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Contempt of Court - Right to Jury Trial - A Fine of $104,000 and Thirty Day Jail Sentence is Serious Offense Entitling Contemnor to Trial by Jury.

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CASENOTE

CONTEMPT OF COURT—Right to Jury Trial—A Fine of $104,000 and Thirty Day Jail Sentence is Serious Offense Entitling Contemnor to Trial by Jury

Ex Parte Griffin,
682 S.W.2d 261 (Tex. 1984)

Don Griffin was temporarily enjoined from selling chemical products and related goods, similar to NCH Corporation's products, to a specific list of NCH customers in several Texas counties.[1] Griffin appealed the temporary injunction, which the court of appeals affirmed.[2] In its contempt motion, NCH Corporation alleged that Griffin violated the temporary injunction on multiple occasions and requested a $500 fine for each violation, as well as a jail sentence of less than six months.[3] The trial court found Griffin to be in contempt of court and sentenced him to thirty days in jail and a $104,000 fine.[4] While in custody, Griffin filed a habeas corpus petition seeking release from jail, contending that a jury should have been present at the contempt proceeding.[5] The Texas Supreme Court granted the writ of habeas corpus.[6] *Held*—Griffin entitled to jury trial.[7] A fine of $104,000 and thirty day jail sentence is a serious offense entitling the contemnor to a trial by jury.[8]

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1. *See Ex parte* Griffin, 682 S.W.2d 261, 261-62 (Tex. 1984). Griffin was also enjoined from taking away or attempting to divert any of the customer accounts identified in a seven page listing of the complainant's customers. *See id.* at 262.

2. *See id.* at 262. The temporary injunction was effective for two years from its date of issuance, or until a final judgment was rendered based on a trial on the merits. *See id.* at 262.

3. *See id.* at 262. NCH Corporation alleged that Griffin sold chemical products to 25 customers listed on exhibit "A" attached to the temporary injunction. *See id.* at 262.

4. *See id.* at 262.

5. *See id.* at 262. Griffin contended the excessive amount of the fines made the offense serious, thereby triggering his sixth amendment right to a jury trial. *See id.* at 262.

6. *See id.* at 262.

7. *See id.* at 262.

8. *See id.* at 262.

Article III section 2[9] and the sixth amendment[10] of the United States Constitution provide the constitutional basis for a trial by jury in criminal proceedings.[11] The right to a jury trial is not automatically invoked for all criminal proceedings,[12] because the common law exception for "petty" offenses has been adopted by the United States Supreme Court.[13] Since the adoption of the common law exception, courts have struggled with the determination of whether a particular offense is petty or serious,[14] especially in

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9. U. S. CONST. art. III, § 2. The third clause of § 2 provides, in the relevant part: "[T]he trial of all crimes. . .shall be by jury." *Id.*

10. U. S. CONST. amend. VI. The sixth amendment states: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." *Id.*

11. *See* Baldwin v. New York, 399 U.S. 66, 68 (1970) (sixth amendment right to jury trial applies to serious crimes); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (right to jury trial attaching to criminal offenses fundamental to prevent injustice). *See generally* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 231 (1971) (sixth amendment not applicable to civil cases).

12. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) (noting difference between petty and serious offenses; only latter entitled to jury trial); Duncan v. Louisiana, 391 U.S. 145, 160 (1968) (petty offenses tried without jury in England and United States, despite seemingly comprehensive language of sixth amendment); *see also* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 HARV. L. REV. 917, 969 (1926) (petty offense exception to trial by jury requirement accepted practice in colonies and later in states).

13. *See, e.g.,* Cheff v. Schnackenberg, 384 U.S. 373, 379 (1966) (prosecution of petty offense does not require jury trial); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937) (right to jury trial does not apply to every criminal proceeding as petty offenses commonly tried summarily); Callan v. Wilson, 127 U.S. 540, 557 (1888) (common law recognized class of petty offenses in which jury trial was unnecessary). For a detailed analysis and review of the historical basis for the petty offense exception, see generally Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 HARV. L. REV. 917, 980-81 (1926) (petty offenses not rigid category, but acts not deeply offending community morals, resulting in relatively light punishment). *But see* Kaye, *Petty Offenders Have No Peers!,* 26 U. CHI. L. REV. 245, 245-46 (1959) (interpretation of constitutional right to jury trial espoused by Frankfurter and Corcoran undesirable and unwarranted abrogation of clear right to trial by jury in all criminal cases).

14. *See* Muniz v. Hoffman, 422 U.S. 454, 475-76 (1975) (adopted federal definition of petty offenses as to imprisonment, but refused to adopt it as to fines because two are inherently different). Despite the Supreme Court's admonition in *Muniz* that fines and imprisonment are intrinsically different, several lower courts have held that a fine in excess of $500 cannot be imposed upon an individual without a jury trial, thus fully adopting the guidelines set forth in the federal statute. *See, e.g.,* United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (federal statute supplies objective criteria in determination of seriousness of offense); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (adopting federal statutory standard for determination of when fines become serious enough to necessitate jury trial); Douglass v. First Nat'l Realty, 543 F.2d 894, 902 (D.C. Cir. 1976) (federal statutory definition of petty offenses provide guidance in this gray area). The federal statute referred to above delineates the objective guidelines to be used in the determination of whether an offense is petty or serious. *See* 18 U.S.C. § 1(3) (1983) (petty offense is any misdemeanor not carrying penalty of more than six months or fine of more than $500).

the area of contempt of court.[15]

Contempt of court has been defined as "an act of disobedience or disrespect toward a judicial . . . body, or interference with its orderly process, for which a summary punishment is usually exacted."[16] Historically, a jury trial was not deemed necessary for prosecution of criminal contempt.[17] The question of whether criminal contempt was to be treated as any other criminal offense was resolved by the United States Supreme Court in *Bloom v. Illinois.*[18] The Court held that the right to a jury trial applies only to cases of "serious" criminal contempt.[19] In order to determine if the contempt was

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15. *See* Frank v. United States, 395 U.S. 147, 149 (1969) (scope of contempt is broad, from criminal to civil sanctions, causing confusion over whether jury trial necessary in all cases); Bloom v. Illinois, 391 U.S. 194, 195 (1968) (question of whether state or federal courts may try cases of contempt without jury is recurring one); *see also* R. GOLDFARB, THE CONTEMPT POWER 2-3 (1963) (American law recognizes individual liberties and rights, but they must be curtailed when threaten order of courts and society in general). *See generally* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 233 (1971) (difficult questions raised in determining when judgment for contempt serious enough to warrant jury trial).

16. *See* R. GOLDFARB, THE CONTEMPT POWER 1, 1 (1963) (contempt divided into many categories which are governed respectively by particular procedures). There are three basic classifications of contempt which must be decided before the appropriate procedures may be applied. *See id.* at 48. The first determination a court usually faces is whether the contempt is criminal or civil, based on the type of penalty imposed. *See* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 235 (1971) (penalty for civil contempt coercive compelling obedience to court order; criminal contempt penalties vindicate authority of court). The next category to determine is whether the contempt is direct or constructive, based on where the contemptuous conduct took place. *See id.* at 221-24 (direct contempt occurs before court, whereas constructive contempt takes place outside court's presence). Finally, there must be a determination as to whether the contempt is petty or serious, requiring a jury trial. *See* Note, *Aggregating Indirect Criminal Contempts of Court — Right to Jury Trial,* 20 WAYNE L. REV. 891, 895 (1974) (determination of seriousness of offense based on legislative penalty, not actual penalty imposed by court).

17. *See* Green v. United States, 356 U.S. 165, 187 (1958) (neither art. III nor sixth amendment require criminal contempts to be tried by jury); Gompers v. Buck Stove & Range Co., 221 U.S. 418, 441 (1911) (civil contempt results in remedial or coercive punishment while criminal contempt vindicates court's authority by making sentence punitive in nature); *see also* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 235 (1971) (if contempt is criminal, constitutional safeguards for criminal trials apply; if civil, they do not).

18. *See* Bloom v. Illinois, 391 U.S. 194, 201 (1968). After reconsidering its earlier position that criminal contempt could be tried without a jury, the Supreme Court concluded that criminal contempt is like any other crime because it is punishable by imprisonment, fines or both. *See id.* at 201. Because of this shift in focus, the Court concluded that the same considerations that make a jury trial fundamental in criminal cases should be applied to criminal contempt proceedings. *See id.* at 202; *see also* Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney,* 63 KY. L.J. 945, 1008 (1975) (*Bloom* rejected previous Supreme Court decisions in adopting six-month rule as boundary for petty offenses).

19. *See* Bloom v. Illinois, 391 U.S. 194, 211 (1968) (seriousness of contempt determined by objective standards); Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 231

serious, the Court applied an objective test which first looked to the maximum legislative penalty authorized,[20] then to the sentence actually imposed, if the legislature had failed to set a maximum penalty.[21] Later Supreme Court opinions adopted a prison sentence of more than six months as the "demarcation" between petty and serious contempt violations.[22] These objective criteria have been utilized by courts for determining whether criminal contempt punished by imprisonment was serious enough to warrant a trial by jury.[23]

Criminal contempt may be punished by the imposition of fines, as well as

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(1971) (*Bloom* court adopted aggregation rule for petty offenses where no jury would be required); *see also* Thompson & Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 623 (1973) (*Bloom* opinion did not determine length of sentence needed to become serious, but only held two year sentence was serious enough to require protection of jury trial).

20. *See* Bloom v. Illinois, 391 U.S. 194, 211 (1968) (courts should look first to penalty authorized by legislature to determine if offense serious or petty); *see also* Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (legislatively authorized penalty of major importance in determination of whether sixth amendment rights will apply). *See generally* Thompson & Starkman, *Multiple Petty Contempts and Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 631 (1973) (*Bloom* court balanced policy considerations in extending jury trial to contempt proceedings).

21. *See* Bloom v. Illinois, 391 U.S. 194, 211 (1968) (courts should only look to fine actually imposed if legislature has not expressed judgment as to seriousness of offense). *See generally* Thompson & Starkman, *Multiple Petty Contempts and Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 631 (1973) (*Bloom* court struggled with conflicting policy considerations before concluding jury trial extends to contempt).

22. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) (fixed dividing line between petty and serious offenses as prison sentence of more than six months); Baldwin v. New York, 399 U.S. 66, 69 (1970) (no offense petty that carries authorized prison sentence of more than six months); *see also* Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney,* 63 KY. L.J. 945, 1005-08 (1975) (detailed history and analysis of Supreme Court's development of six month rule). Adoption of the six month rule as the dividing line between serious and petty offenses has been criticized by several Supreme Court Justices, as well as legal commentators. *See* Baldwin v. New York, 399 U.S. 66, 74-76 (1970) (Douglas, J., and Black, J., concurring) (arbitrariness of six month rule not based on clear language of Constitution but upon "judicial mutilation"); Cheff v. Schnackenberg, 384 U.S. 373, 384-86 (1966) (Douglas, J., and Black, J., dissenting) (rejected six month rule as sole indicator of seriousness of contempt); *see also* Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt,* 50 CINN. L. REV. 677, 683-84 (1981) (trial judge should determine whether contempt serious or petty so safeguards applied at beginning of proceeding to avoid having case reversed on appeal).

23. *See* Bloom v. Illinois, 391 U.S. 194, 201-02 (1968) (extending jury trial right to serious contempt offenses by use of objective criteria based on same considerations used to justify jury trials in criminal cases); Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (objective criteria such as existing statutory laws should be referred to in determining whether punishment authorized necessitates trial by jury). *But see* Thompson & Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 627 (1973) (*Bloom* abandoned traditional view that jury trials impermissible in cases of contempt by interpreting sixth amendment in light of modern considerations).

prison sentences.[24] While the six month standard applies to prison sentences, the United States Supreme Court has not adopted a similar objective standard when a fine is imposed.[25] In *Muniz v. Hoffman,*[26] the Supreme Court considered when an imposed fine becomes serious enough for a jury trial, but declined to set any definitive guidelines.[27] Instead, the Court examined the financial resources of the contemnor involved and held that the imposition of a $10,000 fine on a large labor union was not a serious offense.[28] Later courts interpreting the *Muniz* rationale have concluded that a subjective test of analyzing the contemnor's ability to pay was implicitly applied.[29]

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24. *See, e.g.,* Muniz v. Hoffman, 422 U.S. 454, 475 (1975) (Supreme Court recognized issue when fine imposed for criminal contempt becomes serious one of first impression for Court); Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (recognizing federal statute defines petty offenses as punishable by less than six month prison sentence and/or $500 fine); United States v. Troxler Hosiery, 681 F.2d 934, 937-38 (10th Cir. 1982) (contempt fine of $80,000 depriving manufacturer of illegally obtained profits warranted); *see also* 18 U.S.C. § 1(3) (1983) (petty offense is crime punishable by less than six months imprisonment and by fine of $500 or less). *See generally* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 231 (1971) (although sanctions for contempt vary, imprisonment and fines are most common).

25. *See* Muniz v. Hoffman, 422 U.S. 454, 475-76 (1975) (issue of when contempt fine becomes serious enough to warrant jury trial unresolved); *see also* United States v. Hamdan, 552 F.2d 276, 280 (9th Cir. 1977) (adopting $500 federal statutory limit as boundary for serious criminal contempt until Supreme Court provides clearer guidance). For an extensive list of cases discussing the difficulty of setting definite guidelines when fines are imposed for criminal contempt, see Douglass v. First Nat'l Realty, 543 F.2d 894, 900 n. 42 (D.C. Cir. 1976).

26. 422 U.S. 454 (1975).

27. *See id.* at 476. The Court noted previous Supreme Court decisions relied on 18 U.S.C. § 1(3) (1983) to help determine the boundary between petty and serious offenses, but stated the federal statute has no "talismanic significance" when a fine is imposed. *See id.* at 476-77; *see also* 18 U.S.C. § 1(3) (1983) (serious offense is one with authorized imprisonment of six months or more and fine of $500 or more). Because of the intrinsic difference between fines and imprisonment, the Court declined to set a standard for fines as it had for prison sentences. *See* Muniz v. Hoffman, 422 U.S. 454, 476 (1975) (prison sentence will always be serious, but amount of fine and its impact will vary with contemnor).

28. *See* Muniz v. Hoffman, 422 U.S. 454, 477 (1975) (fine imposed on large labor union not serious enough to require jury to avoid bias considering defendant's financial ability to pay fine).

29. *See* United States v. Troxler Hosiery, 681 F.2d 934, 937 (4th Cir. 1982) (fine of $80,000 against sleepware manufacturer to deprive company of any profits made in violation of court injunction not serious offense because of defendant's ability to pay fine); Musidor v. Great Am. Screen, 658 F.2d 60, 66 (2nd Cir. 1981) ($10,000 fine against corporation guilty of criminal contempt does not require jury trial because amount of fine is petty when compared to defendant's ability to pay). Three other courts, however, have rejected the use of a subjective approach when a fine for criminal contempt is imposed against an individual, adopting instead the objective guidelines set forth in 18 U.S.C. § 1(3) (1983) (misdemeanors with authorized penalties not exceeding six months or fine of $500 or less considered petty offenses). *See, e.g.,* United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (bothersome issues would be raised by requiring trial court to consider individual's financial status when imposing

The determination of whether a criminal contempt sentence is petty or serious is further complicated when fines or prison sentences are imposed simultaneously for multiple contempt violations.[30] The United States Supreme Court has required multiple post-trial prison sentences to be aggregated to determine whether a jury trial was necessary.[31] The contempt violation in the *Codispoti* case, however, occurred in the presence of the trial judge, necessarily restricting the ruling to direct criminal contempts, as distinguished from indirect or constructive contempt, which occurs outside the presence of the court.[32] The rationale behind the aggregation rule was to prevent arbitrary judicial conduct when deciding direct contemptuous acts after the trial, ensuring the defendant would have a trial by jury to hear the contempt allegations by aggregating the multiple sentences.[33] The United

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fines, thus basing constitutional rights on personal wealth); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (rejecting *Muniz* subjective standard of "seriousness of risk and extent of possible deprivation" because potential for unpredictable and nonuniform judgments would be great); Douglass v. First Nat'l Realty, 543 F.2d 894, 902 (D.C. Cir. 1976) (rejecting *Muniz* standard as inapplicable to individual contemnors because fines have greater impact on individuals than corporations).

30. *See* United States v. Seale, 461 F.2d 345, 356 (7th Cir. 1972) (consecutive direct contempt sentences imposed after trial should be aggregated to determine right to jury trial, but little guidance in this area). *But see In re* Puerto Rico Newspaper Guild Local 225, 476 F.2d 856, 859-60 (1st Cir. 1973) (*Seale* aggregation rule inapplicable to multiple indirect criminal contempts); *see also* Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney,* 63 KY. L.J. 945, 1009 (1975) (six month guideline for serious contempt has potential for abuse through use of multiple short-term sentences served consecutively).

31. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 515 (1974) (contemnor's due process rights require multiple sentences be aggregated when trial judge waits until after trial to punish direct contempts occurring during trial); United States v. Seale, 461 F.2d 345, 356 (7th Cir. 1972) (aggregation rule only applies to post-trial sentencing of direct contempts, not to punishment imposed immediately after contempt occurs). *But see* Thompson & Starkman, *Multiple Petty Contempts and Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 649-50 (1973) (basic premise of *Seale* decision improper because mere potential for abuse when imposing separate contempt sentences not sufficient to deny power).

32. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 516-17 (1974) (contemnors punished for direct contempt by multiple consecutive rather than concurrent sentences); *see also,* R. GOLDFARB, THE CONTEMPT POWER 68-69 (1963) (direct contempts are committed within presence of the court and may be punished summarily; indirect contempts occur outside court's presence and require that different procedure be followed). An example of direct contempt is a witness' refusal to answer questions when the court orders him to do so during the trial. See Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 224 (1971) (direct contempt occurs before trial judge; indirect contempt violates court's authority). Indirect or constructive contempt occurs when a judicial order such as an injunction is violated, entitling the party charged to a hearing. *See id.* at 224.

33. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 507 (1974) (defendant tried for direct contemptuous conduct during his criminal trial). *But see In re* Puerto Rico Newspaper Guild Local 225, 476 F.2d 856, 859 (1st Cir. 1973) (aggregation rule for direct contempts inapplicable to indirect contempts occurring outside presence of courtroom because possibility for judi-

States Supreme Court, however, has not yet addressed the issue of multiple prison sentences or fines for criminal contempt violations that are indirect.[34]

The Supreme Court of Texas, however, has addressed the issue of when multiple indirect contemptuous fines are serious enough to warrant a jury trial.[35] In *Ex parte Werblud,*[36] the contemnor was convicted of two separate acts of indirect criminal contempt, and fined $500 for each violation.[37] The court recognized that petty contempt offenses are defined statutorily in Texas.[38] The Supreme Court of Texas held that the imposition of more than one fine does not automatically take the criminal contempt offense out of the petty category, because the United States Supreme Court has expressly refused to set definite guidelines in determining when contempt fines become serious.[39] The court, in effect, looked at the two imposed fines separately,

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cial abuse greatly reduced). *See generally* Note, *Taylor v. Hayes: A Case Study on the Use of the Summary Contempt Power Against the Trial Attorney,* 63 KY. L.J. 945, 1025 (1975) (Supreme Court's distinction between when sentence is imposed for direct contempt illogical and not justified by need of courtroom control).

34. *Compare* Martineau, *Contempt of Court: Eliminating the Confusion between Civil and Criminal Contempt,* 50 CINN. L. REV. 677, 679-80 (1981) (Supreme Court has yet to resolve relationship between indirect contempt sanction imposed and correct procedure to follow when imposing it) *with* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 220 (1971) (indirect contempt proceedings relatively safe because dangers of abuse involved with direct contempts not present).

35. *See Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (two $500 fines not necessarily serious offenses when looked at separately instead of aggregated); *Ex parte* Genecov, 143 Tex. 476, 480, 186 S.W.2d 225, 226-27 (1945) (contempt violations quasi-criminal in nature and should follow criminal procedure as much as possible; multiple violations may be punished in single proceeding). *See generally* Thompson & Sparkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 639-40 (1973) (every separate criminal violation merits separate punishment; same rule should apply to contempt actions since criminal in nature).

36. 536 S.W.2d 542 (Tex. 1976).

37. *See id.* at 544. Werblud refused to pay the imposed fines, was taken into custody, and filed a writ of habeas corpus to obtain his release, alleging he was denied his constitutional right to jury trial. *See id.* at 544; *see also* Note, *Contempt — Right to Jury Trial,* 87 HARV. L. REV. 865, 876 (1974) (indirect contempt sentences should be aggregated to determine contemnor's right to trial by jury).

38. *See Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (Texas statute for criminal contempt within same limits as federal statute and United States Supreme Court decisions); TEX. REV. CIV. STAT. ANN. art. 1911a, § 2 (Vernon Supp. 1985). The first section of the statute authorizes courts to punish for contempt. *Id.* § 1. The text of § 2(a) reads as follows: "Every court. . .may punish by a fine of not more than $500, or by confinement in the county jail for not more than six months, or both, any person guilty of contempt of the court." *Id.* § 2 (a); *see also* Greenhill, *Proposed New Statute on Contempt,* 33 TEX. B.J. 970, 971 (1970) (legislative history of contempt statute indicates drafters were defining petty offense category, for which no right to jury trial attaches).

39. *See Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (*Muniz* warns that $500 limit does not set boundary for determination of serious offenses even if two fines viewed as one penalty); *see also* James v. Headly, 410 F.2d 325, 329 (5th Cir. 1969) (petty sentences should

comparing each one to the objective criteria established by the Texas statute.[40] Since each fine was within the statutory limits,[41] the amount of the fines did not take the contempt out of the petty offense category, and could be tried without a jury.[42]

In *Ex parte Griffin,*[43] a habeas corpus proceeding,[44] the Supreme Court of Texas discharged the relator from custody because he was sentenced for constructive criminal contempt without the protection of a jury.[45] The court held that the multiple contemptuous acts constituted a serious offense, thereby requiring a jury trial because the total amount of the separate fines was unusually large.[46] The *Griffin* court applied the *Muniz* subjective test[47] to determine the seriousness of the risk the contemnor faced and the extent

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not be aggregated to determine right to jury trial). *See generally* Thompson & Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 637 (1973) (issue left open after *Bloom* is whether multiple acts of contempt warranting nominal penalties should be aggregated to determine if jury trial necessary).

40. *See Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (*Muniz* held amount over $500 does not automatically make offense serious even if fines were result of one offense). The court recognized and upheld its previous holding made over 30 years before, that it is permissible to punish two separate acts of constructive or indirect contempt in one proceeding. *See id.* at 547; *see also Ex parte* Genecov, 143 Tex. 476, 480, 186 S.W.2d 225, 227 (1945) (indirect criminal contempt similar to misdemeanor, and both should be treated same by allowing multiple offenses to be charged in same indictment and decided in one proceeding). Since the *Genecov* opinion, however, procedural changes made by the Texas Legislature now require separate indictments for each misdemeanor charge, but the courts have still followed the *Genecov* rationale. *See Ex parte* Gnesoulis, 525 S.W.2d 205, 210 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (would be needless formalism to require same procedure for multiple contempt charges as now required for misdemeanors, as long as contemnor clearly informed of all charges against him).

41. *See* TEX. REV. CIV. STAT. ANN. art. 1911a, § 2 (Vernon Supp. 1985) (contempt may be punished by fine of $500 or less, or imprisonment for six months or less in county jail).

42. *See Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (two separate fines of $500 each do not take offenses out of petty category); *see also In re* Puerto Rico Newspaper Guild Local 225, 476 F.2d 856, 859 (1st Cir. 1973) (indirect criminal contempts resulting in multiple fines should be looked at separately, not aggregated, to determine if jury trial necessary). *But see* Note, *Aggregating Indirect Criminal Contempts of Court — Right to Jury Trial,* 20 WAYNE L. REV. 891, 902 (1974) (*Newspaper Guild* court incorrectly decided to look at multiple contempts separately when they should be aggregated to determine right to jury trial to protect defendant's right from judicial abuse). *See generally* Thompson & Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 646-47 (1973) (noting many courts have held multiple petty sentences should not be aggregated to determine right to jury trial in non-contempt cases; same reasoning applicable to contempt situations).

43. 682 S.W.2d 261 (Tex. 1984).

44. *See id.* at 261 (Griffin was sentenced to thirty days in jail, bringing present habeas corpus proceeding seeking his release).

45. *See id.* at 261 (judgment void as amount of fines too large without jury trial).

46. *See id.* at 262 (aggregate amount of 208 fines too serious to impose without jury trial).

47. *See id.* at 262 (excessive amount of fines too large for any individual to pay without having protection of jury trial); *see also* Muniz v. Hoffman, 422 U.S. 454, 475 (1975) (court

of probable financial deprivation.[48] The Supreme Court of Texas held that the aggregate amount of the fines was too large to impose without the protection of a jury trial.[49] The *Griffin* majority noted that other courts have adopted $500 as the line between petty and serious offenses.[50] The concurring opinion by Justice Robertson argued that contempt proceedings are quasi-criminal in nature,[51] protected by procedural due process standards and not sixth amendment rights as the majority held.[52]

The dissent asserted that Griffin's writ of habeas corpus should have been denied because he failed to establish a right to a jury trial.[53] After distinguishing civil and criminal contempt,[54] the dissent noted that although a bright line standard has been set by the United States Supreme Court for prison sentences,[55] no comparable standard has been set when fines are im-

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should apply subjective test of looking at defendant's ability to pay imposed fine to determine if offense serious enough to require jury).

48. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (fine of $104,000 too great hardship to impose without jury trial protection) *with* Muniz v. Hoffman, 422 U.S. 454, 476 (1975) ($10,000 fine not serious enough deprivation for large labor union to require protection of jury trial).

49. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (jury trial necessary when $104,000 fine imposed on individual) *with id.* at 263 (Gonzalez, J., dissenting) (application of *Muniz* subjective standard to facts of instant case show contemnor does not deserve trial by jury). *But see* Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (determination of seriousness of offense should be made by referring to objective criteria, such as existing national or state laws).

50. *See Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (using other courts' adoption of $500 limit to support result reached). To support its conclusion the court cited the following cases, see United States v. Hamdan, 552 F.2d 276, 280 (9th Cir. 1977) (realistic to assume fine of more than $500 would be serious to all individuals; accepting federal statutory definition of petty offenses); Richmond Black Officers Police Ass'n v. Richmond, 548 F.2d 123, 125-28 (4th Cir. 1977) ($250 fine assessed against each of four defendants was petty offense not requiring trial by jury); Douglass v. First Nat'l Realty, 543 F.2d 894, 902 (D.C. Cir. 1976) ($5,000 fine too large to impose on individual, when compared to federal statute, without benefit of jury).

51. *See Ex parte* Griffin, 682 S.W.2d 261, 263 (Tex. 1984) (Robertson, J., concurring) (fifth amendment due process standards apply instead of sixth amendment right to jury trial because contempt quasi-criminal in nature).

52. *See id.* at 263 (Robertson, J., concurring) (sixth amendment rights should not be available in contempt proceedings).

53. *See id.* at 264 (Gonzalez, J., dissenting) (constitutional right to jury trial not shown by relator when fines imposed for multiple contempts).

54. *See id.* at 263 (Gonzalez, J., dissenting) (criminal contempt concerned with punishing past violations affronting authority of court).

55. *See id.* at 263 (Gonzalez, J., dissenting) (serious offense is one carrying excess of six month imprisonment); *see also* Muniz v. Hoffman, 422 U.S. 454, 475-76 (1975) (criminal contempt does not, in and of itself, warrant jury trial unless it carries with it sentence of more than six month imprisonment).

posed.[56] The dissent accepted that the *Muniz* subjective standard required courts to determine the contemnor's financial ability to pay the fine before declaring the offense to be serious enough to require a trial by jury.[57] The dissent concluded, however, that Griffin could afford to pay the fines, so no jury trial was required.[58]

The majority of the Supreme Court of Texas explicitly applied the *Muniz* subjective standard[59] by looking at the contemnor's financial ability to pay the imposed fines to determine if the offense was serious enough to warrant a jury trial.[60] In applying the *Muniz* subjective standard, however, the *Griffin* court did not consider crucial fact differences between the two cases.[61] In *Muniz,* the contemnor was a large labor union who violated a temporary

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56. *See Ex parte* Griffin, 682 S.W.2d 261, 263 (Tex. 1984) (Gonzalez, J., dissenting) (harder to determine if contempt serious, warranting jury trial, when fine imposed).

57. *See id.* at 263-64 (Gonzalez, J., dissenting) (Griffin's ability to pay fine enhanced by profits made in violation of temporary injunction, reducing imposed fine to net effect of $8,000).

58. *See id.* at 264 (Gonzalez, J., dissenting) (Griffin knowingly violated court orders and personally profited from prohibited sales, thereby precluding jury trial).

59. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (imposed fines too large for anyone to pay without protection of jury trial) *with* Muniz v. Hoffman, 422 U.S. 454, 476 (1975) (corporate contemnor denied right to jury trial because fine not substantial enough for particular defendant to require jury trial). *But see, e.g.,* Bloom v. Illinois, 391 U.S. 194, 211 (1968) (courts should first look to objective standard of legislative judgment to determine seriousness of offense, then to actual penalty imposed if legislature has failed to express judgment); Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (should refer to existing laws and practices surrounding offense in question so determination of how serious offense is will be based on objective criteria); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (application of *Muniz* subjective standard offers inadequate guidelines in determination of seriousness of offense involved).

60. *See Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (individual contemnor's ability to pay fine important in determination of seriousness of offense). Previous United States Supreme Court decisions, however, have established the rule that jury trials apply only to serious cases, not whether the accused can afford to pay the imposed fine. *See, e.g.,* Baldwin v. New York, 399 U.S. 66, 72 (1970) (jury protects accused from government abuse only when charge serious); Cheff v. Schackenberg, 384 U.S. 373, 379 (1966) (prosecution of petty offense does not require jury trial, only required for serious offenses); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937) (right to jury trial does not apply to every criminal proceeding, as petty offenses commonly tried summarily). *See generally* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury,* 39 HARV. L. REV. 917, 981 (1926) (detailed analysis and historical review of basis for petty offense exception to jury trials).

61. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (large fine of $104,000 too serious for individual contemnor to pay without protection of jury trial) *with* Muniz v. Hoffman, 422 U.S. 454, 476 (1975) (corporate contemnor denied right to jury trial because imposed fine of $10,000 not serious enough for that particular defendant). Lower courts have interpretated the holding of *Muniz* to be applicable only to corporations, not individual contemnors. *See* United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (*Muniz* subjective criteria should only be applied to corporate, not individual contemnors); Douglass v. First Nat'l Realty, 543 F.2d 894, 902 (D.C. Cir. 1976) ($5,000 fine imposed on individual contemnor too

injunction and was fined $10,000 for one act of constructive criminal contempt.[62] In contrast, *Griffin* involved numerous violations of a temporary injunction by an individual, resulting in a $500 fine for each separate violation.[63] The *Griffin* majority failed to note that the *Muniz* subjective test has been rejected by other courts in cases involving an individual contemnor,[64] yet the majority cites to two of those very cases to support their analysis and result.[65] While the *Griffin* dissent recognized that the *Muniz* standard has not been applied to individual contemnors,[66] it too disregards these decisions

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large to be decided without jury trial based on objective statute rather than subjective *Muniz* criteria).

62. *See* Muniz v. Hoffman, 422 U.S. 454, 477 (1975) (labor union of 13,000 members can pay $10,000 contempt fine without imposition of jury to prevent bias). The *Muniz* court referred to the federal statutory definition of petty offenses set out in 18 U.S.C. § 1(3) (1983), but warned it has no "talismanic significance". *See id.* at 476-77. The *Muniz* court reaffirmed that a serious offense is one that results in more than a six month prison sentence, but refused to adopt the $500 limit for petty offenses also included in the federal statute. *See id.* at 476-77. The court applied a subjective test of looking at the corporate contemnor's financial ability to pay the fine as being determinative of whether the offense was serious enough to warrant the protection of a jury trial. *See id.* at 476-77.

63. *See Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (fines of $500 each for 208 separate violations, totaling $104,000 too serious to impose without jury). *But see Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (punishment of multiple contempt violations by fine does not automatically become serious offense because total amount of fines more than $500); *Ex parte* Genecov, 143 Tex. 476, 481, 186 S.W.2d 225, 227 (1945) (fines of $50 imposed for each of 30 contempt violations within statutory guidelines not requiring trial by jury). *See generally* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 234 (1971) (determination of seriousness of offense more difficult when multiple sentences for contempt combined in one proceeding).

64. *See, e.g.,* United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (*Muniz* subjective standard of considering contemnor's financial status raises many troubling issues because it bases constitutional rights on personal wealth instead of more reliable objective criteria); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (rejecting subjective *Muniz* standard because potential for unpredictable and inconsistent judgments would be great); Douglass v. First Nat'l Realty, 543 F.2d 894, 902 (D.C. Cir. 1976) (rejecting *Muniz* standard as inapplicable to individual contemnors because fines have greater impact on individuals than corporations); *see also* Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt,* 50 CINN. L. REV. 677, 679-80 (1981) (Supreme Court has yet to resolve relationship between indirect contempt sanction imposed and correct procedure to follow when imposing it).

65. *See Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (citing *United States v. Hamdan* and *Douglass v. First Nat'l Realty* in support of holding right to jury trial exists where potential fine exceeds $500).

66. *See Ex parte* Griffin, 682 S.W.2d 261, 263 (Tex. 1984) (Gonzalez, J., dissenting) (*Muniz* subjective test has never been applied to individual contemnors, but should be in present case). *But see* United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (*Muniz* subjective standard of considering individual contemnor's financial status raises more troublesome issues than objective standard). *See generally* Dobbs, *Contempt of Court: A Survey,* 56

and applies the *Muniz* subjective test to the facts of the instant case.[67] The irony of the *Griffin* majority's reliance on *Hamdan* and *Douglass* is that those courts adopted the federal statute as the only objective criteria possible when fines are imposed for criminal contempt until the United States Supreme Court supplied additional guidance.[68] The *Griffin* majority did not acknowledge the objective rationale used by the *Hamdan* and *Douglass* courts, but instead applied their own subjective judgment in an area that the United States Supreme Court expressly left open to question.[69] Thus, both the *Griffin* majority and dissent applied the subjective *Muniz* test, but each reached opposite results.[70] The *Griffin* majority held that the excessive amount of the imposed fines made the offenses serious enough to require a jury trial, while the dissent would have denied Griffin that right based on his financial ability to pay the imposed fines.[71] These inconsistent results indi-

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CORNELL L. REV. 183, 233 (1971) (difficult questions raised in determination of when penalty for contempt becomes serious enough to warrant jury trial).

67. *See Ex parte* Griffin, 682 S.W.2d 261, 263 (Tex. 1984) (Gonzalez, J., dissenting) (*Muniz* rationale seems to require analyzing individual contemnor's ability to pay imposed fine as step in determination of whether offense serious enough to require trial by jury). *But see* Muniz v. Hoffman, 422 U.S. 454, 476 (1975) (subjective criteria of determining extent of risk corporate contemnor faces important consideration because fines and imprisonment inherently different for individuals as opposed to corporations); United States v. McAlister, 630 F.2d 772, 774-75 (10th Cir. 1980) (*Muniz* does not require case-by-case analysis of individual's financial ability to pay imposed fine in determination of how serious an offense is involved); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (subjective standard of *Muniz* not meant to apply to individual contemnors because would require trial and appellate judges to rely on their own personal experience and judgment in determining seriousness of risk involved).

68. *See* United States v. Hamdan, 552 F.2d 276, 280 (9th Cir. 1977) (uniformity, objectivity and judicial efficiency will be encouraged by accepting statutory definition of petty offense as objective standard for determination of right to jury trial when fines imposed); Douglass v. First Nat'l Realty, 543 F.2d 894, 902 (D.C. Cir. 1976) (important to refer to objective criteria such as federal statute to determine reliable standard to apply to contempt cases).

69. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (fine of $104,000 too serious an offense to not warrant jury trial) *with* United States v. Hamdan, 552 F.2d 276, 279-80 (9th Cir. 1977) (right to jury trial should depend on objective standards, not subjective judgment of particular trial or appellate judge). *See generally* R. GOLDFARB, THE CONTEMPT POWER 48 (1963) (determination of seriousness of contempt as reasonable as "Russian roulette" with as many tragic results).

70. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (fine as large as $104,000 would be serious risk to any individual without jury trial) *with id.* at 263-64 (Gonzalez, J., dissenting) (Griffin made profits of $96,000 from prohibited sales, thus reducing net effect of $104,000 fine to only $8,000, which is not serious offense considering contemnor's willful violation of court order). *But see* United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (constitutional right to jury trial should not be conditioned on basis of individual's financial wealth or lack thereof); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (potential for unpredictable and inconsistent judgments would be just as great even if subjective *Muniz* test limited solely to financial considerations of individual contemnor).

71. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (total fine of $104,000 too

cate the dangers of using a subjective test in situations involving individual contemnor's, and suggests that an alternative approach should have been followed.[72]

One alternative the *Griffin* court could have followed is the objective test set forth in previous United States Supreme Court decisions.[73] The objective approach requires a determination of the maximum penalty authorized by the legislature for the particular offense involved, followed by consideration of the penalty actually imposed if the legislature has been silent as to the seriousness of the offense.[74] In Texas, the applicable statute for contempt defines a petty criminal contempt as a fine of $500 or less, and six months or less in prison.[75] Previous Texas Supreme Court cases recognized the utility of referring to the applicable statutory standard to determine the seriousness of the contempt violation.[76] The *Griffin* court was faced with a similar fact

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serious an offense not to be tried before jury) *with id.* at 264 (Gonzalez, J., dissenting) (contemnor's financial ability to pay imposed fines made contempt petty offense, thereby precluding jury trial).

72. *See* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 247 (1971) (suggesting adoption of statute requiring trial judge to define at beginning of proceeding what type of contempt involved so appropriate procedures may be followed); Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt,* 50 CINN. L. REV. 677, 684 (1981) (too many contempt sentences reversed on appeal because of circular reasoning used to determine if jury trial should have been granted based on final result of proceeding).

73. *See, e.g.,* Frank v. United States, 395 U.S. 147, 148 (1969) (courts should focus on objective criteria such as existing laws to determine seriousness of offense); Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (penalty authorized for crime in question crucial to determine whether serious enough to require sixth amendment safeguards); District of Columbia v. Clawans, 300 U.S. 617, 628 (1937) (courts should look to penalty authorized by law-making body as indication of its social judgment). *See generally* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 233 (1971) (difficult questions raised in determination of when sentence for contempt no longer petty).

74. *See* Bloom v. Illinois, 391 U.S. 194, 211 (1968) (objective standard of looking to penalty actually imposed will determine if jury trial warranted when legislature silent as to seriousness of offense); Cheff v. Schnackenberg, 384 U.S. 373, 379 (1966) (relying on objective criteria set by federal statute to support holding that six month prison sentence not serious). *But see* Thompson & Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 621 (1973) (*Bloom* decision left open question of how to treat multiple contempt violations to determine their seriousness).

75. TEX. REV. CIV. STAT. ANN. art. 1911a, § 2 (Vernon Supp. 1985). The equivalent federal statute defines a petty offense to be any misdemeanor that carries a fine of less than $500 or six month prison sentence, or both. *See* 18 U.S.C. § 1(3) (1983). *But see* Muniz v. Hoffman, 422 U.S. 454, 477 (1975) (federal contempt statute does not automatically apply to fines as it does to prison sentences).

76. *See Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (federal and Texas contempt statutes both provide important objective criteria in determining whether two fines of $500 each remain in petty offense category); *Ex parte* Genecov, 143 Tex. 476, 479, 186 S.W.2d 225, 226-27 (1945) (courts may punish multiple contempt violations in same proceeding, imposing

pattern, but the *Griffin* opinion did not expressly adhere to the earlier precedents.[77] According to *Werblud* and *Genecov,* the facts of the instant case would not merit a jury trial because the trial court fined Griffin $500 for each separate offense, thus remaining within the objective boundaries set forth by the Texas Legislature.[78] Both the *Griffin* majority and dissent, however, relied on their own subjective judgment in the determination of how serious the fine was for this particular defendant.[79] By abandoning the direction of *Werblud, Genecov,* and analogous United States Supreme Court cases, the *Griffin* court failed to adhere to the objective criteria previously advocated.[80]

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maximum allowable penalty for each contempt). Neither the majority nor dissent followed this previous analytical approach in deciding the instant case. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (total amount of fines imposed for multiple contempt makes offense serious) *with id.* at 263-64 (Gonzalez, J., dissenting) (total amount of fine not serious when court considers contemnor's ability to pay fine out of profits made from prohibited sales). *See generally* R. GOLDFARB, THE CONTEMPT POWER 43 (1963) (determination of type of contempt crucial to contemnor's constitutional rights, such as right to jury trial); Thompson & Starkman, *Multiple Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 631 (1973) (contempt power compels obedience to judicial orders so public will believe judgments enforced).

77. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (*Werblud* held two $500 fines were not serious, but instant case presents extreme fact situation) *with id.* at 263 (Gonzalez, J., dissenting) (*Werblud* referred to statutory criteria to determine seriousness of contempt, but *Muniz* subjective criteria should be followed instead).

78. *See Ex parte* Werblud, 526 S.W.2d 542, 547 (Tex. 1976) (separate fines of $500 each within statutory definition of petty offense, even if looked at as one offense by aggregating totals); *Ex parte* Genecov, 143 Tex. 476, 479, 186 S.W.2d 225, 226 (1945) (separate contempt offenses may be punished in same proceeding, as long as contemnor adequately notified of charges against him).

79. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (fine of $104,000 too large for individual contemnor to pay without jury trial protection) *with id.* at 264 (Gonzalez, J., dissenting) (imposed fine not serious enough for jury trial when court considers profits made by contemnor). *But see, e.g.,* United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (bothersome issues raised by requiring trial court to consider individual's financial status when imposing fines, thus basing constitutional rights on personal wealth); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (rejecting subjective standard of seriousness of risk and deprivation because potential for unpredictable and non-uniform judgments great); Douglass v. First Nat'l Realty, 543 F.2d 894, 902 (D.C. Cir. 1976) (rejecting *Muniz* subjective standard as inapplicable to individual contemnors because fines have much greater impact on individuals than corporations); *see also* Comment, *Contempt of Court in Texas,* 14 S. TEX. L.J. 278, 279 (1973) (criminal contempt limited to maximum penalty authorized by statute, but may result in consecutive sentences if series of contemptuous acts occur).

80. *See* Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (authorized penalty determines whether sixth amendment safeguards are invoked for crime in question); District of Columbia v. Clawans, 300 U.S. 617, 628 (1937) (legislative penalty authorized indicates seriousness of crime); United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (*Muniz* subjective standard not meant to apply to individuals because to do so would be basing constitutional rights on individual wealth, which Constitution does not do). *Compare Ex parte* Werblud, 536

A secondary issue which the *Griffin* opinion did not address is whether separate fines imposed for a series of constructive criminal contempts should be considered separately or aggregated to determine if a jury trial is necessary.[81] The *Griffin* decision did not follow Texas precedent by aggregating the total amount of fines imposed on Griffin to determine his right to a jury trial.[82] The previous decisions, however, can be distinguished from the facts of the instant case.[83] In both *Werblud* and *Genecov,* the individual contemnors were fined for a relatively minimal number of violations, when compared to the large number of fines imposed on Griffin.[84] Thus, the *Griffin*

S.W.2d 542, 547 (Tex. 1976) (even though two fines were imposed, offense still petty because each fine within statutory definition of petty contempt) *with Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (fines totaling $104,000 too large for individual contemnor to pay without jury determination); *see also Ex parte* Genecov, 143 Tex. 476, 479, 186 S.W.2d 225, 226 (1945) (fines imposed for 30 separate violations permissible because each fine within statutory defintion of petty offense); Thompson & Starkman, *Multiple Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 621 (1973) (United States Supreme Court has not resolved issue of jury trial in cases of multiple, petty contempts which become serious when aggregated).

81. *See Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (implicitly holding that aggregate amount of fines determine right to jury trial); *see id.* at 264 (Gonzalez, J., dissenting) (contemnor not entitled to jury trial considering net fine imposed). *But see* Note, *Aggregating Indirect Criminal Contempts of Court — Right to Jury Trial,* 20 WAYNE L. REV. 891, 902 (1974) (courts can abuse power to punish for indirect contempt, thus compelling aggregation of multiple fines to protect against arbitrary judicial conduct).

82. *Compare Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (separate fines of $500 each not serious enough to warrant jury trial) *with Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (total amount of 208 separate fines too excessive to impose without jury trial) *and id.* at 263-64 (Gonzalez, J., dissenting) (net fine imposed not serious when contemnor's ability to pay considered). *But see Ex parte* Genecov, 143 Tex. 476, 480, 186 S.W.2d 225, 227 (1945) (contempt offense analogous to misdemeanors, thus both may be regarded separately to determine if petty or serious); *see also* Note, *Contempt — Right to Jury Trial,* 87 HARV. L. REV. 865, 871 (1974) (aggregation of multiple indirect criminal contempt sentences will protect defendant from judicial abuse more times than not). *See generally* Thompson & Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 639 (1973) (multiple contempt violations deserve same analysis to determine if jury trial necessary, because non-continuous criminal violations deserve separate penalties).

83. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (contemnor fined for 208 separate violations resulting in total fine of $104,000) *with Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (individual contemnor fined $500 each for two separate acts of indirect criminal contempt); *see also Ex parte* Genecov, 143 Tex. 476, 480, 186 S.W.2d 225, 226 (1945) (contemnor fined $50 each for thirty distinct violations). *See generally* Thompson & Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 624 (1973) (United States Supreme Court has not considered whether contemnor who commits multiple violations, each resulting in petty sentence, deserves trial by jury).

84. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (contemnor fined $500 each for 208 violations of temporary injunction) *with Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (two $500 fines not serious offense requiring jury trial, either when aggregated or considered separately); *see also Ex parte* Genecov, 143 Tex. 476, 480, 186 S.W.2d 225, 226 (1945) (separate fines of $50 each imposed for 30 separate violations still petty offense). *See*

court was faced with an extreme situation demanding a new approach to reach an equitable result.[85] By aggregating the fines imposed by the trial court, the *Griffin* opinion implicitly adopted the same policy reasons espoused by the United States Supreme Court in *Codispoti v. Pennsylvania.*[86]

The *Codispoti* Court held that judicial efficiency must give way to sixth amendment rights when a post-trial sentence is imposed, because there is no longer a need to have immediate power and control over the courtroom as there is during the course of a trial.[87] Although the *Codispoti* aggregation rule is limited by its facts to direct criminal contempts punished by imprisonment,[88] the rationale of the decision is analogous to indirect criminal contempts punishable by a series of fines.[89] Many legal commentators have noted that both direct and indirect contempts are subject to similar dangers,

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generally Note, *Aggregating Indirect Criminal Contempts of Court — Right to Jury Trial,* 20 WAYNE L. REV. 891, 902 (1974) (considerations of judicial efficiency must give way to constitutional safeguards such as trial by jury when individual rights at stake).

85. *See In re* Puerto Rico Newspaper Guild Local 225, 476 F.2d 856, 859-60 (1st Cir. 1973) (aggregation rule should not be applied to cases of indirect criminal contempt unless exceptional circumstances exist). *But see* Note, *Aggregating Indirect Criminal Contempts of Court — Right to Jury Trial,* 20 WAYNE L. REV. 891, 898 (1974) (both direct and indirect contempt power susceptible to judicial abuse, requiring multiple fines be aggregated in both situations to determine right to jury trial).

86. *Compare* Codispoti v. Pennsylvania, 418 U.S. 506, 515 (1974) (multiple post-trial sentences for direct contempt should be aggregated to require jury trial to protect defendant from government oppression) *with Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (amount of 208 fines totaling $104,000 too large for individual contemnor to pay without protection of jury trial). *See generally* Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney,* 63 KY. L.J. 945, 1016 (1975) (*Codispoti* court adopted aggregation rule to prevent judicial abuse and arbitrary conduct by imposing right to jury trial in most cases of multiple penalties).

87. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 515-16 (1974) (post-trial sentencing of direct contempt requires aggregation of all multiple penalties imposed because individual defendant's constitutional rights more important than need to maintain order in courtroom); United States v. Seale, 461 F.2d 345, 356 (7th Cir. 1972) (potential for abuse of summary contempt power greater when used after trial than if imposed immediately after contempt occurs). *But see* Note, *Aggregating Indirect Criminal Contempts of Court — Right to Jury Trial,* 20 WAYNE L. REV. 891, 902 (1974) (indirect contempt subject to subtle misuse through imposition of multiple penalties, each within statutory minimum, compelling protection of contemnor from such abuse by aggregation of all fines imposed).

88. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974) (aggregation of multiple fines limited to punishment of direct contempt). *See generally* R. GOLDFARB, THE CONTEMPT POWER 68 (1963) (direct contempts are committed within the presence of court and may not be punished summarily, while indirect contempts occur outside courtroom, requiring different procedures be followed).

89. *See* Note, *Aggregating Indirect Criminal Contempts of Court — Right to Jury Trial,* 20 WAYNE L. REV. 891, 902 (1974) (indirect contempt subject to subtle judicial misuse, compelling individual be protected by aggregation of multiple fines); *see also* Note, *Contempt — Right to Jury Trial,* 87 HARV. L. REV. 865, 869 (1974) (punishment for indirect contempts occur at separate hearing, making imposition of jury less burdensome than for direct con-

such as subtle judicial misuse, which justifies aggregation of multiple penalities to ensure the protection of a jury trial.[90] Thus, the *Griffin* decision implicitly applied the *Codispoti* aggregation rule, thereby rejecting the Court's previous non-aggregation approach to multiple fines.[91] The explanation for the opposite results reached by the majority and dissent, however, lies in their reliance on the *Muniz* subjective test, rather than in an application of the *Codispoti* aggregation rule.[92] The *Griffin* majority in essence substituted its own judgment of when multiple fines became serious, while the dissent analyzed the contemnor's financial ability to pay the imposed fines to reach a contrary result.[93] If the court had applied only the *Codispoti* aggregation rule the same result would occur but without the difficulties of the subjective *Muniz* approach evidenced in both the majority and dissent in *Griffin*.

The unique situation presented to the Supreme Court of Texas in *Ex parte Griffin* required a careful review of the historical background surrounding

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tempts, thus strengthening argument for aggregation of multiple fines imposed for indirect contemptuous act).

90. *See* Thompson & Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 649-50 (1973) (judicial power to impose multiple contempt fines or sentences subject to abuse); Note, *Aggregating Indirect Criminal Contempts of Court — Right to Jury Trial,* 20 WAYNE L. REV. 891, 902 (1974) (multiple fines for indirect criminal contempt should be aggregated to determine right to jury trial, just as direct criminal contempts treated, because judicial abuse great in both situations); *see also* Note, *Contempt — Right to Jury Trial,* 87 HARV. L. REV. 865, 869 (1974) (protection of aggregation of penalties for direct contempts imposed after trial should be extended to cases of multiple indirect contempts, because misuse of contempt power can occur in either situation).

91. *Compare Ex parte* Griffin, 682 S.W.2d 261, 261 (Tex. 1984) (total fine of $104,000 too serious to impose without protection of jury trial) *with Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (multiple fines should be looked at separately to determine right to jury trial); *see also Ex parte* Griffin, 682 S.W.2d 261, 264 (Tex. 1984) (Gonzalez, J., dissenting) (net fine not serious enough to warrant jury trial).

92. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (contemnor entitled to jury trial because amount of imposed fines serious offense) *with id.* at 264 (Gonzalez, J., dissenting) (contemnor not entitled to jury trial because fines not serious when considering contemnor's ability to pay). *See generally* Note, *Contempt — Right to Jury Trial,* 87 HARV. L. REV. 865, 866 n. 10 (1974) (courts should not subjectively interpret how serious fine is in light of defendant's financial status because results in great uncertainty and wasteful litigation).

93. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (aggregate amount of fines too large for anyone to pay without jury trial) *with id.* at 264 (Gonzalez, J., dissenting) (net fine imposed not serious when considering profits made by contemnor from prohibited sales, thus increasing his ability to pay fines). *But see* United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (application of subjective standard substitutes particular judge's own personal judgment concerning seriousness of risk for objective statutory guidelines); *Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (objective statutory criteria used to determine seriousness of offense). *See generally* Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt,* 50 CINN. L. REV. 677, 684 (1981) (too many contempt sentences reversed on appeal because of circular reasoning used to determine if jury trial should have been granted based on final result of proceeding).

the right to a jury trial in constructive criminal contempt situations. The *Griffin* decision lacks such a comprehensive approach, and is content to apply conclusory reasoning, using a subjective test never before applied to individual contemnors to reach their result.[94] The dissenting opinion by Justice Gonzalez also applies subjective criteria to reach a result contrary to the majority's. Past United States Supreme Court and Texas cases in this area rely instead upon the objective criteria provided by relevant statutes before determining the seriousness of the offense.[95] Policy reasons, such as predictability and uniformity of decisions, dictate adherence to the objective approach, even in cases involving multiple contempt violations.[96] In *Griffin,* however, the extreme number of contempt violations demanded deviation from the stricter view of past decisions of the court.[97] In addressing the

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94. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (multiple fines totaling $104,000 too large to impose without jury trial) *with* Muniz v. Hoffman, 422 U.S. 454, 476 (1975) (fines and imprisonment inherently different for individuals instead of corporations, thus subjective criteria of contemnor's ability to pay fine only imposed on corporate defendants); *see also* United States v. McAlister, 630 F.2d 772, 774-75 (10th Cir. 1980) (*Muniz* does not require case-by-case analysis of individual's financial ability to pay imposed fines because would base constitutional rights on personal wealth); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (subjective *Muniz* standard inapplicable to individual contemnors because requires trial and appellate judges to rely on their own personal experience in determining whether jury trial necessary). *See generally* Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt,* 50 CINN. L. REV. 677, 684 (1981) (appellate courts frequently reverse contempt judgments because proper procedures not followed).

95. *See, e.g.,* Frank v. United States, 395 U.S. 147, 148 (1969) (courts should focus on objective criteria such as existing laws to determine seriousness of offense); Bloom v. Illinois, 391 U.S. 194, 211 (1968) (seriousness of contempt determined by objective standards); Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (legislatively authorized penalty of major importance in determination of whether sixth amendment right of trial by jury applies); *see also Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (federal and Texas contempt statutes both provide important objective criteria in determining whether two fines of $500 each remain in petty category); *Ex parte* Genecov, 143 Tex. 476, 479, 186 S.W.2d 225, 226 (1945) (fines imposed for 30 separate violations permissible because each fine within statutory definition of petty offense). *See generally* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 233 (1971) (difficult questions raised in determining when judgment for contempt serious enough to warrant jury trial).

96. *See, e.g.,* United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (*Muniz* subjective criteria should only be applied to corporate, not individual contemnors to avoid basing constitutional rights on individual wealth); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (practical benefits of efficiency, uniformnity and objectivity encouraged by applying objective standards to determine when jury trial necessary for contempt offenses); Douglass v. 1st Nat'l Realty, 543 F.2d 894, 902 (D.C. Cir. 1976) (objective criteria should be referred to as providing most reliable indication of seriousness of contempt offense); *see also* Dobbs, *Contempt of Court: A Survey,* 56 CORNELL L. REV. 183, 234 (1971) (difficult to determine if contempt sentence petty or serious when multiple sentences combined in one proceeding). *See generally* R. GOLDFARB, THE CONTEMPT POWER 48 (1963) (determination of seriousness of contempt as risky as "Russian roulette").

97. *Compare Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (fines imposed for 208

issue of when fines become serious, the *Griffin* court chose the most lenient approach possible, by combining the subjective *Muniz* test with aggregation of the multiple fines.[98] Other courts have suggested a better approach would be to apply the accepted objective test of comparing the applicable statute to the aggregate amount of the multiple fines.[99] Thus, the defendant's interests would be protected from arbitrary judicial conduct by aggregating the fines, while such policy goals as predictability and uniformity would be promoted by use of the objective standard. The equities of the situation would be justly resolved without sacrificing judicial integrity or efficiency. The Supreme Court of Texas had an opportunity to clarify a confused area of the law in *Ex parte Griffin,* but failed to establish reasonable guidelines for later courts to follow. Unfortunately, the status of contempt in Texas will remain under the present cloud of uncertainty and confusion until the Supreme Court of Texas again has the opportunity to review multiple criminal contempt violations resulting in an excessive amount of fines.

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separate violations of temporary injunction makes offense serious enough to be tried before jury) *with Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (two fines of $500 each remain in petty category not requiring jury trial); *see also Ex parte* Genecov, 143 Tex. 476, 479, 186 S.W.2d 225, 226 (1945) (fines imposed for thirty separate violations permissible because each fine within statutory definition of petty offense). *See generally* R. GOLDFARB, CONTEMPT OF COURT 43 (1963) (determination of type of contempt crucial to contemnor's constitutional rights such as right to trial by jury).

98. *See Ex parte* Griffin, 682 S.W.2d 261, 262 (Tex. 1984) (imposition of 208 separate fines aggregated and found to be serious enough to require jury trial). *But see Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976) (two $500 fines are petty when looked at separately and compared to objective statutory criteria). *See generally* Thompson & Starkman, *Multiple Petty Contempts and the Guarantee of Trial by Jury,* 61 GEO. L.J. 621, 631 (1973) (extension of jury trial right in contempt cases by United States Supreme Court requires practical considerations be analyzed when implementing such right to unique contempt situations).

99. *See* United States v. McAlister, 630 F.2d 772, 774 (10th Cir. 1980) (subjective criteria raises bothersome issues because individual contemnor's constitutional rights based on his financial ability to pay fines); United States v. Hamdan, 552 F.2d 276, 279 (9th Cir. 1977) (subjective standard inapplicable to individual contemnors because requires trial and appellate judges to rely on their own personal experiences in determining seriousness of risk involved); *see also* Note, *Aggregating Indirect Criminal Contempts of Court — Right to Jury Trial,* 20 WAYNE L. REV. 891, 902 (1974) (considerations of judicial efficiency must give way to constitutional safeguards, such as trial by jury when individual rights at stake).