-99
Respondent.	:	

PLEASE TAKE NOTICE THAT hat upon the annexed affirmation of David L. Feige, the annexed exhibits and the prior proceedings in this case, the undersigned will move this Court at 27 Madison Avenue New York, NY 10010, on ___________ at ______or as soon thereafter as Counsel may be heard for an Order granting the following relief:

1. AN ORDER STAYING THE EXECUTION OF A WARRANT OF COMMITMENT FOR CRIMINAL CONTEMPT PENDING APPEAL

2. IN THE ALTERNATIVE AN ORDER STAYING THE EXECUTION OF SENTENCE AND GRANTING RECOGNIZANCE OR BAIL PENDING APPEAL

And such further relief the court should deem just and proper.

DATED: Bronx, New York
December 22, 1999

____
David L. Feige
THE BRONX DEFENDERS
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of
FREDRICK LYNCH,

Petitioner,

For an Order Pursuant to Article 78
Of the Civil Practice Law and Rules

-against-

JUSTICE PHYLIS SKLOOT BAMBERGER

Respondent.

VERIFIED PETITION

No. 7-A-1-99

Petitioner FREDRICK LYNCH, by his assigned attorney, DAVID L. FEIGE of the Bronx Defenders alleges that:

1. This Petition is submitted pursuant to Article 78 of the Civil Practice Law and Rules and Judiciary Law Section 752 and 755 for an Order setting aside an order of Respondent Phylis Skloot Bamberger of the Supreme Court of Bronx County, which held petitioner in criminal contempt and sentenced him to _____ days imprisonment.

2. This application is occasioned by the order of contempt entered by Judge Bamberger on _____ after a plenary hearing, and the issuance of a warrant of commitment ordering that Mr. Lynch be imprisoned for a term of _________.

ARTICLE 78 JURISDICTION

3. According to Judiciary Law Sections 752 and 755, this court has jurisdiction under CPLR Article 78 to review a contempt adjudication and sentence.

PARTIES

4. Petitioner FREDRICK LYNCH was a juror in the matter of People v. Donnell Murray and Antoine Walker, Mr. Lynch served on the trial and through five days of deliberations.

5. Respondent Judge PHYLIS SKLOOT BAMBERGER is a Justice of the Supreme Court. After conducting investigations, and assembling witnesses, over the objection of the defense, she presided over the plenary proceeding held before her on _________, and thereafter found Mr. Lynch guilty of criminal contempt and sentenced him to a term of _________.

ALLEGATIONS OF FACT

I. Procedural History

6. After deferring his jury service three times, Fredrick Lynch was again summoned for jury service. Nervous about failing to show up, Mr. Lynch appeared and was empanelled and ultimately selected to serve as a juror in the matter of People v. Donnell Murray and Antoine Walker. Mr. Lynch appeared promptly and faithfully throughout the trial and was sequestered for the five days of deliberations. After obviously bitter divisions in the jury room, it appears that seven jurors banded together and sent a note through their faction's 'acting foreperson' complaining about fellow jurors. (Jury Note Number 10).

7. The seven jurors complained about three different jurors alleging bias against each. One was alleged to live to close too the defendant to be fair, another was alleged to be unable to render a verdict because of concerns about the defendant's mother, and Mr. Lynch was alleged to be unfair because he had been incarcerated.

8. Judge Bamberger made inquiry of Mr. Lynch (and possibly the others) on two separate occasions. She also began making inquiries, including directly contacting authorities in Nassau County, and compiling documentary evidence which ultimately form the basis for the contempt proceeding. Based on those inquiries, it was ascertained that Mr. Lynch had

been convicted of felonies in 1989 and 1990. Although it was clear after five days of deliberations and the apparent mutiny in the jury room, that a verdict was unlikely, Judge Bamberger declared a mistrial, disbanded the jury, angrily faulting Mr. Lynch for the mistrial. She then assigned counsel to Mr. Lynch to defend him against the contempt charges she indicated she now wished to pursue.

9. On December 15, 1999, the Justice Bamberger issued a supplemental order to show cause why the respondent, Frederick Lynch, who had previously been a juror in the matter of People v. Donnell Murray and Antoine Walker, should not be held in contempt.

10. Judge Bamberger alleged five contemptuous acts: that Mr. Lynch in 1995 failed to disclose on the juror summons that he had prior felony convictions; that Mr. Lynch failed to disclose to the jury clerk that he had prior felony convictions; that Mr. Lynch failed to disclose to the Court that he had prior felony convictions after the Court made a general inquiry of the panel; that Mr. Lynch failed to disclose in response to jury questionnaire eighteen that he had prior felony convictions; that Mr. Lynch failed to truthfully and fully answer the Court's inquiries. The order to show cause was made returnable on December 20, 1999.

11. The supplementary order, dated December 15, 1999, which appears to have supplanted the original, does not detail if the Court intends to pursue civil or criminal contempt against Mr. Lynch. Instead, the Court simply asserted that it intended to hold Mr. Lynch in contempt. Even assuming that the Court intended to pursue contempt pursuant to Judicial Law Section 750, the Court did not specify which subsection of Section 750 Mr. Lynch's act allegedly violated.

12. On December 20, 1999, Mr. Feige and co-counsel appeared before the Court. Defense counsel asserted that because the alleged contemnor was not personally served with the order to show cause, the Court lacked jurisdiction over Mr. Lynch. See People v. Balt, 312 N.Y.S.2d 587 (1970). The Court rejected counsel's argument, concluding that as it had provided two copies of the order to show cause to counsel, and because the Court observed counsel conferring with Mr. Lynch, personal service was established. Defense counsel again objected. On order of the Court, Mr. Lynch was brought into the courtroom.

13. The Court informed Counsel and Mr. Lynch that the Court intended to call two witnesses in its prosecution of Mr. Lynch. The Court also informed counsel that it had

procured copies of Mr. Lynch's jury summons through personally contacting the jury clerk, without receiving an order from the Appellate Division in seeming contravention of Section 509(a) of the Judiciary Law.

14. In the brief proceeding held on December 20th, the People, represented by ADA Elisa Koenderman, informed the Court that they intended to investigate the above matter and determine if the filing of criminal charges were appropriate. Defense Counsel consented to an adjournment to provide the People the opportunity to investigate the matter. The Court granted the People only two days to investigate, and noted that the Court's proceeding would constitutionally foreclose a later criminal prosecution. The matter was adjourned to December 22, 1999, for hearing.

15. On December 22, 1999, Defense Counsel moved for the disqualification of Judge Bamberger from the instant matter pursuant to 22 NYCRR 604.2(d)(2), governing the disqualification of a judge presiding over a plenary hearing on contempt. Specifically Defense Counsel alleged that adjudication of the contempt proceeding required either Judge Bamberger's recollection and/or her testimony concerning the conduct allegedly constituting contempt. It is Mr. Lynch's direct conversations with Judge Bamberger that constitute the Court's claims of contempt. Notably, the Court provided Defense Counsel with transcripts of the Court's interrogation of Mr. Lynch as documentary evidence supporting the allegation of contempt. Judge Bamberger refused to disqualify herself.

16. Defense Counsel thereafter objected to the multiple role of Judge Bamberger as investigator of the contemptuous conduct, prosecutor of the alleged contemptuous action, and as ultimate arbitrator of Mr. Lynch's guilt or innocence on due process grounds as protected by both the Federal and State Constitutions. Specifically, Defense Counsel noted that the Court contacted and secured evidence from the Clerk of the Jury, the court stenographer, and from court personnel in Nassau County. It appears that the Court also procured Mr. Lynch's criminal abstract from State authorities. Moreover, the Defense noted that the Court intended to call and question witnesses as would a prosecutor, that the Court would conceivably cross-examine Mr. Lynch should he choose to testify, and thereafter would render a verdict. The Court overruled Defense Counsel's objection to the Court's multiple functions in its prosecution of Mr. Lynch.

17. Defense Counsel also objected as there was insufficient notice as to whether the court was proceeding under a civil or criminal contempt theory. Petitioner also objected to the lack of notice as to which specific subsection, of the Judiciary Act the Court was intending to proceed under. The Court failed to note any defect.

18. Defense Counsel objected to the Court alleging that Mr. Lynch engaged in contemptuous conduct when he failed to disclose on a 1995 jury summons that he had prior convictions. Prosecution and punishment for an alleged act that occurred over four years ago was untimely and long past the applicable statute of limitations of two years. The Court rejected this contention.

19. Defense Counsel objected to the failure of the Court to permit the People adequate time to investigate the instant matter and file appropriate criminal charges. Defense Counsel noted that there is no evidence that the administration of justice would be hampered by any delay involved in pursuing the matter through ordinary criminal process, and the decision to proceed via a plenary contempt proceeding was arbitrary and not exercised with the greatest caution. The Court rejected this contention.

20. The Court convicted Mr. Lynch of contempt and sentenced him to a period of incarceration not to exceed __________ days.

Beyond the large number of procedural errors which are legally detailed below, Defense Counsel asserts that the evidence presented was insufficient as a matter of law to sustain a conviction for criminal contempt. Specifically, the court itself failed to adduce any evidence that Mr. Lynch's conduct impaired or interrupted any judicial proceedings. As described above, Petitioner files this action, pursuant to C.P.L.R Article 78, to appeal the finding of contempt and warrant of commitment.

II. Mr. Lynch's Background and Record of Attendance

21. Any court should proceed with caution in the incarceration of a trial juror. This is especially true when the juror has been held in contempt in a plenary proceeding giving rise to a number of reviewable issues. Fredrick Lynch is a working man with a family. He appeared when ordered by jury summons and returned faithfully at the request of the court. Mr. Lynch appeared every day he was asked to at the trial and remained sequestered during deliberations. He returned to the court even after contempt proceeding were initiated against

him. There is a very real danger that should the court not grant this motion, Mr. Lynch would serve a substantial portion or even all of his sentence before this court could grant meaningful review of this complicated proceeding. In addition to the danger of such an unjust result must be added the cruelty of the scheduling decisions made here. In hearing this matter immediately before the Christmas holiday and New Year's holiday, the court makes meaningful review even less likely. Although the defense had requested an adjournment until after the holidays, the court denied the defense's request, insisting on ruling on the case prior to Christmas. Therefore, petitioner requests that Fredrick Lynch, a working man with deep roots in the community (he has lived in New York for over 30 years), who served on a trial jury, be released pending the appeal of his contempt conviction and sentence.

22. In addition to the fact that Mr. Lynch is not a flight risk, and beyond the cruelty of incarcerating him for the holidays, there are serious appellate issues to be addressed in this case. The multiple errors committed by Judge Bamberger also militate for the release of Mr. Lynch. Some of them are detailed below.

ALLEGATIONS OF LAW

I. Justice Bamberger exceeded her authority in presiding over the plenary hearing in clear violation of 22 NYCRR 604.2(d)(2).

The essence of the charges against Mr. Lynch is that he failed to fully and honestly answer the questions posed by the Court. Specifically, the Court provided Defense Counsel with transcripts of extensive conversations between the Court and Mr. Lynch. In those transcripts, the Court inquires if "it was a misdemeanor charge" (T.P. 74), if the charge "had a number attached to it," (T.P. 75), "or a degree or anything attached to it," (T.P. 75). The Court then inquires if Mr. Lynch "received a sentence of one year," (T.P. 75), if he "served that in the Nassau County jail." (T.P. 75). The Court proceeds to the essence of the charges, "when you got the notice in the mail, the notice asks if you've ever been convicted of a crime … Did you check off that notice?" (T.P. 75). Later the Court attempts to clarify if Mr. Lynch was convicted of a felony or a misdemeanor. "You copped out. Do you remember what it was that you said to the judge – did you talk to the judge in the courtroom when you copped out?" (T.P. 77) When Mr. Lynch states that he doesn't remember what he said to the judge,

the Court asks: 'Do you remember what the lawyer said to the judge." (T.P. 77). Again, Mr. Lynch has no recollection, and answers in the negative when questioned by the Court "[D]id your lawyer say what it was that you had done." (T.P. 78). At that point, the Court inquires of Mr. Lynch if "you're relatively certain that this was a misdemeanor charge … and not a felony charge." (T.P. 78).

Three of the five alleged contemptuous acts charged against Mr. Lynch involve direct interaction with Judge Bamberger. It is the testimony of Judge Bamberger which is essential to any adjudication of contempt. It is of no import whether that testimony is in the form of the transcribed conversation between the Court and Mr. Lynch (for which no evidentiary rule permits its introduction), or through direct recollection and/or testimony from Judge Bamberger herself. It is the testimony, interrogations, recollections and words of Judge Bamberger which are essential to any finding. There can be no adjudication of contempt unless the Court takes notice of its own prior recollections of the trial proceedings and conversations with Mr. Lynch, or directs herself to provide such testimony. Yet it is just such a scenario that the Rules of the First Department, Appellate Division prohibit. No judge may sit in judgment of an alleged contemnor when it is that judge's recollection or testimony that is necessary for adjudication. See 22 NYCRR 604.2(d)(2). The refusal of Judge Bamberger to disqualify herself is stunning. The Court's own rules prohibit her sitting as the final arbitrator in this matter. As a matter of clear and precise statutory law, the conviction of Mr. Lynch must be reversed on these grounds alone.

Coupled with the Court's refusal to disqualify itself pursuant to clear statutory mandate is the Court's wholly inappropriate assumption of not only the role of arbitrator, but prosecutor and investigator as well. Judge Bamberger obtained from the Clerk of the Jury the summons completed by Mr. Lynch in 1995. The Court also secured all notes it believed relevant from the court stenographer and evidence of criminal conviction from Nassau County. The Court also procured Mr. Lynch's extract from State authorities. The Court also commanded to appear witnesses on its behalf. The Court directed and conducted the investigation of this case. The Court then donned the hat of a prosecutor. The Court called and questioned witnesses. The Court conducted inquiry. The Court presented the case. Mr. Lynch is entitled to a fair and neutral finder of fact, both as a matter of Federal and State constitutional law. A defendant in a criminal contempt proceeding is afforded a host of

procedural rights, including the right to be presumed innocent and proved guilty beyond a reasonable doubt without the assistance of their own testimony, See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444, 31 S. Ct. 492, 499 (1911). The defendant must have the right to be advised of the charges against him, have a reasonable opportunity to respond, be permitted the advice and assistance of counsel, and have the right to call witnesses. See Cooke v. United States, 267 U.S. 517, 537, 45 S. Ct. 390, 395 (1925). Finally, and most importantly, the defendant is entitled to a public trial before an unbiased judge. See e.g., In re Oliver, 333 U.S. 257, 68 S. Ct. 499 (1948), Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11 (1954) (holding that trial court should not have heard contempt proceeding against attorney where court and attorney became embroiled through course of underlying trial). Of course, a court confronted with grave contemptuous conduct need not turn a blind eye. But that conduct must be addressed by a tribunal that does not wear the dual hats of prosecution and judge. The United States Supreme Court, in Young v. United States ex rel. Vuitton Et Fils S.A., 481 U.S 787, 107 S.Ct. 2124 (1987), addressed just such a scenario where the lower court failed to assure the impartiality of the prosecuting authorities in a contempt prosecution. The Supreme Court recognized the legitimacy of a court to initiate proceedings against a contemnor, but directed the proceedings to be handled by an unbiased and neutral prosecutor. "The logic of this rationale is that a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied." Id. at 801, 107 S. Ct. at 2134. Of course a court may inquire of the prosecuting authorities if they intend to proceed with a prosecution. Upon failure of that authority to so act to protect the interests of the judicial branch, the court may be compelled to seek redress through the appointment of a private prosecutor. However, Judge Bamberger failed to seek redress through the appropriate prosecuting authorities. Instead, she chose to become the prosecuting authority. She becomes investigator, prosecutor, and final arbitrator. There is no semblance of an impartial, unbiased authority. There was no neutral judge in the instant case. Judge Bamberger directed, controlled, and resolved this case. "In light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those to whom they apply, the notion of judges in effect making the laws, prosecuting their violation, and sitting in judgment of these prosecutions, summons forth … the prospect of 'the most tyrannical licentiousness.'" Id. at 822, 107 S. Ct. at 2145 (citing Anderson v. Dunn, 6

Wheat. 204, 228, 5. L.Ed. 242 (1821)) (Scalia, J., concurring). In the absence of any compelling reasons for such actions by an allegedly impartial arbitrator, Mr. Lynch's conviction violates the most basic norms of due process.

II. Justice Bamberger erred in failing to provide adequate notice of the nature of the proceedings instituted against Mr. Lynch.

The supplemental order to show cause, dated December 15, 1999, clearly fails to provide adequate notice as to either the nature of the proceedings against Mr. Lynch, or to the specific charges of contempt facing Mr. Lynch. The order simply provides that the Court issued "an order to show cause why the respondent should not be held in contempt." Surely the Court was aware of the distinction between civil and criminal contempt, between Judicial Law Section 750 and 753. Arguably, the Court, by alleging the basest and vaguest of charges, could theoretically proceed under either provision. But the Court chose not to claim either section. Such a decision may be premised on the Court's recognition that its inherent powers under the criminal contempt statute, Judicial Law section 750, are sharply circumscribed as compared to its powers under the civil contempt statute and its desire not to circumvent its authority by choice of statute. See Gabrelian v. Gabrelian, 108 A.D.2d 445, 489 N.Y.S.2d 914 (1985) (holding that power to punish for civil contempt is much broader than power to punish for criminal contempt, noting that power to punish for criminal contempt is sharply circumscribed). But whatever the motivation of the Court, it cannot proceed with such an inadequate and obtuse charging document. "Both under the Judiciary Law, [Section] 751(1), and as a matter of fundamental due process, an alleged contemnor is entitled to know that criminal contempt is being sought before the imposition of criminal sanctions may be considered." Garry v. Garry, 121 Misc.2d 81, 467 N.Y.S.2d 175, 178 (1983). There was no notice in the instant case whether the Court intended to seek civil or criminal charges.

Moreover, even if the Petitioner can guess that the Court intended to proceed under the criminal contempt statute, Judiciary Law Section 750, the Defense is at a loss as to which sharply circumscribed act the Court is intending to pursue. There are seven distinct acts that constitute criminal contempt. The Petitioner had no idea under which section the Court was proceeding, yet each section offers a different realm of possible defenses and answers. The

Petitioner was precluded from adequately addressing the charges by their complete and utter lack of knowledge of what charges they were defending against.

III. Justice Bamberger erred in convicting and sentencing Mr. Lynch for an offense barred by the statute of limitations.

The Court proceeded under a charge that was barred by the statute of limitations. The Court solicited and introduced evidence that Mr. Lynch signed a summons in 1995 that asserted that he had no criminal convictions. Should such an allegation be prosecuted criminally, the most likely charge is "Making a Punishable False Written Statement," contrary to P.L. 210.45. That offense is a Class A misdemeanor, punishable up to one year incarceration. As a misdemeanor, prosecution must commence within two years after the commission thereof. See C.P.L. 30.10. Clearly, over four years later, that prosecution would be time-barred. However, the Court now seeks to impose a contempt conviction, with a maximum term of incarceration of thirty days, for conduct that could not be prosecuted as a crime. There is no explicit statute of limitation for the charge of criminal contempt. However, simple logic and reason dictates that the charge of criminal contempt in the instant case is time-barred. The more serious the crime, the longer the statute of limitations. A prosecution for an A felony may commence at any time, reflecting the gravity and seriousness society views such offenses. A prosecution for any other felony must be commenced within five years, and within two years for misdemeanors. The gravity of each offense is reflected by the length of sentences legally authorized. The lower the permissible sentence, the shorter the statute of limitations. The charge of criminal contempt, assuming that is the charge the Court is proceeding under, provides a sentence of only thirty days. That charge cannot, by any logic, have a longer period of limitations than a misdemeanor punishable by one year. The Court, in the instant matter, cannot proceed under a charge that is clearly time-barred.

IV. Justice Bamberger erred in proceeding to sentence in a matter in which she never appropriately assumed *in personam* jurisdiction.

The Court lacked personal jurisdiction over Mr. Lynch. The Court provided Defense Counsel with two copies of the supplemental order to show cause. And although counsel was

present and, having been assigned, essentially required to accept service, The Court never served Mr. Lynch with any copy of the order. The Court concluded that its observations of Mr. Feige in conversation with Mr. Lynch, coupled with the fact that the Court provided Mr. Feige with two copies of the order, constituted personal service of Mr. Lynch. That determination is in clear error. It is equally clear that service upon the attorney of the alleged contemnor is inadequate. See People v. Balt, 34 A.D.2d 932, 312 N.Y.S.2d 587 (1st Dept. 1970). There is no authority in law to suggest that providing defense counsel copies of the order to show cause, coupled with any court's observation of interaction between counsel and his client, constitutes service. Nor did the Court cite any authority for its ruling, except to question the zealousness of Defense Counsel. Failure to establish personal service is a fatal jurisdictional defect. See Matter of Murray, 98 A.D.2d 93, 469 N.Y.S.2d 747 (1983). Moreover, Defense Counsel did not waive any claim of jurisdictional defect by producing Mr. Lynch before the bar of the Court upon direct order of the Court. Waiver of jurisdictional defect cannot be predicated upon a Hobbesian choice where counsel must either incur the wrath of the Court and contempt sanctions for counsel himself for failure to comply with a direct order of the Court, or waive a legitimate claim of jurisdictional defect. Defense Counsel fully and adequately objected to the actions of the Court. Thereafter complying with the order of the Court is not a waiver.

V. Justice Bamberger erred in failing to allow a responsive prosecutorial agency ample time to investigate and proceed on the alleged misconduct.

The appellate courts have long determined that the imposition of criminal contempt by a judge must be severely curtailed and exercised only in the most extreme of circumstances. "The power to attach and commit, being arbitrary and unlimited, is to be exercised with the greatest caution, and as the application of this remedy involves the withdrawal of the offense from the cognizance of a jury, it is only to be resorted to where the administration of justice would be hampered by the delay in pursuing the ordinary criminal process." In re Lehman, 256 A.D. 677, 11 N.Y.S.2d 429 (1939). This Court exercised no hesitation in wielding its unchecked power of contempt. The Court granted the People a mere two days to investigate whether criminal charges were appropriate. When the People expressed hesitation that an investigation could be completed in that time frame, the Court expressed open disdain that the

People could not complete an investigation in that time period. When the People indicated their belief that the Court's rush to exercise its power would prevent a subsequent criminal prosecution through the application of the Double Jeopardy principle, the Court readily agreed, but sped forward. There is absolutely no reason why this matter should not have been handled in the ordinary course of criminal prosecution. Of course, the Defense does not presume that the Court marches forward out of an extreme desire to impose a period of incarceration. However, there are no facts present that could justify the need for the Court to assert its authority in such a manner. The authority of the Court was not publicly challenged, and the Court was not in open disrepute as a result of the alleged actions of Mr. Lynch. Indeed, the Court felt no immediate challenge to its authority as it recognized there was no need to proceed via summary contempt. Nor did the Court face an executive branch unwilling to step into the matter. The People fully indicated a willingness to investigate. The Court is surely not faced with a recalcitrant District Attorney's Office that shows no desire to vindicate the interests of the Court. But the Court has effectively removed this matter from the hands of the People, for no apparent reason. This decision by the Court is contrary to the clearly-settled mandate of the appellate courts that the exercise of the contempt power must be used sparingly. Through its actions, it is this Court that treats with contempt the mandate of the higher courts. This Court acted arbitrarily. The decision to proceed via contempt is utterly unsupported by any facts on the record.

VI. Justice Bamberger's finding of contempt is factually insufficient as a matter of law.

The Court convicted Mr. Lynch of contempt, apparently under Judiciary Law 750. That determination is utterly without support in the record and not sustained by any evidence. In seeking to criminally punish contempt, a court is strictly limited to the prohibited acts delineated in Judiciary Act 750 and no others. "The acts which may constitute a contempt are specified in section 750 of the Judiciary Law 'and no others' are punishable as criminal contempts by a court of record." Spector v. Allen, 281 N.Y. 251, 258-59, 22 N.E.2d 360, 364 (1939). Moreover, consistent with the full constitutional protection accorded those accused of criminal contempt, see e.g., Young v. United States ex rel. Vuitton Et Fils S.A., supra, the

statute must be construed strictly in favor of the defendant. See Spector v. Allen, supra, 281 N.Y. at 260, 22 N.E.2d at 365.

Although the Court failed to specify which provision of Section 750 Mr. Lynch violated, it is clear that only two subsections offer any potential grounds for the imposition of criminal sanctions in the instant matter. Of course, this subsequent "guesswork" by Defense Counsel that the Court was proceeding under Judiciary Law 750 does not remedy the prior failure of the Court to provide adequate notice of the charges. Counsel remained substantially handicapped in formulating a defense because he had no idea what the Court was charging. That during the course of the hearing itself, Defense Counsel was able to surmise that the Court was proceeding under Judiciary Law 750, is of little assistance in remedying Counsel's prior inability to adequately prepare a defense. Counsel assumes that the Court was proceeding under one of two subsections. Subsection 1 prohibits "Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority." Subsection 3 forbids conduct that consists of "Willful disobedience to [the court's] lawful mandate. No other subsection remotely applies. The record is devoid of evidence to support either subsection 1 or 3 of the Judiciary Law 750.

There was no lawful mandate issued by the Court in the instant case. As repeatedly determined by numerous courts, a "lawful mandate" must be clear and unambiguous. "Punishment for criminal contempt is a drastic remedy for willful wrong. The mandate must be clear before disobedience can subject a person to such punishment." Id. at 259, 22 N.E.2d at 364. Disobedience of only a clear and unambiguous mandate of the court, given in accordance with the law, is subject to criminal contempt. See In re Mullen, 177 Misc 734, 31 N.Y.S.2d 710 (1941). Indeed, so stringent in the requirement of a clear and precise mandate that courts have refused to find contempt where individuals have seemingly violated written orders of the court. In People v. Forman, 145 Misc.2d 115, 546 N.Y.S.2d 755 (1989), the defendant, in violation of a court-issued order of protection forbidding the defendant from engaging in "offensive conduct" against his wife, made threatening phone calls to his wife. The Court held that those actions did not constitute criminal contempt where the mandate of the court was vague and ambiguous as to what conduct was required. See also Ellenberg v. Brach, 88 A.D.2d 899, 450 N.Y.S.2d 589 (1982); People v. Solomon, 150 Misc. 873, 271

N.Y.S. 136 (1934). In the instant case, there was no mandate issued by the Court. The Court issued no clear and unambiguous order compelling Mr. Lynch to provide specified information. Instead, the record is replete with a confusing, misdirected, and perplexing examination by the Court of Mr. Lynch. Equally clear is that Mr. Lynch had little or no idea what he was being asked or the significance of what he was being asked. Often, Mr. Lynch does nothing more than parrot the questions of the Court. Finally, the Court gets to the crux of the issue, with the question: "And you're relatively certain that this was a misdemeanor charge … and not a felony charge." (T.P. 78). Under no theory of law would this question, a question itself made conditional by the Court's insertion of the term "relatively certain," constitute a clear and unambiguous mandate of the court. There was simply no clear mandate issued by the Court.

As such, Mr. Lynch can only be convicted of criminal contempt if he engaged in conduct before the Court that was "[d]isorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority." The only conduct that occurred before the Court consisted entirely of the Court's questioning of Mr. Lynch in an effort to determine what exactly Mr. Lynch was convicted of. As noted, that conversation, although confusing and perplexing, certainly cannot be characterized as insolent. Mr. Lynch constantly addresses the Court with respect, always answering "Yes, ma'am," or "No, Ma'am." Indeed, any determination that Mr. Lynch disrupted the judicial proceedings is belied by the fact that Judge Bamberger attempted to rehabilitate Mr. Lynch and return him to the jury. (T.P. 79-80).

The jury deliberations in the matter of People v. Donnell Murray and Antoine Walker were clearly contentious. Jury Note Number 10 reveals a jury in disarray. Seven jurors created a faction, elected their own 'acting foreperson' and submitted a note about three fellow jurors. There are rampant recriminations and accusations. There is no basis to believe that Mr. Lynch's prior criminal record was the reason this jury was unable to deliberate together, nevermind reach a verdict. The Court, although finding Mr. Lynch in contempt, offered no evidence that he disrupted any legal proceedings. The Court offered no evidence that he was the cause of the jury in-fighting. Instead, the Court surmises as such. The Court, with no basis in fact, comes to the conclusion that Mr. Lynch must have been the source of

discontent. This determination is absurd. There is no evidence, and the Court's conjecture is wholly inappropriate.

Petitioner, through Defense Counsel, sought to refute any assertion that legal proceedings were disrupted by the prior criminal record of Mr. Lynch. Defense Counsel attempted to show that the jury was hopelessly conflicted, and that such a conflict was not the result of Mr. Lynch's past convictions. To such an end, Defense Counsel requested to call the other juror members, and requested process of the Court to that effect. That request was denied by the Court. It is without question that one accused of criminal contempt has the right of compulsory process. See Cooke v. United States, 267 U.S. 517, 537, 45 S. Ct. 390, 395 (1925). Denial of that right is, per se, grounds for reversal of conviction.

In the absence of any evidence that Mr. Lynch disobeyed a lawful mandate of the Court, or engaged in behavior committed in the presence of the Court that disrupted the legal proceedings, there is no basis for the conviction of contempt. That conviction must be reversed.

WHEREFORE, Petitioner FREDRICK LYNCH by his attorney DAVID FEIGE respectfully requests this court to:

(a) Grant an ORDER staying the execution f the warrant of commitment for criminal contempt pending appeal.
(b) In the alternative grant an ORDER staying the execution of sentence and granting recognizance or bail pending appeal.
(c) And any further relief this court deems just and proper.

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