IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01480-COA

JASON ZEBERT **APPELLANT**

v.

IN THE MATTER OF THE GUARDIANSHIP OF THOMAS E. BAKER **APPELLEE**

DATE OF JUDGMENT:	07/18/2012
TRIAL JUDGE:	HON. DAN H. FAIRLY
COURT FROM WHICH APPEALED:	RANKIN COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	WAYNE MILNER
ATTORNEY FOR APPELLEE:	HARRY JONES ROSENTHAL
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	APPELLANT FOUND IN CONTEMPT AND ORDERED INCARCERATED UNTIL HE PURGES HIMSELF OF CONTEMPT
DISPOSITION:	AFFIRMED
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, C.J., BARNES, AND FAIR, JJ.

BARNES, J., FOR THE COURT:

¶1. In 2000, the Rankin County Chancery Court appointed attorney Jason Zebert guardian over the person and estate of Thomas E. Baker. Zebert posted a bond for $35,000. From 2000 to 2008, Zebert provided the chancery court with required yearly accountings, which the court approved. However, in early 2009, Zebert failed to provide the chancery court with the eighth accounting (for the period beginning October 1, 2007, and ending September 30, 2008). An order to show cause for the past-due accounting was issued by Chancellor John Grant III on April 8, 2009. The order required Zebert to appear before the court on June 1,

2009. Several continuances (in response to Zebert's motions) were granted throughout the next year. In one of the motions for a continuance, Zebert asked to be replaced as guardian. Harry Rosenthal was appointed guardian over Baker and his estate on September 2, 2009.

¶2. On October 4, 2010, two years after the accounting was due, Zebert filed a "Petition Exhibiting Eighth Accounting of Estate." However, the petition only covered the period from October 1, 2007, to December 31, 2007. For the next several months, three more continuances for the "show cause" hearing were entered. On June 27, 2011, Judge Grant issued another show-cause order, requiring Zebert to appear for a hearing on July 26, 2011. After the hearing, Judge Grant found that the proper annual accounting had not been filed and approved. In his order dated July 26, 2011, Judge Grant found Zebert in contempt and ordered him to be incarcerated; the chancellor suspended the incarceration, however, until August 4, 2011, to allow Zebert time to "fil[e] and hav[e] approved all annual accounting(s) that are past due in this cause[.]"

¶3. Zebert subsequently filed a motion for the recusal of Judge Grant. On August 4, 2011, Judge Grant once again stayed Zebert's incarceration, this time until September 8, 2011, to allow Zebert and his counsel "additional time in which to prepare and present to the Court past due annual accountings that have not been properly filed or approved." A few days later, on August 8, Judge Grant recused himself, appointing the Honorable Dan Fairly to hear the matter. The order also sealed the prior orders of contempt (July 26, 2011; August 4, 2011) and the current August 8, 2011 order from public viewing until further order of the chancery court.

¶4. On September 8, 2011, Zebert filed another accounting "for the period beginning October 1, 2007, and ending July 27, 2011." It was in this accounting that Zebert noted that he had made "disbursements of $44,468.83 and $133,749.92 in loans extended on behalf of the Estate." It was also noted that at the beginning of the accounting period, Baker's account at First Commercial Bank held $164,909.93; at the end of the accounting period, the account only held $6,555.50. Attached as exhibits to the petition for accounting were spreadsheets of the account's income/expenses for this period. A short hearing was held before Judge Fairly, who ordered Zebert to provide all outstanding bank statements for Baker's account. Zebert told the chancellor that all remaining documentation would be available by September 19.

¶5. Yet, on that date, Zebert still had not provided bank statements, but merely copies of the checks for the vouchers. Consequently, Judge Fairly found Zebert in contempt for failure to present an acceptable accounting and fined him $1,500. The chancellor also continued "all other matters in this cause, including but not limited to the other findings of contempt and incarceration" until the next hearing on October 3, 2011, at which time the chancery court "expect[ed]" Zebert to produce bank statements and copies of cancelled checks. In a supplement to the accounting, filed that same day, Zebert explained that without obtaining the chancery court's approval, he had disbursed funds totaling $133,749.92 from Baker's estate for three different loans, all at five percent interest: (1) $75,000 to Sherri Baggett and

Jimmie Susan Fowler from January 2008 to January 15, 2012;[1] (2) $37,000 to Fowler, payable January 15, 2012; and (3) $21,749.92 "made/advanced" to Fowler, payable January 15, 2012. Fowler was Zebert's employee; Baggett was a female acquaintance of Zebert's. As already noted, these disbursed funds reduced the assets of the estate from approximately $165,000 to $6,555.50.[2] The supplement also stated that the loans were secured by an interest in land located in Rankin County, Mississippi, with a value in excess of $350,000. However, although a description of the property was attached, there was no deed of trust for the property provided with the supplemental accounting.

¶6. Another show-cause hearing was held on July 18, 2012. At that hearing, Zebert was questioned about the unapproved disbursements from the estate, which he claimed involved loans to an employee and a female acquaintance. Zebert confessed he had not obtained approval from the court to make the disbursements. He also claimed that documentation regarding the disbursements had been inadvertently destroyed by water damage to his office during a storm.[3]

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[1] The record also reflects that check number 1432, dated January 11, 2008, was a disbursement payable to Zebert for $75,000 – the memo line read "Transfer For C[ertificate of Deposit]." It is unclear whether this disbursement corresponds to the loan amount mentioned. There is no record of a certificate of deposit in Zebert's name.

[2] A memo from First Commercial bank dated September 14, 2011, confirmed the account balance as of July 27, 2011, was $6,554.95. However, the account number listed in the memo is different than the account number for Baker's guardianship account.

[3] In July 2008, Zebert wrote two checks payable to himself from the guardianship account, totaling approximately $8,000, for roofing and miscellaneous repair.

¶7. Judge Fairly found Zebert in civil contempt. He ordered Zebert to jail "until he purges himself of such contempt." Zebert, who is still incarcerated, appeals the order, claiming that the order of contempt was criminal in nature, rather than civil, and must be reversed since it is impossible for him to comply with the chancery court's order.[4] Finding no error, we affirm.

STANDARD OF REVIEW

¶8. A chancellor's finding of contempt is reviewed for manifest error. *Jones v. Mayo*, 53 So. 3d 832, 838 (¶21) (Miss. Ct. App. 2011).

> The decision to hold a person or entity in criminal or civil contempt . . . is a discretionary function of the [chancery] court. Issues of contempt are questions of law to be decided on a case-by-case basis. Regarding a determination of contempt, a [chancery] court due to its temporal and physical proximity to the parties is infinitely more competent to decide the matter.

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[4] The only issue on appeal concerns the nature of the chancellor's order of contempt. Zebert admits in his brief that he did not obtain approval from the chancery court for the aforementioned expenditures. Zebert also notes that he has since received a "target letter from the United States Department of Justice" concerning his mismanagement of Baker's estate. Moreover, counsel for Zebert stated during oral argument before this Court that federal charges were pending against Zebert and that he anticipated Zebert will be "convicted by pleading guilty to misappropriation of funds." Counsel also submitted that Zebert acknowledges that these funds were misappropriated and "is willing to face up to it and admits his guilt."

On October 8, 2013, a letter was sent to this Court by the Federal Public Defender's Office of the Northern and Southern Districts of Mississippi, requesting that this Court take into account evidence of the anticipated federal charges against Zebert for the misappropriation of Baker's funds and vacate Zebert's contempt order. The Appellee has filed a motion to suppress the letter, which this Court has granted as the letter concerns facts that are not only outside the record, but also occurred after the chancery court's ruling in the matter.

Corporate Mgmt. Inc. v. Greene Cnty., 23 So. 3d 454, 466 (¶32) (Miss. 2009) (internal citations and quotations omitted).

DISCUSSION

I. Whether the order of contempt issued by the chancellor was civil or criminal in nature.

¶9. At the hearing on July 18, 2012, Judge Fairly found Zebert to be in civil contempt "by clear and convincing evidence." The chancellor summarized:

> You have woefully failed to properly account to this court, Mr. Zebert. This court has been abundantly patient with you. I can't imagine why . . . Judge Grant didn't put you in jail [a] long time ago, because that's where you are going today. Until you properly account to this court for every penny of this man's money, you're going to sit over there in the Rankin County jail.
>
> I adjudicate you to be in willful and contumacious contempt. I'm reinstating Judge Grant's Order incarcerating you; and you're going to jail, sir, until you account for every penny.

Zebert responded, "I understand what a proper accounting is, and I certainly can put that together"; however, he later questioned the chancery court as to how he could accomplish that task while incarcerated. The chancellor said that was Zebert's problem to solve. The corresponding "Order of Contempt and Incarceration" stated that Zebert was "to present and *have approved* an accounting in this cause." (Emphasis added).

¶10. "The purpose of civil contempt is to compel compliance with the court's orders, admonitions, and instructions, while the purpose of criminal contempt is to punish." *In re McDonald*, 98 So. 3d 1040, 1043 (¶5) (Miss. 2012) (quoting *Graves v. State*, 66 So. 3d 148, 151 (¶11) (Miss. 2011)).

> The order of contempt is entered by the court for the private benefit of the offended party. Such orders, although imposing a jail sentence, classically provide for termination of the contemnor's sentence upon purging himself of the contempt. The sentence is usually indefinite and not for a fixed term. Consequently, it is said that the contemnor "carries the key to his cell in his own pocket."
>
> On the other hand, a criminal contempt proceeding is maintained solely and simply to vindicate the authority of the court or to punish otherwise for conduct offensive to the public in violation of an order of the court.

Jones v. Hargrove, 516 So. 2d 1354, 1357 (Miss. 1987) (citation omitted). A criminal-contempt penalty "[is] designed to punish the contemnor for disobedience of a court order; punishment is for past offenses and does not terminate upon compliance with the court order." *C.K.B. v. Harrison Cnty. Youth Court*, 36 So. 3d 1267, 1273 (¶16) (Miss. 2010) (quoting *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 868 (¶35) (Miss. 2004)).

¶11. On appeal, Zebert claims that it is "factually and legally impossible" for him to present an *approved* accounting since he admittedly misappropriated funds from the estate and "perpetuated a fraud on the court." He also says compliance with the chancery court's order is physically impossible since, from jail, he has no access to the necessary documentation. Zebert therefore contends that since it is impossible for him to comply with the chancellor's directive, he was subjected to "constructive" criminal contempt, which requires the chancery court to provide him with "procedural due process safeguards." *See Davis v. Davis*, 17 So. 3d 114, 120 (¶23) (Miss. Ct. App. 2009). Zebert also argues that Judge Fairly should recuse himself since the record reflects that Judge Fairly had a personal bias against him.

¶12. Judge Fairly's reasoning for remanding Zebert into custody was to compel compliance with his order to present a proper accounting of funds. Judge Fairly never stated during the hearing that Zebert had to have an approvable accounting; he said that Zebert needed to provide a "proper" accounting. However, as already noted, the order for contempt and incarceration did state that Zebert was required "to present and have approved an accounting in this matter[.]" The footnote in the order further stated:

> While accountings have been presented, none have been approved by the Court. All of the presented accountings and supplements fall woefully short of the statutorily required information necessary for the Court to approve same. Vouchers, presented by Mr. Zebert after being previously ordered by the Court, showed unauthorized and unapproved expenditures made by Jason T. Zebert.

This is the basis for Zebert's assertion that he cannot provide an accounting that would be approved, due to the misuse of funds.

¶13. We find no merit to Zebert's claims that the order was criminal in nature and that he is unable to comply with the order.[5] This is not a situation where Zebert owes money that

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[5] The dissent notes Zebert's argument that the contempt order should be set aside because he failed to receive proper notice of the show cause hearing through a Rule 81 summons. M.R.C.P. 81 He claims that the lack of a Rule 81 summons violated his due-process rights. "Criminal-contempt defendants are entitled to notice under Mississippi Rule of Civil Procedure 81(d), which requires service of process." *Corr v. State*, 97 So. 3d 1211, 1216 (¶12) (Miss. 2012) (citing M.R.C.P. 81(d)(2)).

As will be addressed more fully in section II of this opinion, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Pearson v. Browning*, 106 So. 3d 845, 851 (¶32) (Miss. Ct. App. 2012) (quoting *Vincent v. Griffin,* 872 So. 2d 676, 678 (¶6) (Miss. 2004)). In *Dennis v. Dennis*, 824 So. 2d 604, 610 (¶16) (Miss. 2002), the supreme court held that the appellant, who "*was given a meaningful opportunity to explain his actions which were the subject of the motion*

he is not able to pay; he is merely being required to provide a statement of all income and disbursements to and from Baker's trust account, together with all his paperwork related to his management of Baker's funds from October 2007 to September 2008. Zebert even stated at the July 18, 2012 hearing that he would be glad to provide "whatever information, documentation, or accounting the court wishes to be presented." Yet, over one year later, the record is still devoid of any documentation as to where the misappropriated funds have gone. Despite the chancery court's language in the order, it is apparent from the record that Judge Fairly knew there were unapproved expenditures; he merely wanted Zebert to provide the documentation that would evidence where the funds went. Although Zebert claims nothing further could be gained by another accounting, we observe that appellate counsel for Zebert could not state with certainty that Zebert has provided all the documentation that he has. The fact remains that the only accounting for the period at issue in this case is incomplete and contains evidence of fraud. Zebert admits to being solely responsible for the missing funds; appellate counsel emphatically stated to the Court that Zebert was the "person who took the

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for contempt" and who failed to show "that he was prejudiced in any way by the lack of proper notice," had waived any claim "of defective service and violation of due process." (Emphasis added).

At the hearing, Zebert mentioned that his attorney did not get notice, but he never denied that he received notice of the hearing. Zebert's Rule 81 argument is a matter of form over substance. Zebert had been dealing with the issue of the defectiveness of the accounting for two years. He had already been held in contempt and ordered incarcerated (twice), although his incarceration had been stayed in the hope that he would satisfy the chancery court's requirements. Moreover, Zebert entered an appearance at the hearing; he took advantage of the opportunity to explain and defend his actions to the chancellor.

money and had it at his disposal."[6]

¶14. The dissent notes Zebert has a Fifth Amendment right not to incriminate himself by admitting to the embezzlement of funds. However, Zebert has invoked no such privilege and has not raised as an issue on appeal any deprivation of his constitutional rights. Furthermore, had he wished to invoke this privilege, Zebert should have done so starting with the first order by Judge Grant requesting the overdue accounting. It is generally held that any invocation of the privilege must be made at the outset. "The privilege [against self-incrimination] is not ordinarily self-executing[;] it *must be affirmatively claimed when self-incrimination is threatened*, and a defendant may lose its benefit inadvertently, without making a knowing and intelligent waiver, simply by failing to invoke it." *State v. Richard*, 697 A.2d 410, 415 (Me. 1997) (emphasis added) (citing *Minnesota v. Murphy,* 465 U.S. 420, 427-28 (1984)).[7]

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[6] According to counsel during oral argument, one of the women who allegedly received the "loans" was investigated and testified that she did not receive the money. Counsel for Zebert stated it was apparent that the chancery court determined that the money did not go to anyone but Zebert. The latest accounting to the chancery court, however, represents that secured loans were made to the two women.

[7] In *Richard*, the defendant was sued for selling unregistered securities. The State sought a complete accounting. *Richard*, 697 A.2d at 412. Paul Richard "objected to the accounting only on the ground that it was an inappropriate remedy, without mentioning his Fifth Amendment right." *Id*. at 412-13. He failed to provide the appropriate accounting, and the State filed two separate motions for contempt over a six-month period. *Id*. at 413. After the State filed its second contempt motion, Richard asserted his Fifth Amendment privilege and "declined to provide the accounting." *Id*. After a hearing, the lower court found him to be in contempt and ordered him incarcerated. Richard appealed, claiming that prior to the second motion for contempt, he had no "reasonable apprehension of criminal prosecution." *Id*. The Supreme Judicial Court of Maine held:

¶15. This Court also finds it a bit disingenuous for Zebert to assert that his incarceration makes it physically impossible to comply. Zebert had hired an attorney, Melissa Gardner Warren, to represent him at his initial "show cause" hearings. Judge Grant entered a continuance, staying Zebert's incarceration, on August 4, 2011, based on Warren's request that she be allowed to assist Zebert with preparing the accounting. Yet no explanation has been provided why the accounting was not completed at that time with Warren's assistance. Rosenthal, counsel for the Appellee and successor guardian to the estate, contends that the request by the chancellor "can be simply done, and would require less than three (3) days to prepare and present the same . . . for the Court['s] review[.]" He also reported during oral argument before this Court, without objection, that he even visited the jail and offered to help Zebert, but was refused.

¶16. Although Zebert argues it is necessary that he be released from incarceration to address the pending federal charges against him, we are obliged to respect the chancery

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> Given the facts as set forth by the court, we treat this as a finding that Richard first waived his Fifth Amendment rights *when he failed to invoke them in response to the State's requests for an order to provide an accounting*, made in its simultaneous motions for a temporary restraining order and a preliminary injunction filed in March 1996. Richard's argument that he could not have invoked the privilege because he had no reasonable apprehension at that juncture that his submission of an accounting could lead to a criminal prosecution is not persuasive.

Id. at 415 (emphasis added). The *Richard* court also noted that Richard was notified from early on that he had violated the statute prohibiting the sale of unregistered securities. In this case, Zebert was apparently aware from the outset that a full and proper accounting would make him subject to prosecution.

court's role "to act as the superior guardian" to those suffering from disability who are unable to act for themselves. *In re Wilhite*, 121 So. 3d 301, 305 (¶11) (Miss. Ct. App. 2013) (quoting *Carpenter v. Berry*, 58 So. 3d 1158, 1163 (¶19) (Miss. 2011)).

> The court will take nothing as confessed against them; will make for them every valuable election; *will rescue them from faithless guardians*, designing strangers, and even from unnatural parents[;] and in general[,] *will and must take all necessary steps to conserve and protect the best interest of these wards of the court*.

Id. at 306 (¶11) (emphasis added) (quoting *Carpenter*, 58 So. 3d at 1163 (¶19)).

¶17. Judge Fairly has aptly summarized Zebert's continuing unwillingness to provide what the chancery court has requested. At the hearing on September 19, 2011, when Zebert only provided copies of the checks to the court, instead of the requested bank statements, Judge Fairly said:

> It is just positively clear you've been playing games with the court, Mr. Zebert. And, you know, you are purposely – I made – I couldn't have said bank statements – I bet I said it ten times when we were last here in court [on September 8, 2011], because there's no way I can do a reconciliation of that without the bank statements.

Subsequently, on November 14, 2012, Judge Fairly submitted a response to a motion for writ of habeas corpus filed by Zebert, concluding:

> The Court had before it an abundance of evidence to find Zebert in willful and contumacious contempt of Court and ordered him jailed. Zebert committed a fraud upon the Court. He stole Baker's money. *But that is not why he remains in jail*. He remains in jail and, to the extent this Court has the power, will remain in jail until he gives the Court a *full and complete accounting of all the funds which he wrongfully expended* and, since he has failed to account for the money, presumably stolen. He offered no explanation as to where the money went that he transferred electronically to one of his personal accounts. This Court wants to know: Where did the money go? An accounting will reveal

> that. . . . Zebert's incarceration here dealt with his willful disobedience to account for the missing money.
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> . . . .
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> In conclusion, this Court is strongly persuaded and continues to conclude that *unless and until Zebert purges himself of his contempt, which he can do from the confines of the Rankin County jail by presenting a full and complete accounting of all funds he removed from the Baker account*, he should remain in the Rankin County jail.

(Emphasis added).[8]

¶18. Consequently, we find nothing to support Zebert's contention that Judge Fairly's order of contempt was criminal in nature. "[A] valid order of civil contempt does not become punitive simply because the contemnor persists in punishing himself." *United States v. Harris*, 582 F.3d 512, 520 (3d Cir. 2009). At some point, Zebert's incarceration for civil contempt may become unhelpful and punitive in nature; however, there is no indication that this stage has yet been reached. *See Commodity Futures Trading Comm'n v. Armstrong*, 269 F.3d 109, 112 (2d Cir. 2001) (A confinement of more than eighteen months for contempt "d[id] not automatically mean that [the] confinement ha[d] lost all realistic possibility of having a coercive effect, but it might well affect the degree of deference to be accorded a trial judge's determination."); *United States ex rel. Thom v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985) (The contemnor was imprisoned for fifteen months. If after months, or perhaps even years, the contemnor "steadfastly refuse[s] to yield to the coercion of incarceration, the judge

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[8] Zebert filed a motion for writ of habeas corpus on August 28, 2012, requesting release from custody. The Mississippi Supreme Court denied Zebert's motion on November 19, 2012.

would be obligated to release [him] since incarceration would no longer serve the purpose of the civil contempt order[.]"); *Anyanwu v. Anyanwu,* 771 A.2d 672, 679-81 (N.J. Super. Ct. App. Div. 2001) (Since there was no evidence to support the hearing judge's determination that there was "no substantial likelihood of compliance," the appellate court reversed the judge's ruling that contemnor should be released from incarceration after four years. "No hard and fast rule or fixed period of time defines when coercive commitment becomes punitive, but refusal to comply is in itself insufficient for a finding that the commitment has lost its coercive power.").

¶19. Regarding any personal bias, the chancellor noted that Zebert was actually ordered to be incarcerated by Judge Grant. It was only due to the mercy shown by Judge Grant on July 26, 2011, and August 4, 2011, that he was not incarcerated at that time. The chancery court, as "superior guardian" of Baker's estate, has not only the authority, but also the responsibility, to rescue Baker from the fraudulent actions of his "faithless guardian" – here, by requiring that guardian, Zebert, to provide all information regarding his management of the estate.

¶20. We find this issue is without merit.

II. Whether the failure to issue Zebert a summons under Mississippi Rule of Civil Procedure 81 for the July 18, 2012 show-cause hearing was a violation of Zebert's due-process rights.

¶21. Although Zebert was mailed the order to show cause and notice of the hearing on July 18, 2012, the dissent notes Zebert's argument that the contempt order should be set aside because he failed to receive notice of the show-cause hearing through a Rule 81 summons.

Zebert claims that this was a violation of his due-process rights. However, as we have concluded that the contempt was civil in nature, this issue is moot. The Mississippi Supreme Court has held that "[*c*]*riminal*-contempt defendants are entitled to notice under Mississippi Rule of Civil Procedure 81(d), which requires service of process." *Corr v. State*, 97 So. 3d 1211, 1216 (¶12) (Miss. 2012) (emphasis added) (citing M.R.C.P. 81(d)(2)).

¶22. We find Zebert's Rule 81 argument unpersuasive. Zebert had been dealing with the issue of the defectiveness of his accounting for more than two years. The initial order to show cause was filed on April 8, 2009; the hearing was set for June 1, 2009. Ten continuances were granted at the request of Zebert over the next two years, delaying the show-cause hearing until July 26, 2011. At that hearing, Judge Grant found Zebert in contempt and ordered him incarcerated, but the incarceration was stayed in the hope that Zebert would satisfy the chancery court's requirements. Judge Grant recused himself shortly thereafter, and a short hearing was held before the new chancellor, Judge Fairly, on September 8, 2011. Zebert assured Judge Fairly that he would provide all remaining documentation on September 19, 2011. However, he failed to do so, and the matter of the accounting and his contempt was continued until the hearing on July 18, 2012. Zebert was well aware of the basis for the hearing; Judge Fairly observed at the hearing: "Mr. Zebert fully knows why we're here today." Zebert had already been found in contempt on July 26, 2011. The July 18 order of contempt simply *reinstated* Judge Grant's prior order of contempt and lifted the suspension of Zebert's incarceration.

¶23. Additionally, Zebert never objected to service of process at the July 18, 2012 hearing.

At the show-cause hearing, Zebert casually mentioned that his attorney, Warren, did not get notice, but he never denied that he received notice of the hearing.[9] Zebert also entered an appearance at the hearing; he took advantage of the opportunity to explain and defend his actions to the chancellor. "With regard to a contempt proceeding, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Pearson v. Browning*, 106 So. 3d 845, 851 (¶32) (Miss. Ct. App. 2012) (quoting *Vincent v. Griffin,* 872 So. 2d 676, 678 (¶6) (Miss. 2004)). In *Dennis v. Dennis*, 824 So. 2d 604, 610 (¶16) (Miss. 2002), the supreme court held that the appellant, who "*was given a meaningful opportunity to explain his actions which were the subject of the motion for contempt"* and who failed to show "that he was prejudiced in any way by the lack of proper notice," had waived any claim "of defective service and violation of due process." (Emphasis added); *see also Chasez v. Chasez*, 957 So. 2d 1031, 1037 (¶15) (Miss. Ct. App. 2007) ("Any objections to service of process may be waived if a defendant appears in an action without raising the objection in the initial pleadings or attached motions.") (citation omitted). Consequently, we find no merit to Zebert's issue of notice under Rule 81.

III. Whether the order of July 19, 2012, rescinded the order of contempt and incarceration at issue on appeal.

¶24. Zebert also claims that Judge Fairly's July 19, 2012 order rescinded the prior order of contempt and incarceration filed the previous day. Thus, he claims that he should be

[9] We also note that the majority of the motions for continuances were filed by Zebert on his own behalf, not by Warren. He was listed in the court filings as fiduciary and attorney.

released from incarceration.

¶25. The July 19, 2012 order states in part: "ORDERED THAT the prior Order of August 8, 2011, to the extent that it is sealed the order of that date and any prior orders be and the same is hereby rescinded." We find that this language merely serves to unseal the chancery court's August 8 order and rescinds all orders prior to that date. The chancery court, in its response to the motion for habeas corpus, confirms our finding, noting: "To argue that the Order of July 19, 2012, rescinded the Order of Contempt and Incarceration entered the day before stretches credulity to its utmost. The Order simply unsealed those Orders previously sealed by Judge Grant." Accordingly, we find this issue to be without merit.

¶26. **THE JUDGMENT OF THE CHANCERY COURT OF RANKIN COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., IRVING, P.J., CARLTON, MAXWELL AND FAIR, JJ., CONCUR. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY ISHEE AND ROBERTS, JJ. JAMES, J., NOT PARTICIPATING.

GRIFFIS, P.J., DISSENTING:

¶27. Is Zebert in jail because he failed to file a proper guardianship accounting,[10] or is he in jail because he failed to tell the chancellor what he did with the money he stole or misappropriated? The answer decides this case.

¶28. If Zebert is in jail because his accounting is insufficient, he is guilty of civil contempt. If Zebert is in jail because he will not say what he did with the money he took from the

[10] See Uniform Chancery Court Rules 6.01 through 6.17.

guardianship without approval, he may be guilty of constructive criminal contempt. The difference matters to the due process required.

¶29. I agree with the majority that there is sufficient evidence in the record to conclude that Zebert misappropriated, stole, or embezzled almost $200,000 from the guardianship. Zebert has been incarcerated for almost eighteen months now. The chancellor has said that he can get out of jail when he purges the contempt; said differently by the chancellor, "[u]ntil you properly account to this court for every penny of this man's money, you're going to sit over there in the Rankin County jail."

¶30. What does Zebert need to do to get out of jail, i.e., purge the contempt? Certainly, if he is able to return the money that he disbursed without court authority, the contempt would be purged. If he tells the court that he squandered the money on "wine, women, and song," would that be a "proper account" of the money? I do not think so. It is my analysis of the chancellor's contempt order that Zebert must return the money to get out of jail.

¶31. Hence, my opinion is that Zebert was found not in civil contempt but in constructive criminal contempt. Although I agree that, ultimately, incarceration is the proper remedy for Zebert's actions, I find that his actions are criminal, and he is subject to the due-process protections of the criminal-justice system before he is incarcerated. For these reasons, I respectfully dissent. I would reverse and vacate the chancellor's order of contempt and incarceration.

I. Whether the order of contempt issued by the chancellor was civil or criminal in nature.

¶32. The distinctions between civil and criminal contempt are confusing, difficult, and often blurred. In *Hinds County Board of Supervisors v. Common Cause*, 551 So. 2d 107, 120-21 (Miss. 1989), the supreme court ruled:

> The landmark case which distinguishes civil and criminal contempt is *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), which states the following:
>
> > *Contempts are neither wholly civil nor altogether criminal. And it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases*. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. Imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. On the other hand, if the defendant does that which [he] has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

(Emphasis added).

¶33. Recently, in *Corr v. State*, 97 So. 3d 1211 (Miss. 2012), the supreme court considered

a contempt order that is similar to the one in this case. There, the chancellor found that process servers were in direct criminal contempt and were sentenced to a term of incarceration. *Id.* at 1213 (¶3). The court considered the due-process protections that were afforded. The court held:

> [I]n classifying a finding of contempt as civil or criminal, this Court focuses on the purpose for which the power was exercised. On appeal, the trial court's classification is not conclusive. Thus, the determination should focus on the character of the sanction itself and not the intent of the court imposing the sanction.

Id. at 1214 (¶7) (citation omitted).

¶34. The majority is satisfied that Zebert's contempt was civil. "The purpose of civil contempt is to compel compliance with the court's orders, admonitions, and instructions, while the purpose of criminal contempt is to punish." *In re McDonald*, 98 So. 3d 1040, 1043 (¶5) (Miss. 2012) (quoting *Graves v. State*, 66 So. 3d 148, 151 (¶11) (Miss. 2011)). To determine the type of contempt, we must "focus on the character of the sanction itself and not the intent of the court imposing the sanction." *Corr*, 97 So. 3d at 1214 (¶7) (citations omitted).

A. Proceedings before the previous chancellor

¶35. This guardianship began in 2000. For approximately seven years, Zebert filed and presented annual accountings. The assigned chancellor approved each one of the accountings. In fact, by order dated February 14, 2008, the chancellor held that Zebert's "Petition Exhibiting Seventh Annual Accounting filed herein be, and the same hereby is approved and allowed as such." Zebert was current on the required guardianship accountings

through September 30, 2007. The guardianship bank account had a balance of $164,909.93.

¶36. From October 2008 through October 2010, the clerk and the assigned chancellor issued a number of reminders, orders to show cause, and orders continuing hearings. Each of these asked Zebert to file the annual accountings required by Uniform Chancery Court Rules 6.01 through 6.17.

¶37. On October 4, 2010, Zebert filed a "Petition Exhibiting Eight[h] Accounting of Estate." The chancellor did not approve this accounting. Instead, by order dated July 26, 2011, Zebert was found in contempt and ordered to be incarcerated until he complies with the Uniform Chancery Court Rules by filing and having approved all annual accountings past due. Nevertheless, the order suspended Zebert's incarceration until August 4, 2011.

¶38. Zebert then filed a motion for recusal. The chancellor executed another order, dated August 4, 2011, that found Zebert in contempt and ordered his incarceration. Again, the order suspended his incarceration order until September 8, 2011.

¶39. On August 8, 2011, the chancellor entered an order that "stayed indefinitely" the previous contempt and incarceration order. The chancellor also recused himself from presiding over this case. The case was transferred to Chancellor Dan Fairly.

B. Proceedings before the current chancellor

¶40. On September 8, 2011, Zebert filed a "Petition Exhibiting Eight[h] Accounting of Estate." Attached to the petition was a schedule of income and expenses, in a form similar to the earlier accountings. On the same day, the chancellor entered an order of continuance until September 19, 2011.

¶41. On September 19, 2011, Zebert filed a "Supplement to Eighth Accounting of Estate." Zebert noted that disbursements, in the form of "loans," had made from the guardianship account. These loans were not authorized. Attached were letters from First Commercial Bank that stated the balance in the guardianship account was $6,555.50. Also attached were approximately fifty-five pages of canceled checks (i.e., vouchers) written on the guardianship account.

¶42. A hearing was held on September 19, 2011, but there is no transcript in the record. The chancellor entered an order that provided:

> Jason T. Zebert is found in willful and contumacious contempt of this Court's prior oral order *to present to this Court bank statements* in this cause.
>
> . . . .
>
> [A]ll other matters in this cause, including but not limited to other findings of contempt and incarceration, are hereby continued to October 3, 2011 at 9:00 a.m. at which time the Court expects Jason T. Zebert to present to the Court bank statements and copies of canceled checks for the Court's review.

(Emphasis added). There is no record of a hearing held on October 3, 2011.

¶43. In January 2012, the chancery clerk served Zebert with yet another notice of a past-due accounting. On July 5, 2012, the chancellor issued an order to show cause for a past due-accounting. The order directed Zebert to appear on July 18, 2012, "to show cause, if any they have, why they should not be sanctioned and/or removed."[11]

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[11] Zebert argues that he was not served with proper process. Zebert was served notice under Mississippi Rule of Civil Procedure 5. He was not served with a M.R.C.P. 81 summons. As the attorney of the guardianship, Zebert was ordered to appear and "to show cause, if any they have, why they should not be sanctioned and/or removed." At the hearing,

¶44. On July 18, 2012, Zebert filed the "Petition Exhibiting Ninth Accounting of Estate." Attached was a schedule of income and expenses, in a form similar to the earlier accountings. The petition indicated that the guardianship account had a balance of $564.41. Also, on July 18, 2012, Zebert filed an "Accounting Supplement" that stated: "Attached hereto are the listings of the electronic loan disbursements in the above referenced Estate Account." There were two pages attached that itemize, by date, "loan disbursements" in the sum of $48,745.

¶45. A hearing was held on July 18, 2012. The transcript is in the record. The chancellor identified each pleading filed in the court file and interrogated Zebert. The chancellor was not satisfied with Zebert's accountings or Zebert's inability to testify about where the guardianship funds had been spent. Also, the chancellor was concerned that Zebert had misappropriated a substantial sum of the guardianship's assets. At the conclusion of the hearing, the chancellor held Zebert in contempt and incarcerated him. In the order, the chancellor held:

> THIS CAUSE came on for hearing on the Order to Show Cause for failure of the Fiduciary, Jason T. Zebert, to present and have approved an accounting in this matter[,] and the Court after finding that it has jurisdiction over the parties and subject matter herein, further finds that Jason T. Zebert has failed to present and have approved the accounting in this cause.

Zebert was not removed. Zebert complained at the hearing that he did not have proper notice of the hearing. Zebert was held in contempt and jailed. A court order that sets a hearing of contempt, which could result in incarceration, requires that a summons be served on the defendant under M.R.C.P. 81. Here the defendant is Zebert, the attorney, serving in a fiduciary capacity in relation to the guardianship. The chancellor's failure to ensure proper service of process, under M.R.C.P. 81, is a violation of Zebert's due-process rights and requires reversal. *See Powell v. Powell*, 644 So. 2d 269, 274 (Miss. 1994).

> IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Jason T. Zebert be and is hereby found in willful and contumacious civil contempt of this Court's prior orders to present and have approved an accounting in this cause.
>
> > [Footnote 1] While accountings have been presented, none have been approved by the Court. All of the presented accountings and supplements fall woefully short of the statutorily required information necessary for the Court to approve same. V ouchers, presented by Mr. Zebert after being previously ordered by the Court, showed unauthorized and unapproved expenditures made by Jason T. Zebert.
>
> IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Sheriff of Rankin County, Mississippi, is authorized and empowered to seize and confine Jason T. Zebert and incarcerate him in the Rankin County Jail until he purges himself of such contempt.
>
> IT IS FURTHER ORDERED, ADJUDGED and DECREED that the prior Order of Contempt and Incarceration entered in this cause by the Chancellor for Place 2 of the Chancery Court of Rankin County, Mississippi, that suspended the incarceration of Jason T. Zebert, be and is hereby lifted and reinstated.

This is the order from which Zebert appeals.

¶46. Harry Rosenthal appeared at the July 18, 2012 hearing as the "custodian-in-fact" of Mr. Baker. Rosenthal provided the chancellor with several documents and bank statements. These documents were included in record. The docket identifies these documents as "Accounting Exhibits filed by D.F," and the table of contents of the record identifies these as "Accounting Exhibits filed by Judge Fairly." The record contains approximately 200 pages of documents, which may be identified as follows:

A. Correspondence between the Veteran's Administration and Rosenthal.

B. The guardianship's monthly bank statement, at Regions Bank, for the

period of September 15, 2011 through October 13, 2011, including canceled checks.

C. A document, dated November 15, 2011, signed by Rosenthal, titled "Amended Custodian's Second Annual Accounting of the Estate of Thomas E. Baker for the period 10/10/10 through 10/1/11," and filed with the Veterans Administration. This accounting provided the following information:

Beginning balance	$154,100.01
Funds received	44,519.40
Less expenditures	-6,164.76
Ending balance	$192,454.65

Attached were copies of bank statements, including deposit slips and canceled checks, for the period of October 14, 2010 through October 13, 2011.

D. A document, dated October 29, 2010, signed by Rosenthal, titled "Guardian's First Annual Accounting of the Estate of Thomas E. Baker, September 9, 2009[,] to October 30, 2010," and filed with the Veteran's Administration. In this accounting, Rosenthal indicated that he was requested to serve as Mr. Baker's guardian on September 2, 2009. Rosenthal was approved as the [Veterans' Administration's] guardian-in-fact. This accounting provided the following information:

Beginning balance	$ 0.00
Funds received	154,119.01
Less expenditures	- 19.00
Ending balance	$ 154,100.01

E. The guardianship's monthly bank statements, from an account with Regions Bank, with Rosenthal as signatory, for the period of April 19, 2012 through June 19, 2012, including canceled checks.

F. The guardianship's monthly bank statements, from an account with First Commercial Bank, with Zebert as signatory, for the period from October 16, 2007 through June 16, 2011, including canceled checks.

¶47. On July 19, 2012, Judge Fairly executed another order that states: "Ordered that the

prior Order of August 8, 2011, to the extent that it sealed the order of that date and any prior orders be and the same is hereby rescinded."

C. Character of Sanction – Civil or Criminal Contempt

¶48. As stated earlier, the type of contempt is based "on the character of the sanction itself and not the intent of the court imposing the sanction." *Corr*, 97 So. 3d at 1214 (¶7).

¶49. The chancellor has determined, and record evidences, the fact that Zebert made unauthorized disbursements from the guardianship account for his personal benefit. The majority recognizes, and I agree, that Zebert faces criminal charges.[12]

¶50. My examination of the record finds: (1) several petitions to approve accountings filed by Zebert;[13] (2) the guardianship's monthly bank statements that show Zebert's unauthorized disbursements (these were presented to the chancellor at the July 18, 2012 hearing by

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[12] Mississippi Code Annotated section 97-23-19 (Supp. 2013), titled, "Embezzlement; by agents, bailees, trustees, servants and persons generally," provides:

> If any person shall embezzle or fraudulently secrete, conceal, or convert to his own use, or make way with, or secrete with intent to embezzle or convert to his own use, any . . . money, or other valuable security, effects, or property of any kind or description which shall have come or been entrusted to his care or possession by virtue of his office, position, place, or employment, either in mass or otherwise, with a value of Five Hundred Dollars ($ 500.00) or more, he shall be guilty of felony embezzlement, and, upon conviction thereof, shall be imprisoned in the custody of the Department of Corrections not more than ten (10) years, or fined not more than Twenty-five Thousand Dollars ($25,000.00), or both.

[13] The petitions do not fully comply with Uniform Chancery Court Rules 6.03 and 6.05. Nevertheless, Zebert did file petitions showing each disbursement of the guardianship funds, albeit some disbursements were neither authorized nor for the benefit of the ward.

Rosenthal and were in the record before the chancellor entered the July 18, 2012 order);[14] (3) all of the guardianship account's canceled checks (i.e. vouchers) (also filed by Rosenthal).[15] The record before this Court contains sufficient evidence of how the guardianship funds were spent. This evidence does not show *where* Zebert spent the money after it was transferred to his personal accounts or for his personal use.

¶51. The majority determines that Zebert is "merely being required to provide a statement of all income and disbursements to and from Baker's trust account, together with all his paperwork related to his management of Baker's funds from October 2007 to September 2008." Maj. Op. at (¶13). If that is all that is required, such information is in the record before this Court and was in evidence before the chancellor on July 18, 2012. Yet, I do not believe this was the reason why Zebert was held in contempt and incarcerated.

¶52. The majority then concludes:

> Yet, over one year later, the record is still devoid of any documentation as to *where the misappropriated funds have gone*. Despite the chancery court's language in the order, it is apparent from the record that *Judge Fairly knew there were unapproved expenditures; he merely wanted Zebert to provide the*

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[14] The bank statements, albeit copies, provide the information required by Uniform Chancery Court Rule 6.03. The presentation of these bank statements appear, in my opinion, to purge Zebert's contempt finding in the September 19, 2011 order, which found Zebert "in willful and contumacious contempt of this Court's prior oral order to present to this Court bank statements." Based upon the presentation of these bank statements, Zebert was no longer in contempt of the September 19, 2011 order.

[15] Based on Uniform Chancery Court Rule 6.04, the vouchers must "consist of a receipt or canceled bank check showing to whom and for what purpose the money was paid." The checks included in the record certainly show to whom the money was paid, there are a number of checks written to Zebert and the bank statements show electronic transfers.

> *documentation that would evidence where the funds went*. Although Zebert claims nothing further could be gained by another accounting, we observe that appellate counsel for Zebert could not state with certainty that Zebert has provided all the documentation that he has. The fact remains that the only accounting for the period at issue in this case is incomplete and contains evidence of fraud. Zebert admits to being solely responsible for the missing funds; appellate counsel emphatically stated to the Court that Zebert was the "person who took the money and had it at his disposal."

Id. (emphasis added). This finding makes it clear that both the majority and the chancellor do not expect Zebert to purge the contempt by filing documents in the nature of the accounting. Instead, the contempt can only be purged if Zebert confesses to taking the money and tells the chancellor where the money has gone. This information will assist in the recovery of the funds that were illegally removed.[16] Thus, in my opinion, when the

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[16] I rely on the majority's reference to the chancellor's words in response to Zebert's motion for writ of habeas corpus:

> The Court had before it an abundance of evidence to find Zebert in willful and contumacious contempt of Court and ordered him jailed. Zebert committed a fraud upon the Court. *He stole Baker's money*. But that is not why he remains in jail. He remains in jail and, to the extent this Court has the power, will remain in jail until he gives the Court a full and complete accounting of all the funds which he wrongfully expended and, *since he has failed to account for the money, presumably stolen. He offered no explanation as to where the money went that he transferred electronically to one of his personal accounts.* This Court wants to know: *Where did the money go?* An accounting will reveal that . . . .
>
> In conclusion, this Court is strongly persuaded and continues to conclude that unless and until Zebert purges himself of his contempt, which he can do . . . by presenting a full and complete accounting *of all funds he removed from the Baker account*, he should remain in the Rankin County jail.

(Emphasis added).

chancellor held that Zebert is to be incarcerated until he can "account for every penny," this is a criminal contempt.[17]

¶53. I cannot find the wrongful conduct here is Zebert's failure to account. Instead, it appears that the chancellor seeks restitution for the guardianship. The record contains the information necessary to comply with the accounting requirements of the Uniform Chancery Court Rules. Instead, it appears to me that the wrongful conduct is the fact that Zebert misappropriated, stole, or embezzled the guardianship's assets. I interpret the chancellor's contempt order as an effort to find and recover the money unlawfully taken.

¶54. In *Corr*, the court held:

> The proceedings were for constructive (indirect) criminal contempt, "that is, for acts that—in whole or in part—occurred outside the presence of the judge" not for direct criminal contempt, and, therefore, Appellants were entitled to due-process protections. "A direct criminal contempt is one which takes place in the very presence of the judge making all the elements of the offense personal knowledge." This Court has provided that:
>
> > [D]irect criminal contempt involves words spoken or actions committed in the presence of the court that are calculated to embarrass or prevent the orderly administration of justice. Punishment for direct contempt may be meted out instantly by the judge in whose presence the offensive conduct was

[17] I note that the chancellor was correct to order a forensic audit of the guardianship accounts. Indeed, a claim should be filed against Zebert that would allow the exercise of subpoena power to follow the funds and seize any and all documents from Zebert's office, his home, or from others who may have knowledge or information about the monies wrongfully taken from this guardianship. The record before this Court, however, does not indicate that Zebert has been discharged as the guardian, a new guardian appointed, or any efforts made to recover on the surety bond, from Zebert or others who may have received these monies. If such claim has not been filed, the limitations period may soon preclude such action or otherwise limit recovery.

committed[.]

> Unlike direct contempt, constructive contempt involves actions which are committed outside the presence of the court. In the case of constructive criminal contempt, we have held that defendants must be provided with procedural due process safeguards, including a specification of charges, notice, and a hearing.

Corr, 97 So. 3d at 1214 (¶8). Here, the wrongful conduct did not occur within the presence of the chancellor. Instead, the wrongful conduct was the unauthorized expenditures of guardianship funds. As such, I conclude that the contempt proceedings were for constructive criminal contempt despite the majority's and the chancellor's characterization of the contempt as being civil.

¶55. When the chancellor learns that a fiduciary has misappropriated, stolen, or embezzled guardianship assets, as the case here, there comes a point that it becomes a criminal matter and the wrongdoer is entitled to certain inalienable rights protected by the Constitution. In criminal cases as in criminal-contempt matters, even Zebert is entitled to the presumption of innocence and basic constitutional protections.[18] For example, Zebert may assert his

[18] These constitutional protections include, but are not limited to, the Fifth Amendment right not to "be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty . . . without due process of law," and the Sixth Amendment "right[s] to a speedy and public trial, by an impartial jury . . ., to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." With a criminal charge against him, Zebert would also be entitled to a reasonable bail. Zebert has been afforded none of these protections here, and he has been incarcerated for approximately eighteen months.

constitutional right to remain silent.[19] The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." In this action, it appears to me that Zebert's choice is to either testify against himself and get out of jail on the chancellor's contempt and incarceration order, or assert his constitutional right and remain in jail without the possibility of bond.

¶56. I commend the chancellor for his efforts in the handling of this matter, and I note the difficulty presented by current legal precedent on contempt. Nevertheless, I am compelled to conclude that the chancellor's finding was one of constructive criminal contempt and not civil contempt.

¶57. In *Corr*, the supreme court held:

> The Mississippi Constitution provides that, "in all criminal prosecutions the accused shall have a right to demand the nature and cause of the accusation." Miss. Const. art. 3, § 26 (1890). For indirect criminal contempt, this Court requires notice of the charges and the specific conduct alleged to be contemptuous and a hearing. *See Purvis*, 657 So. 2d at 798 ("constructive contempt requires a specification of charges, notice and a hearing.") (citing *Wood v. State*, 227 So. 2d 288, 290 (Miss. 1969)); *Moulds v. Bradley*, 791 So. 2d 220, 225 (Miss. 2001) ("Without notice of constructive criminal contempt sanctions, the accused's due process rights were violated."); *Premeaux*, 569 So.2d at 684 ("defendant must be afforded minimum due process rights" and

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[19] The majority responds that Zebert has waived his right to assert his constitutional rights because he should have asserted these rights when the previous chancellor requested an overdue accounting. To support this contention, the majority cites a 1997 Maine criminal court decision. There, at least, the issue of the defendant's constitutional rights were submitted to a court of criminal jurisdiction. *State v. Richard*, 697 A.2d 410 (Maine 1997). I do not believe this case supports the majority's argument. Instead, I used this as an example to establish that Zebert's actions were recognized by the chancellor to be criminal in nature, it should have been turned over to the district attorney, and Zebert's incarceration based on the criminal laws of this State.

> "[d]ue process includes notice to the alleged contemnor that she was being considered for criminal contempt.") (citing *Mabry v. Howington*, 569 So. 2d 1165, 1167 (Miss. 1990), and *Cook v. State*, 483 So. 2d 371, 375 (Miss. 1986)). The chancellor issued orders in the underlying DHS cases notifying Appellants of show-cause hearings and instructing them to "be prepared to present evidence as to why they should not be found in contempt of court and sanctions, including incarceration and/or a fine, should be entered." Thus, Appellants received a modicum of actual notice of the contempt proceedings.
>
> However, the chancellor did not issue summonses to the proceedings. Criminal-contempt defendants are entitled to notice under Mississippi Rule of Civil Procedure 81(d), which requires service of process. [M.R.C.P.] 81(d)(2). This Court has explained that, "although contempt proceedings often are filed in the same cause number and proceed with the underlying case, they are held to be separate actions, requiring new and special summons under Mississippi Rules of Civil Procedure 81." *Shavers v. Shavers*, 982 So. 2d 397, 402 (Miss. 2008) (citation omitted); *see Hanshaw v. Hanshaw*, 55 So. 3d 143, 146 (Miss. 2011) ("Because contempt proceedings are distinct actions, they require notice consistent with Mississippi Rule of Civil Procedure 81(d)."). "In contempt proceedings, 'complete absence of service of process offends due process *and cannot be waived*.'" *Dennis v. Dennis*, 824 So. 2d 604, 609 (Miss. 2002) . . . (emphasis added) (citations omitted). Thus, notice by the issuance of summonses under Rule 81 must occur before contempt proceedings are conducted. The failure to issue Appellants summonses for the contempt proceedings violated Appellants' due-process rights and likewise warrants reversal.

Corr, 97 So. 3d at 1216 (¶¶11-12).

¶58. Based on *Corr*, I conclude that the contempt proceedings here were for constructive (indirect) criminal contempt. I also find that the chancellor was required to issue process that would give Zebert notice of the criminal charges against him. The chancellor failed to do so and violated Zebert's due-process rights. I would vacate the contempt judgments and vacate the order of incarceration.

II. Whether the chancellor was required to recuse.

¶59. Because the majority has affirmed this case, I see no reason to address this issue other than to say that the court in *Corr* held that recusal is mandatory in a constructive criminal contempt proceeding. *Id.* at 1215 (¶10).

¶60. It is for these reasons that I respectfully dissent.

ISHEE AND ROBERTS, JJ., JOIN THIS OPINION.