COA21-137 27A DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

v. ) From Gaston County

 )

LYDIA ROBINSON )

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**DEFENDANT-APPELLANT’S BRIEF**

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# ISSUES PRESENTED

1. **The court erred by entering a contempt judgment ordering 30 days in jail without providing Ms. Robinson summary notice and an opportunity to be heard as required by statute.**
2. **Under the plain language of N.C.G.S. § 7A-451(a)(1), it was error not to provide Ms. Robinson with counsel in the summary contempt proceedings against her.**

# STATEMENT OF THE CASE

On 2 August 2020, Lydia Robinson[[1]](#footnote-2) entered a public Gaston County District Court magistrate’s office to present evidence to Magistrate Mark W. Oakes for a probable cause determination. After an exchange, Magistrate Oakes found Ms. Robinson in direct criminal contempt and sentenced her to an active 30-day sentence. Ms. Robinson filed written notice of appeal to Superior Court on 4 August 2020. The case was heard at the 21 September 2020 session of Gaston County Superior Court before the Honorable Jesse B. Caldwell III. On 23 September 2020, after *de novo* review, Judge Caldwell found Ms. Robinson in direct criminal contempt and sentenced her to 48 hours in custody with credit for the two days she had already served. From judgment entered, Ms. Robinson gave oral notice of appeal.

# GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction to hear this appeal pursuant to N.C.G.S. §§ 5A-17 and 7A-27(b).

# STATEMENT OF THE FACTS

On the afternoon of 2 August 2020, Lydia Robinson entered the public portion of the Gaston County magistrate’s office. She waited for the group in front of her to complete their business and was the only person present in the public portion of the courtroom when it was her turn. (Tp 8) She was there to report a death threat she received and had on her phone. Magistrate Mark Oakes was on duty.

Magistrate Oakes recognized Ms. Robinson from the local paper, *The Gazette* (Tp 14), which had been covering local protests that followed Ms. Robinson’s arrest after her mistreatment by an employee at Tony’s Ice Cream while wearing a Black Lives Matter button.[[2]](#footnote-3) Magistrate Oakes also testified he follows Ms. Robinson’s posts on Facebook. (Tpp 14, 24)

Ms. Robinson approached the magistrate’s window to present evidence for a probable cause determination regarding the threat against her life. (Tp 8) She showed the threat on the phone to Magistrate Oakes. (Tpp 8, 15) He said he did not look at the threat on her phone because per the sign on the courtroom door, phones are not allowed in the courtroom. (Tp 15) Magistrate Oakes testified the usual procedure would be for a member of the public to write an affidavit describing the threat. (Tpp 15, 17) He did not tell Ms. Robinson about this procedure or request she follow it. (Tp 15) Ms. Robinson read the threat from her phone to Magistrate Oakes for his consideration. (Tp 17) From this, Magistrate Oakes told Ms. Robinson that, “according to the general statute it wasn’t a direct threat.” (Tp 8)

Magistrate Oakes testified Ms. Robinson “didn’t like” the determination and got, “I wouldn’t say angry, but argumentative,” by which Magistrate Oakes clarified he meant “[s]he just tried to repeat it and repeat it and repeat it. And it was the same threat so it was ruled no probable cause for a direct threat.” (Tp 8)

Magistrate Oakes told Ms. Robinson “that she needed to leave and take the cell phone out or I would hold her in contempt.” (Tp 9) For the next two to three minutes Ms. Robinson had her phone out. During that time, Magistrate Oakes believed her to be taking video, though he did not see any such video or evidence actual video was taken. (Tpp 9-10, 24) During that same two- to three-minute period, Magistrate Oakes testified he did not say anything as he was “waiting for [Ms. Robinson] to leave the courtroom.” (Tp 10) At the end of those two to three minutes, Magistrate Oakes said, “[W]e’re finished,” and lowered the blinds on his window, shutting himself off from Ms. Robinson’s view. (Tp 10, 19)

Within earshot of Ms. Robinson and the public side of the courtroom, but behind closed blinds, Magistrate Oakes told his colleagues the woman in the courtroom, now hidden behind blinds, was “the instigator of the Tony’s Ice Cream.” (Tp 11) Magistrate Oakes testified that after Ms. Robinson heard his characterization of her, she “yelled” through his closed window, “[W]hat do you mean, instigator?” (Tp 20) Ms. Robinson left the courtroom and walked to her car in the parking lot. (Tpp 11, 20)

Magistrate Oakes then decided to find Ms. Robinson in contempt. (Tp 21) He “notified the sheriff’s department, the sheriff’s office, about what my intentions were. And they went out to her car and were trying to get her out of her car. It wasn’t exactly immediate.” (Tpp 11-12) Law enforcement brought Ms. Robinson back to the jail side of the magistrate’s office where Ms. Robinson was served with a copy of the completed contempt order sentencing her to 30 days in jail. (Tp 21; Rp 3) She was then taken into custody without further discussion. (Tpp 12, 21)

#  After *de novo* review on appeal in Superior Court, Judge Caldwell entered written findings of fact and conclusions of law, finding Ms. Robinson in direct criminal contempt. (Rpp 5-17) Judge Caldwell offered Ms. Robinson to continue the prayer for judgment or sentence her to two days of jail with credit for two days already served. (Tpp 59-61) Ms. Robinson opted for the two-day sentence and, after judgment was entered, gave oral notice of appeal. (Tpp 65-66)

# STANDARD OF REVIEW

#  The same standard of review applies to both Issue I and Issue II: Whether a trial court violated a statutory mandate is an issue of law reviewed *de novo*. *State v. Perkinson*, 844 S.E.2d 336, 337 (2020). Under the *de novo* standard, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower” court. *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (cleaned up).

# ARGUMENT

#

#  Lydia Robinson walked into the Gaston County magistrate’s office on 2 August 2020 to report a death threat she received. Instead of having that threat fully considered, a four- to six-minute interaction with Magistrate Oakes in an empty courtroom turned into a contempt judgment and 30-day jail sentence for Ms. Robinson. Ms. Robinson’s contempt judgment should be reversed for two reasons: (1) the magistrate failed to give Ms. Robinson summary notice and an opportunity to respond to the criminal contempt charge as required by statute; and (2) the court failed to provide Ms. Robinson with counsel in the summary contempt proceedings against her.

## The court erred by entering a contempt judgment ordering 30 days in jail without providing Ms. Robinson summary notice and an opportunity to be heard as required by statute.

Because the magistrate did not give Ms. Robinson summary notice and an opportunity to respond to the criminal contempt charge as required by statute, N.C.G.S. § 5A-14(b), the judgment must be reversed. *Perkinson*, 844 S.E.2d at 337; *Peaches v. Payne*, 139 N.C. App. 580, 587, 533 S.E.2d 851, 855 (2000); *State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979).

1. **Numerous findings of fact made by the court are unsupported by the evidence, particularly as they related to the court’s statutory obligation to give summary notice of and an opportunity to respond to the contempt charges.**

Findings of fact numbers 14, 15, 16, and 19 in the Superior Court’s Order and Judgment are unsupported by the evidence and should not be binding on this Court.

Findings 14 and 15: Magistrate Oakes’ testimony, which was the only evidence at the hearing, demonstrated Magistrate Oakes told Ms. Robinson one time to take her phone and leave the courtroom or she would be held in contempt. (Tp 9) Despite the court’s finding otherwise, Magistrate Oakes never testified he told Ms. Robinson to “stop arguing with him, or he would hold her in contempt of court.” (Rp 10, ¶ 14) He did provide Ms. Robinson notice on arguing grounds once, let alone twice. (Rp 11, ¶ 15)

Finding 16: The initial premise of finding 16 relies on the unsupported findings in paragraphs 14 and 15 discussed above. The court’s finding that as Ms. Robinson had her phone up for the last two to three minutes of the interaction “she continued to argue with [the magistrate], freely expressing herself and being heard in response to being given notice she would be held in contempt of court if she did not leave,” (Rp 11, ¶ 16) both presupposes notice and reaches a legal conclusion that ignores Magistrate Oakes’ testimony that he sat silently during this brief period and then shut his blinds on Ms. Robinson, thereby depriving her of any opportunity to be heard about the contempt charge.

Finding 19: The finding is accurate in that the district court order “states that the magistrate gave the defendant a clear warning that the conduct was improper and gave her summary notice of the charges and a summary opportunity to respond.” As discussed below, however, these pre-printed findings on the magistrate’s order and any embrace of them by the Superior Court are contradicted by the facts.

1. **The court’s conclusions of law regarding summary notice and an opportunity to be heard are unsupported by the facts and are error; the magistrate failed to comply with N.C.G.S. § 5A-14(b).**

The State’s position at Ms. Robinson’s Superior Court hearing was that the magistrate was under no obligation to provide a warning or summary notice of any contempt charge to Ms. Robinson. (Tpp 36-37) That is not the law. UnderN.C.G.S. § 5A-12(b)(2), the court must warn the individual the conduct is improper before imposing a fine or imprisonment for criminal contempt. Further, under N.C.G.S. § 5A-14(b), the court must give the individual summary notice of the charges and a summary opportunity to respond before imposing a contempt judgment. Here the magistrate failed to comply with these statutory mandates and the Superior Court’s conclusions otherwise were error.

A judge’s or magistrate’s unique power to order direct criminal contempt in a summary fashion is “extraordinary, because it authorizes the Judge to act as prosecutor, jury and Judge at once, and to impose incarcerative sanctions without affording an alleged contemnor the right to an evidentiary hearing, the right to counsel, or the opportunity for adjournment to prepare a defense.” *Williams v. Cornelius*, 76 N.Y.2d 542, 546-47, 563 N.E.2d 15, 17-18 (1990). History, however, has shown “the unwisdom of vesting the judiciary with completely untrammeled power to punish contempt, and makes clear the need for effective safeguards against that power’s abuse.” *Bloom v. Illinois*, 391 U.S. 194, 207 (1968). Protections are necessary because a judge’s power to use criminal contempt “is arbitrary in its nature and liable to abuse.” *In re Terry*, 128 U.S. 289, 313 (1888). To curb such abuses, our General Assembly requires trial courts to follow certain procedural steps to protect individuals’ rights, even in summary direct contempt proceedings.

Before entering a judgment for direct criminal contempt, “the judicial official *must* give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt.” N.C.G.S. § 5A-14(b) (emphasis added). This Court has made clear that in a summary proceeding, the defendant *must* (1) be told the basis for the contempt, *and* (2) given an opportunity to respond *before* punishment is imposed. *Verbal*, 41 N.C. App. at 307, 254 S.E.2d at 795; *see also Perkinson*, 844 S.E.2d at 337. When those procedural protections are curtailed, the judgment must be reversed.

The order signed by Magistrate Oakes in this case contains a pre-printed finding that “the contemnor was given summary notice of the charges and summary opportunity to respond.” (Rp 3) The form does not include a check box or any other specific indication this finding was made. *See Perkinson*, 844 S.E.2d at 337 (noting same before concluding the contempt judgment and sentence were imposed without the required notice and opportunity to be heard). Indeed, the record directly contradicts the pre-printed language, showing instead that judgment and sentence were imposed without giving Ms. Robinson summary notice and an opportunity to be heard.

Magistrate Oakes testified he told Ms. Robinson “[i]f she didn’t take the phone and leave the courtroom I would hold her in contempt.” (Tp 19) She was not given notice of contempt on the basis of arguing. (Tp 10) Magistrate Oakes decided to hold her in contempt, “[b]ecause she wouldn’t leave. She didn’t leave after I closed the blinds.” (Tp 21) He also testified that after two to three minutes, Ms. Robinson did in fact leave and go to her car. (Tp 21) Before doing so, Ms. Robinson was not afforded an opportunity to respond about why she should not be held in contempt. No summary of any response by Ms. Robinson was made by the magistrate, and there was no finding that any excuse or explanation proffered was inadequate or disbelieved as required under this Court’s precedent. *See Verbal*, 41 N.C. App. at 307, 254 S.E.2d at 795.

The following testimony from Magistrate Oakes illustrates the lack of process Ms. Robinson was afforded in their exchange:

Q. And you also indicated that at some point in time you told her that you were going to hold her in contempt of court for having a phone?

A. If she didn’t take the phone and leave the courtroom I would hold her in contempt.

Q. And then you closed your blinds; is that correct?

A. Yes.

Q. Okay. And then she ---

THE COURT: I’m sorry. Did what? What was that?

[COUNSEL]: He closed the blinds to the office.

Q. Is that correct?

A. Yes, sir.

(Tpp 18-19) Essentially, the magistrate told Ms. Robinson, who was still trying to discuss the threat on her phone, to take her phone and leave and, without saying anything further, the magistrate closed the blinds on the window through which he and Ms. Robinson had been talking. (Tpp 10, 19) The courts’ findings and conclusions that Ms. Robinson received the procedural protections mandated by N.C.G.S. § 5A-14(b) are unsupported by the evidence. *See, e.g.*, *Perkinson*, 844 S.E.2d at 338 (reversing contempt judgment where defendant not given proper notice or opportunity to be heard); *State v. Tincher*, 266 N.C. App. 393, 400-01, 831 S.E.2d 859, 864-65 (2019) (reversing for failure to give notice and an opportunity to be heard when defendant yelled obscenities after his probation was revoked); *State v. Randell*, 152 N.C. App. 469, 472, 567 S.E.2d 814, 817 (2002) (similar); *Payne*, 139 N.C. App. at 586-87, 533 S.E.2d at 854 (similar).

Ms. Robinson’s case illustrates the importance of the procedural protections in N.C.G.S. § 5A-14(b). She went to the magistrate’s office as a member of the public seeking redress for a threat against her life. It is hard to imagine many more serious matters among those screened through the magistrate’s office. Instead of receiving the consideration one would expect under such circumstances, Ms. Robinson was met by a magistrate who knew of her and viewed her as an “instigator” affiliated with the Black Lives Matter movement and responsible for days of local protests and counter-protests that followed her arrest at Tony’s Ice Cream.

Ms. Robinson tried to show Magistrate Oakes the threat on her phone. Instead of explaining to Ms. Robinson the affidavit-based process by which probable cause was generally determined, Magistrate Oakes simply refused to look at the threat on Ms. Robinson’s phone, told her to put her phone away, and threatened her with contempt. Ms. Robinson continued to plead her case about the death threat with Magistrate Oakes for two or three minutes, during which the magistrate remained silent until he said he was done and shut the blinds before loudly reporting to other court personnel that Ms. Robinson “was the instigator to the Tony’s Ice Cream.” (Tp 19) At no time during the discussion about the death threat against her, nor when the magistrate was behind blinds, nor when she was brough back to the jail side of the magistrate’s office and taken into custody did Ms. Robinson have an opportunity to respond to Magistrate Oakes’ threat of contempt. In short, the magistrate’s behavior deprived Ms. Robinson, “an opportunity to present reasons not to impose a sanction.”  *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 594 (1998)).

Further, such behavior was unprofessional and only reinforced what former Chief Justice Cheri Beasley called the “two kinds of justice” that plague our courts—one for white people whose lives are threatened, for example, and another for Black people who dare suggest their lives matter, too. *See* Chief Justice Cheri Beasley, Supreme Court of North Carolina, Speech Addressing the Intersection of Justice and Protests Around the State (June 2, 2020) (App. 8); *see also e.g.,* N.C. Code of Jud. Cond., Cannon 2 (“A judge should . . . conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”); *In re Hill*, 368 N.C. 410, 416, 778 S.E.2d 64, 68 (2015) (noting where a judge intentionally fails to give contemnors notice and an opportunity to be heard, such action can subject the judicial official to public reprimand and “brings the judicial office into disrepute”); *In re Edens*, 290 N.C. 299, 305, 226 S.E.2d 5, 9 (1976) (“Conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.”).

If Ms. Robinson had been given an opportunity to explain her concerns about the threat against her life to an outwardly impartial magistrate who explained the proper affidavit procedure for presenting such threats, it is likely that the court would not have found her in contempt. Similarly, if Ms. Robinson had not had the blinds closed in her face and then been disparaged by the magistrate, it is likely that the court would not have found her in contempt. Because the magistrate failed to give Ms. Robinson summary notice and an opportunity to be heard before entering the contempt judgment in accordance with N.C.G.S. § 5A-14(b), the judgment must be reversed. *Payne*, 139 N.C. App. at 587, 533 S.E.2d at 855; *Verbal*, 41 N.C. App. at 307, 254 S.E.2d at 795.

## Under the plain language of N.C.G.S. § 7A-451(a)(1), it was error not to provide Ms. Robinson with counsel in the summary contempt proceedings against her.

Under N.C.G.S. § 7A-451(a)(1), “[a]n indigent person is entitled to the services of counsel in … (1) Any case in which imprisonment, or a fine of five-hundred dollars ($500.00), or more, is likely to be adjudged.” N.C.G.S. § 7A-451(a)(1). On its face, this statute entitled Ms. Robinson to the appointment of counsel when summary criminal contempt proceedings were initiated against her, because she was subject to “censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three[.]” N.C.G.S. § 5A-12(a).

Ms. Robinson acknowledges this Court recently rejected this statutory right to counsel argument in *State v. Land*, 848 S.E.2d 564, 569 (2020), and that this Court is bound by its decision in that case. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). However, Mr. Land’s petition for discretionary review of this issue of first impression remains pending before our Supreme Court, and Ms. Robinson raises this meritorious claim here to preserve it for any future litigation should our Supreme Court reverse this Court’s decision in that case. *See State v. Land*, N.C. Sup. Ct. No. 397P20.

# CONCLUSION

For the foregoing reasons and authorities, Ms. Robinson respectfully requests this Court to reverse her contempt judgment.

Respectfully submitted this, the 30th day of April, 2021.

 Electronically Submitted

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# CERTIFICATE OF COMPLIANCE

I hereby certify that Defendant-Appellant’s Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare the brief.

This, the 30th day of April, 2021.

 Electronically Submitted

 Heidi Reiner

 Assistant Appellate Defender

# CERTIFICATE OF SERVICE

I hereby certify that the original Defendant-Appellant’s Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the foregoing Brief has been served upon Daniel O’Brien, Special Deputy Attorney General, by sending it electronically to dobrien@ncdoj.gov.

This, the 30th day of April, 2021.

 Electronically Submitted

 Heidi Reiner

 Assistant Appellate Defender

COA21-137 27A DISTRICT

NORTH CAROLINA COURT OF APPEALS

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**APPENDIX**

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Adam Orr, “Woman who sparked Tony’s protests speaks out,” *Gaston Gazette*, https://www.gastongazette.com/story/special/2020/07/23/ woman-who-sparked-tonyrsquos-protests-speaks-out/115007832/ (July 23, 2020) App. 1

Adam Orr, “Black leaders say it’s time to talk in wake of protests,”

 *Gaston Gazette*, https://www.gastongazette.com/story/special/

‌‌ 2020/07/25/black-leaders-say-itrsquos-time-to-talk-in-wake-of-protests/‌115008728/ (July 24, 2020) App. 4

Chief Justice Cheri Beasley, Supreme Court of North Carolina, Speech Addressing the Intersection of Justice and Protests Around the State (June 2, 2020) App. 8

1. Ms. Robinson is also referred to as Lydia McCaskill and Lydia Mcaskill in various court documents. This brief refers to her as Ms. Robinson in accordance with the judgment and appellate entries. [↑](#footnote-ref-2)
2. *See* Adam Orr, “Woman who sparked Tony’s protests speaks out,” *Gaston Gazette*, https://www.gastongazette.com/story/special/2020/07/23/ woman-who-sparked-tonyrsquos-protests-speaks-out/115007832/ (July 23, 2020) (App. 1); Adam Orr, “Black leaders say it’s time to talk in wake of protests,” *Gaston Gazette*, https://www.gastongazette.com/story/special/‌‌2020/07/25/black-leaders-say-itrsquos-time-to-talk-in-wake-of-protests/‌115008728/ (July 24, 2020) (App. 4). Ms. Robinson respectfully asks this Court to take judicial notice of news articles describing in further detail and context the Tony’s incident Magistrate Oakes referenced in describing how he knew who Ms. Robinson was. *See State v. Williams*, 263 N.C. 800, 803-04, 140 S.E. 2d 529, 532 (1965) (discussing judicial notice of publicly available facts in the news). [↑](#footnote-ref-3)