Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

Docket No. 5485

ROBERT JOHNSON,

Petitioner

vs

THE STATE OF MISSISSIPPI,

Respondent

Place Washington, D.C.

Date April 21, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

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Petitioner

vs

THE STATE OF MISSISSIPPI,

Respondent

No. 5485

The above-entitled matter came on for argument at 1:00 o'clock p.m. on Wednesday, April 21, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments this afternoon in Number 5485: Johnson against Mississippi.

Mr. Porter, you may proceed whenever you are ready.

ORAL ARGUMENT BY STEPHEN W. PORTER, ESQ.

ON BEHALF OF PETITIONER

MR. PORTER: Mr. Chief Justice, and may it please the Court:

My name is Stephen Porter of the law firm of Williams and Connolly and sitting at the counsel table is Richard Ruge of the law firm of Hogan and Hartson. We are co-counsel for Petitioner in this matter.

This case arises out of the conviction and sentencing of a Mississippi Civil Rights worker under circumstances that would appear to ignore every pronouncement, every limitation cautionary statement that this Court has over the years ever made over the issue of the use by a traveler of the power of whether it -- due process to punish allegedly contumacious behavior summarily.

The facts briefly reviewed are as follows: On January 27, 1969 Petitioner was summarily convicted by a Grenada County, Mississippi Circuit Court Judge, Marshall Perry for a remark he allegedly made in Judge Perry's courtroom --

Judge Perry sentenced Petitioner to four months in

jail, although the maximum sentence is one month, to which the Supreme Court of Mississippi later reduced the sentence. The conviction resulted from the incidents which occurred on January 24, 1967 in the Judge's courtroom.

At 9:00 a.m. that morning prospective jurors for the January term occupied benches near courtroom doors, a section normally reserved for the public.

Q Has his one-month sentence been stayed?

A Yes, Your Honor.

Q Served --

A Yes, Your Honor; his one-month sentence has been stayed.

The most direct route to the seats reserved for defendants in pending cases before the term involved walking in front of these jurors. Judge Perry announced that anyone entering the court while in session would be required to use an aisle in the rear and this announcement was made approximately five or ten minutes before Robert Johnson appeared in court.

When Petitioner Johnson arrived he walked by the most direct route to the seats reserved for the prospective defendants and as he did he walked in front of the jurors.

Q And he was there as a defendant in a case that was going to be tried that day?

A Yes, Your Honor. Whether or not it was

going to be tried that day, it was the opening day of the term and he was required --

Q And he was the defendant in one of the cases that the court was going to try during that term?

A Yes, Your Honor.

Petitioner Johnson was apprehended by the Deputy Sheriff, who ordered him to walk around to the rear. At this point, according to the State's show-cause petition, Johnson thereupon said in a loud and offensive voice: "What the hell do you mean go around to the rear?"

That is the sum total of any allegation of contumacious behavior on Petitioner's part.

Q What would be your view if the Judge had then and there, or upon the adjournment of the court, had imposed a sentence of 30 days for contempt of court?

A Your Honor, first of all, I think that that would be a far different matter than what he did do. And I think even then the behavior of Petitioner Johnson that was alleged is far less than the outrageous behavior which is present in many of the decided cases in this court on this subject.

Furthermore, I think there is another issue which ought to be raised and faced and determined, and that is the question of whether the Judge ought to invoke a summary contempt power against a person who is not then involved in a

proceeding before the court, or whether or not the ordinary fuller hearing ought to be required.

Q What difference does it make whether it's a spectator, a tourist, a defendant or a member of the bar of the court?

A Well, I think, Your Honors, that --

Q Except that it might be a higher degree of culpability on the part of the lawyer.

A Leaving aside the question of a lawyer for a moment, I think the difference is this: that in the case of a defendant before the court it is possible -- it is much more difficult to invoke summary punishment, because it involves the possibility of prejudicing the case, possibly prejudicing the jury and possibly interrupting the proceedings.

There is a lesser remedy available in respect of a spectator. He can be removed from the court; the court can proceed with its business and still take care of, in due course, charging the contemnor with responsibility for his act.

Q Was the judge on the bench at the time that this Petitioner --

A Yes, Your Honor; the judge was on the bench. Although --

Q What was going on in the courtroom? Was a trial in progress or --

A The record does not show what was going, whether or not -- if it was going on. It appears that Petitioner arrived in the court shortly after the judge was making his opening announcements with respectto -- I don't think a trial was going on; I don't think jurors had been chosen yet with respect to any of the pending cases.

Q Preliminary matters --

A Some preliminary matters. I believe that is correct, Your Honors.

Q Well, you haven't indicated your view of the matter, but you don't need to. The view of the court's power summarily to deal with an utterance of that kind in the courtroom. Do you question the court's power to deal with that kind of an utterance?in the courtroom by any person?

A I don't question that -- the power of the court to deal with an utterance of that kind in the courtroom, although I think traditionally it would have to have been the kind of behavior which would have disrupted the proceedings. The State's show-cause petition alleges that the sheriff and his deputy brought Petitioner before the judge and related to the judge what had happened, indicating that the judge had never heard the disruption which had taken place.

And again, I think that although the court has the power to dispose of a disruption in the court, the question of whether or not it should deal with it in a summary proceeding

where some other method would be appropriate and still reserving the possibility of a prosecution for contemptuous behavior, is a reasonable and proper result.

Q If a man stands up in the courtroom and says to a judge, looking him straight in the face: "Go to hell." The judge can't do anything about it?

A I'm not suggesting that the judge cannot do anything about it, Your Honor. I am suggesting --

Q What do you suggest he could do?

A Well, there are several things he could to, and it depends, I think --

Q He could put him in jail for 30 days right then and there; couldn't he?

A I think he could probably put him in jail for 30 days right then and there.

Q Legally.

A Yes, Your Honor; legally he could put him in jail for 30 days right then and there, if the judge saw and heard the -- this is the old distinction between direct and indirect contempts.

Q If the sheriff heard it and told the judge that, that's different? Even though it's in the courtroom?

A I think that is correct; yes, sir.

Q Is there a state statute that covers it?

A There is a state statute that covers

contempt of -- direct contempt of court, punishable by one month -- empowers the judge to sentence a contemnor to one month in jail, in a direct contempt under Mississippi statutes.

Q Well, this judge indicated later he heard it himself.

A This judge later indicated, Your Honor, after two years had gone by, that he did hear it himself, although he had in the intervening time, scheduled a show-cause hearing. One step of the show-cause hearing and then he cancelled it.

Q Well, I don't know that that's inconsistent with his having heard it, and I wouldn't think it is inconsistent with his having heard it, but the sheriff brought the man up to him and then told him what he said.

A Well, I think it was inconsistent in this respect, and that is --

Q Well, he perhaps didn't say, "Well, I heard it myself, so you don't need to tell me," but he let him tell him.

A Then he scheduled a show-cause hearing in -- which would be the proper procedure under Mississippi statutes for an indirect contempt.

Q Well, it wouldn't be improper for a direct one, would it?

A No, it would not be improper to provide

a hearing; that is correct.

The judge ordered the show cause, ordering that the show cause petition be filed and within two days of the order, petitioner filed a motion that Judge Perry disqualify himself in the pending show cause hearing, alleging personal prejudice and further alleging that since the judge had ordered his arrest he could not fairly decide the action.

On February 1, 1967, approximately a week after the event, Petitioner filed a petition for removal to the United States District Court for the Northern District of Mississippi. It was not until some 21 and a half months had elapsed that the United States District Court remanded the prosecution to the Grenada County Circuit Court, holding that Petitioner's remedy in the Federal system could rely only after he demonstrated he had been deprived of his constitutional rights by the state courts.

On January 22, 1969, prior to any action in Grenada County on the contempt charge and two months after the Federal Court had returned the prosecution to the state system, Petitioner and others filed an action in the United States District Court for the NOrthern District of Mississippi, a whole separate action to restrain trials of Negroes and women until such time as those persons were not systematically excluded from juries in violation of the U. S. Constitution.

Judge Perry was named as one of the defendants in that

action and served with process on January 23, 1969. On January 24, 1969 a summons was issued directing Johnson to appear in Judge Perry's courtroom on January 27th to show cause why he should not be punished on the old contempt charge.

On January 27th Petitioner and his attorney did appear in front of Judge Perry for the show cause hearing, at which time the Judge cancelled the hearing, instead giving a contempt conviction sentencing Petitioner to four months in jail. Bail was set at $2,000 and subsequently reduced to the statutory maximum of $300 by the Supreme Court of Mississippi.

Later that same morning in a second appearance before Judge Perry in an effort to obtain the Judge's signature on a bill of exceptions, the Judge refused and when Petitioner's attorney prepared a bill of exceptions the Judge summarily adjudged her in contempt, a conviction which was later reversed by the Supreme Court of the State of Mississippi.

Q Why was it that the Judge, when this episode happened, didn't punish him summarily?

A I'm sorry, Your Honor; you mean why he didn't punish him in 1967?

Q Yes. Immediately when the episode happened.

A The record does not show why he didn't. The record only shows that he just elected to travel the show cause route rather to invoke such summary powers as he might have had under the Mississippi statutes.

Q When was the order to show cause returnable?

A The order to show cause was returnable on February 1st, I think, nine days after the alleged contumacious behavior.

Q Well, then I take it it was issued almost immediately?

A Yes, Your Honor; it was issued almost immediately, following the judge's order that a show cause order be issued.

Q Then why wasn't it heard then?

A Why was it not heard immediately?

The judge ordered that the show cause petition be issued in 48 hours and why he didn't set it down for an earlier hearing is not in the record, Your Honor.

Q And then he issued another one?

A The second one was two years later. The February 1st show cause hearing was not held because by that time and new petition had been filed in Federal Court.

Q Do you respond in writing to a show cause order in that jurisdiction?

A I'm not aware of whether you do or whether you don't, Your Honor.

Q Was there any response to your first show cause order?

A I think the response was a motion filed that Judge Perry excuse himself from hearing the matter and that motion was never heard and never determined by the judge.

Q And was that -- there was then a suit filed against him?

A There was then a suit filed against Judge Perry. That was after 21 and a half months had elapsed and after the Federal system had returned the case to the Grenada County Circuit Court. About two months after the case had been returned, and still without any action taken on it in Grenada County the separate suit was filed by the Petitioner naming Judge Perry as a defendant.

Q What case was being tried at the time this occurred?

A Do you mean, Your Honor, the proceeding that was going on in the courtroom?

Q Before the Court at the time the Court was interrupted.

A I don't believe there was any proceeding going on at the time. I believe they were in the process of choosing jurors.

Q For what case?

A I believe they were selecting eligible jurors for all of the pending cases at that time.

Q For the week?

A Yes.

Q Was there any complaint to the court about anything that had been done?

A Not that I know of, Your Honor; the record suggests none.

Q It was just a disorder that happened for any reason?

A The reason appears to have been the request by the deputy sheriff that Petitioner walk around the rear of the room to take his seat rather than take the more direct route and pass in front of the prospective jurors.

Q Well, was he on trial, or charged --

A He was scheduled for trial during that term.

Q For what?

A I believe it was a, as indicated in the record, I believe it was a trespass case which was, although there wasn't --

Q What was it about?

A I don't know what it was, Your Honor. It is not in the record. The only thing that is in the record which we have in the footnote in our brief is that there was never any prosecution on the matter. The proseuction on the substantive charge against Petitioner was dropped. I believe it was a trespass arising out of a civil rights demonstration.

Q In a restaurant or something like that; courthouse, or what?

A I have no idea, Your Honor; it's not in the record.

From its earliest decisions this Court has recognized the use of summary procedures to convict must be carefully controlled since they do not encompass the ordinary procedural safeguards incorporated in our system of justice: the right of the accused to be apprised fully of the nature of the charges against him; the right to put on a defense; the right to counsel.

Generally the narrow area within which summary contempt proceedings have been permitted is where the trial judge has observed the contumacious conduct and then acts swiftly by conviction of the contemnor rather than by an alternative remedy in order to quell the disturbance threatening to upset the sanctity of the courtroom. Other remedies have been held constitutionally permissible in dealing with an obstreperous defendant.

This Court recently, in Illinois versus Allen mentioned at least two others: restraint and removal from the courtroom. Other summary procedures suggest themselves, contempt procedures suggest themselves where appropriate, such as a civil contempt, a postponement of the proceedings in a proper case or by the judge informing the defendant that the

charges would be preferred against him for contempt at the conclusion ofthe trial and referred to another judge.

In light of these other possible remedies and in light of this Court's recent holding in Mayberry versus Pennsylvania, which restricted the use of a summary conviction after a trial's conclusion, since at that time immediate restorationof order is made or vindication of the authority of the court. It is no longer the primary requisite.

Petitioner's conviction and its affirmance by the Supreme Court of Mississippi must be reversed.

Q Wasn't there a major part of Mayberry, though, that the judge who was going to later hear the case, had himself been slandered and insulted personally and hence there might have been some question about his fairness?

A I think, Your Honor, that is --

Q Does he rely on this case to suggest that the judge trying this contempt later might have had a personal animus and would be biased?

A Several possibles suggest themselves, Your Honor. There are several affidavits in the record suggesting Judge's personal bias against the defendant --

Q Based on what, though? Based on what? I mean, just generalized allegations wouldn't suffice, though.

A Yes, and also allegations of prejudice or the possibility of prejudice as a result of the lawsuit filed

by Petitioner naming the Judge as a defendant at the time of the second show cause hearing.

Q Yes.

A That might, I suggest, be an even greater possibility of bias --

Q What was the charge in the suit against the judge?

A The suit, Your Honor, was against the Judge and several others for systematically restraining and preventing Negroes and women from serving on juries in Grenada County, Mississippi.

Q But this did not have anything to do with this Petitioner? I mean --

A Petitioner was a plaintiff.

Q But he wasn't suing him for anything the judge did to him?

A No, Your Honor, other than as a member of a class.

Q Mr. Porter, you were not counsel for Johnson at the time of this incident, were you?

A No, I was not.

Q Do I correctly infer that the attorney which he had at that time was also cited for contempt?

A Yes, sir, both --

Q And with what result?

A The first attorney who represented him on the day of the alleged contumacious behavior was cited for contempt for protesting in Judge Perry's court that the show cause hearing was improper and that trial was restrained by a temporary restraining order issued by the U. S. District Court for the Northern District of Mississippi and the case was just never brought to trial after the temporary restraining order expired.

The second attorney, the attorney who represented him at the time of the second show cause hearing, at the time the second show cause hearing was -- was also cited for contempt and that contempt conviction -- that summary conviction was reversed by the Supreme Court of Mississippi on the grounds thatit was not a direct contempt of court charge and that a summary procedure did not apply.

Q Well, now, the summary procedure then was the correct procedure, under Mississippi law to use in Johnson's case, I take it, since it was not, in your view, a direct contempt?

A Your Honor, if it were not a direct contempt the summary procedure would not be --

Q Well, but he did not give the summary procedure here, did he?

A No, he did not. I thought you were suggesting that the summary procedure would be used.

Q No.

A It would not be the correct procedure.

Q So that you do not have any quarrel with the procedure that the judge used to deal with the contemnor?

A The show cause procedure itself -- no quarrel with the procedure that was scheduled. We are alleging that failure to then hold the show cause hearing or to hear the motion that the judge excuse him and that the show cause hearing be before an unbiased judge was improper.

Q Do you suggest that a person in the posture of Johnson may disqualify a judge by bringing a lawsuit against him?

A No, Your Honor; I don't suggest that and I don't think that there is any suggestion here that this lawsuit was brought to divest the judge of his power to hear a contempt charge.

Q In your earlier arguments you suggested thatthis was one of the large factors, I think is the way you put it, in probable bias, since he was a defendant in a lawsuit, the judge was a defendant in a lawsuit.

A Yes, Your Honor; I think it is a major factor, but I think that if, in a lapse of two years' time you have your Petitioner, who is a civil rights worker who was working actively in that field when he brings a lawsuit --

Q What difference does it make whether he

was a civil rights worker or a plumber if he is guilty of contumacious conduct in the courtroom?

A Well, I think if you have an intervening legitimate lawsuit with merits which was not brought simply to divest on some charge in order to divest the judge of his jurisdiction to hear the contempt charge I think you have an intervening factor which simply requires the judge to excuse himself.

Q Has that lawsuit been tried?

A That lawsuit, for the record, was won by Petitioner. The Federal District Court issued an order enjoin ing the judge and the other defendants from any further act which violate civil rights of the plaintiffs. In other words, a class. As a matter of fact, that order, Your Honor, was issued and Judge Perry and others were enjoined prior to the time that the judge cancelled the show cause hearing.

In other words the suit was filed within a matter of 48 to 72 hours the United States District Court issued its injunction.

Q Supposing a judge has a contempt committed in his presence, a direct contempt, then he says: "I find you in contempt. I will postpone sentencing until the conclusion of your trial, until I get through with this case." And then he brings the Petitioner in and says: "I impose 30 days on you." Would you have quarrel with that procedure?

A No, Your Honor; I would not.

Q Would that be equivalent to what's happened here or is it different?

A I think it's something far different --

Q Well, that's what I'm trying to get at --

A Something far different has happened here. There was no finding of contempt by the judge. First of all, it's not clear that this was a proper case in which there could be a finding of contempt by the judge without a hearing.

Secondly, even if this were the case that power was not invoked by the judge. He did not specifically find Petitioner in contempt. He instead ordered a show cause hearing. He ordered two show cause hearings and he later cancelled those hearings and we're suggesting that once the judge has elected to use another procedure unless there is intervening obstreperous behavior there may not be a cancellation of the due process hearing and a return to the summary procedure because at thatpoint, two years down the road or three years or even one day down the road there is no longer any need to quell the disorder in the courtroom. That summary procedure has historically been reserved for just that purpose: to quell a disruption. And if the judge elects not to utilize it for the purpose of quelling a disruption he ought not have it later.

Q Well, when the '69 show cause order was

issued that was the operative one, under your view, was a response put in, an answer put in by the -- by your client? What I'm getting at: were the issues in fact pending?

A No, Your Honor, I think there were no issues of fact entered. The Petitioner pointed out -- Petitioner appeared for the show cause hearing and asked, through his attorney, to put on a defense and that request was denied. The bill of exceptions which was in the record, Petitioner's attorney states that she was prepared to present evidence of the fact that Petitioner did not behave contumaciously.

The power to punish summarily, in any event, if this Court is to permit in limited instances its continued use, it should only be sanctioned where all else has proved unavailing. Otherwise a defendant stands confronted with a conviction, never having had a chance to assert a defense. The only protection remaining between him and the jailhouse door, an appeal which the record/shows is often scanty at best and nonexistent at worst. Such an appeal, even ultimately successful, might be long, arduous and expensive and might be completely avoided if all the facts had been examined in an unbiased fashion at the trial level.

In summary: we have before us what I think is an outrageous case which aptly demonstrates the perils of the misuse of the power to punish summarily. This -- was here employed

where the State's own petition admits the alleged misconduct did not occur within the sight and hearing of the judge, where an alternative remedy could have been selected, where swiftness is not a prerequisite and where there was ample evidence of possible bias.

Finally, there is wholly absent in the record in this case the unusual, exceptional or flagrant nature of [illegible] behavior, which is ordinarily a condition precedent to the invocation of summary procedures.

Q Would you make the same argument if the sentence, the penalty of 30 days had been imposed?

A Immediately, Your Honor?

Q Any time.

A Rather than a sentence of four months? Yes, Your Honor, we would make the same argument.

Q So that it isn't that the length of the penalty you are complaining about; it's the process?

A It's the process. The penalty has already been reduced to the statutory maximum by the Supreme Court of Mississippi.

Q Has been reduced to what?

A To the statutory maximum. Judge Perry's sentence exceeded the statutory maximum and was reduced by the Supreme Court of Mississippi to the statutory maximum of 30 days.

MR. CHIEF JUSTICE BURGER: Mr. Lyell.

ORAL ARGUMENT BY G. GARLAND LYELL, JR.,

ON BEHALF OF RESPONDENT

MR. LYELL: Mr. Chief Justice and may it please the Court:

I might say this at the outset, that Judge Perry is an old friend of mine, a classmate, and I have known him for years, and he has his way of doing things that are sometimes rather unpredictable, frankly.

Q Who is this; the judge or the --

A The judge. The judge that imposed this sentence.

Q This is in Grenada County --

A Grenada County.

Q Is this the same Judge Perry who was involved in the proceedings in Winston County as related in Appendix C to your brief? This is the same Judge Perry?

A Same judge. And, according to my reason for making an appendix to the brief -- was that the -- hadn't been published at the time this brief went to the printer.

Without all of the clouds of bias and prejudice that may have existed, assuming for argument, on the part of Judge Perry, towards this so-called "civil rights worker," or whoever he might be, I don't see that he is in any position to complain of the procedure that was used against him.

If Judge Perry heard those contemptuous remarks--

Q Did he hear them?

A He said he did.

Q I understand from Petitioner --

A In the petition he instructed the show cause petition for information which he instructed the prosecutor to prepare. I think that's where the prosecuting attorney who prepared it said it was reported to Judge Perry. But you will find in the record that Judge Perry himself stated that he heard it.

Q Would there be anything inconsistent between hearing it and having it reported to him?

A It could have been both. But, I might add this: even though punishment was not summarily imposed, which he had a right to do for a violation of contempt in his presence, and he directed the prosecuting attorney to file an information or show cause order, if it had occurred out of his presence or out of his hearing it would have been constructive or indirect and he wouldn't have had this 30 days maximum jail sentence. He could get six months, for example.

And I think this thing -- Mr. Justice Harlan, I forgot the words he used to describe the last show cause order or hearing, every opportunity was given this man and his counsel to provide some sort of response to show something in litigate, something to purge himself. Nothing was ever done. Now, it's

true that's a long time to wait to impose a penalty for contempt, but they never appeared to defend themselves and --

Q There never was a denial of what was said? Never, up until this moment.

A No, sir. And to me it gets back -- I don't know whether our statute on appeals for contempt in Mississippi is unique or not. I didn't have time to research some other states; it would have been atremendous task, but I agree thoroughly with the rationale of Mayberry and other similar cases that if summary punishment is not immediately imposed that that judge ought to get some other judge to hear the thing. Hear the evidence and determine whether or not there was a contempt and what the penalty ought to be.

Some judge unstung by the contemnor's conduct, unbiased, unprejudiced and unattached -- but I suggest this: I felt I was sort of like on thin ice in this case for a while and after I tried to get counsel to agree in spite of the fact that I think in Rule 37 you file a submission without argument, I tried to get them to agree to submit it.

But, in studying the thing I studied on appeals from contempt convictions and I found a right interesting thing which I point out in my original brief, that that statute accomplishes, I think, a greater degree, by a greater degree what would be accomplished by having one singlejudge hear this thing at a later date when summary punishment was not imposed.

That statute, on appeal from a contempt conviction provides that the Supreme Court of Mississippi, nine judges, will review the thing on the record and decide (1): was there contempt? Then if they determine that there was a contempt from that cold printed record, uninfluenced by a courtroom atmosphere and what not, they can do one of four things.

They determine, the statute says, whether the appellant was guilty of contempt, and the sentence or decree or order of the court below may be affirmed, reversed, annulled or modified, according to the judgment of the Appellate Court. That, of course, was the reason I attached that Boston opinion as an appendix to the brief to show just how the State Supreme Court has handled these things.

Now, there was a case where the same Judge Perry found a man named Boston, who is a lawyer in Winston County, Mississippi, that ran against Judge Perry for Circuit Judge, in contempt and he appealed to our Supreme Court and they completely annulled the conviction. They didn't reverse, remand or modify; they completely annulled it, as you can see from that appendix.

Q I have some problems with your argument and perhaps you can straighten it out, Mr. Lyell, about your argument about the Mississippi statute that gives the Supreme Court reviewing power. In this particular case in its opinion

the Supreme Court of your State said: "Upon appeal to this Court from a conviction of direct complaint the statement of the substantive facts set out in the judgment of the trial court will be taken as true and correct." Well, that's pretty far away from any sort of factual review that I had understood you to suggest.

And secondly, since there was no hearing there really wasn't anything to review in this case if they took the findings in the trial court's judgment as true and correct and the trial judge does not conduct a hearing on the show cause order, there is just no review at all --

A Well, I think what they mean, Mr. Justice Stewart, is this: that they have to accept as a fact, from the finding of the trial court what this contemnor did. As Justice Marshall asked, there has never been any denial of the fact that he did what he did. Then, under this appeal statute they would determine if that is a contempt, and go ahead and vacate, reverse, or --

Q Well, there has never been a denial. How was there ever any opportunity for a denial? As I read the statement of facts in the Petitioner's brief it boils down to the fact that at 9:00 o'clock in the morning on January 27, 1969 Johnson, with his lawyer, appeared before Judge Perry, and denying Johnson's request for a hearing, Judge Perry read the order adjuding Johnson of criminal contempt and sentencing him

to four months in prison.

A Well, his --

Q And therefore, if there was no showing or opportunity for a hearing and if there was denial of a hearing, and if the Appellate Court takes the facts stated in the judgment of the trial judge as true and correct, I don't see how there could have been any Appellate review at all. As a matter of fact it suggest a _____ kind of review that you suggest the Mississippi statute requires.

A My recollection is that at least two of these so-called these show cause orders were served to give him an opportunity to file a written response. I've forgotten which justice asked if a written response is required in Mississippi. I don't think it is, but any contemnor that I have ever heard of that has been allowed to purge himself, has done so, or had anything to say in litigation or by way of apology.

Q Purge himself means to offer some excuse for doing something, and admit you have done it; doesn't it?

A Yes, as I understand the word.

Q Well, on Page 40 of the appendix it stated that: Martha _____, and that was his lawyer, as I understand it, at that time requested a hearing, which request was denied. Now, is that true?

A What date was that, sir?

Q I think it was 1969. 9:00 a.m. on January 27, 1969, at which Johnson was found to be in contempt, and there was a denial of a request for a hearing, according to the --

A He had been previously afforded an opportunity to file a response and have a hearing.

Q Now, where is that in the record? Or in the appendix. I have looked through it and I can't find it.

A I haven't seen the printed record. In fact it was an informa pauperis appeal, was it not? And I think our written record was up here when I had the thing shoved on me --

Q Well, this was filed on February 10, 1971.

Q We're speaking now of the brown printed appendix.

A My information was that he had two hearings set and at the first one he didn't even show up.

Q Is it your position he defaulted in his opportunity to present evidence of mitigation or to purge or to explain --

A I think so.

Q And that the occasion Justice Stewart is referring to, then in your view, was just the occasion to hear the scheduled sentence for contempt?

A Perhaps on the second one, but he was

there on the second one. My recollection is that they asked for another judge to hear it and rather than make any defense. which gets back to the proposition that if Judge Perry heard it and took testimony after having a denial of whether or not he uttered the contemptuous words, conduct, and was still found in contempt, then under the very salutory statute on appeal -- which I think is even better than having a single judge; you've got nine Supreme Court Judges dispassionately reviewing the thing from the printed record. And, as illustrated by the Boston case, completely annulling a contempt conviction.

Q Well, Mr. Lyell, I'm looking at page 40, as Mr. Justice Stewart referred to, these are the proceedings so it's stated here, before Judge Perry at 9:00 o'clock on January 27, 1969. Here it's recited that Martha M. Wood, requested a hearing and the request was denied and then objected to the denial and then this appears. Judge Perry stated that he had intended to give Respondent a hearing on the contempt charge, as the court files ordering him to appear and show cause proved, but that "Since the Respondent had the audacity to go to a Federal Court" and whether Judge Perry meant by that the original removal order or the affirmative jury suit or both is not clear, he was not going to give him a hearing.

A Well, I can't answer that.

Q You can't say whether that did or did not

occur?

A I can't; no, sir.

Q Don't you think that brings --

A Sir?

Q Don't you think that brings this case within Mayberry?

A Well, I think, Mr. Justice White, that if guilty of a summary contempt which would bear immediate imposition of punishment.

Q Well, how do you know he said these things?

A The only thing in the printed record is that he did it.

Q Except that he never had an opportunity for a hearing to testify that he --

A Well, the record shows he had one previous opportunity and did not appear.

Q I can only say what appears here and from this it appears that he didn't, so we don't know whether, if he had a hearing, perhaps he would have taken the stand and denied that he said it.

Q The only determination he ever said it is by a judge who perhaps arguably, at least, shouldn't have heard it at all.

A Well, I can only say this, Mr. Justice

White, that when the conviction was appealed to the State Supreme Court there was no complaint made, no effort made in the State Supreme Court and I think you have the original record here, that based on that ground, that he didn't have a chance to deny, that he did this thing.

Q Well, why is that statement on page 40? What was it put there for?

A WEll, I'm talking about the previous opportunity.

Q Well, I'm talking about this time.

A This time?

Q Where there is a man who has done nothing he could be tried for contempt; he asks for a hearing and they say they won't give it to him because of his audacity in going to the Federal Court. Would that be accepted as a good defense for the Supreme Court of Mississippi? To reject a man's claim to be heard?

A I don't think the Supreme Court of Mississippi or this Court ought to concern itself with anything other than the fact: didhe commit this act, which has gone undenied completely --

Q Well, he's asking here for a hearing on it, which means that he's denying something.

A Well, if we accepted the facts in the record, and I think we can, since it has gone undenied -- now

nobody's claimed --

Q WEll, the judge didn't hear how this defense -- his defense was not that he had previously been given an answer when he had the audacity to go into the Federal Court and try to get relief.

A Well, that was after the first show cause order was entered.

Q Well, whenever it was, is that correct in Mississippi and do you consider it correct as Attorney General, to tell a defendant who has gone into Federal Court that he has had the audacity to go there and he won't hear anything else from him?

A All I can say is, Your Honor, that I wouldn't have done it.

Q Well, Counsel, as I understand it this material on pages 40 and 41, et cetera, beginning at 38, are the allegations set forth in the bill of exceptions. That's not evidentiary matter in the sense of a record that was made at the time. It is in the nature of allegations which appear in the complaint.

Q Well, but they are not, if I may suggest it, it seems to me that they are the bill of exceptions. Isn't this what the Supreme Court of Mississippi decided the appeal upon?

A They had all of that in the record.

Q Yes. I mean, they had the bill of exceptions; did they not?

A I am sure it was in there --

Q And I gather that these are the exceptions which were taken to the proceeding; isn't that right?

A I am sure that was in the record before the Supreme Court hearing.

Q Well, I think there is some similarity between Mississippi and Alabama proceedings. The bill of exceptions in Alabama, and I think it is in Mississippi, is a statement of facts attested to by the judge or accepted by him as being the truth of what appears as shown in the bill of exceptions.

A Well, in Mississippi you can do this two ways. You take the bill of exceptions as something that transpires in the courtroom which is not taken down by the court reporter.

Q Well, some of them are not there.

A And, some claims that are not there --

Q Well, what about those -- what about that that is there and accepted as the bill of exceptions?

A The Judge, in preparing the bill of exceptions, the Judge, if he agrees that those things transpired he will sign it. You can get two members of the bar who were present in court to sign it.

Q That's right; that's what you call the bi-standard of the bill of exceptions.

A Right.

Q But here you have a bill of exceptions appearing to us as being signed, and being the bill of exceptions which states the facts which we should accept as facts; isn't that right?

A Well, the bill of exceptions --

Q What signatures appear on -- well, if I'm reading the correct document, on page 44 you have three lawyers for Johnson have signed this petition and then the Clerk of the Court has certified that this is the true and certified copy of what the lawyers have filed.

Q Well, that's explained on page 43 in paragraph 15. Under your statute if there are two lawyers present in the court, as you told us, they can sign the bill of exceptions in the event that the judge does not or will not, and then they sign it and that's the bill of exceptions.

Q What happened here apparently is -- the paragraph under conclusion it says that Judge Perry refused to sign it and therefore the alternative of having two lawyers who were present sign it, was --

A Well, it still would -- I would still defend the proposition, if the Court please, that since this was a direct contempt in the presence of the Court, which I

must accept the fact, because there has never been any denial of it, or attempt to deny it and in any document which was filed or in any argument that has been made, I think in that respect the Supreme Court of Mississippi could accept the trial judge's statement as to what transpired.

To me it simply gets back to this: how could this man complain, when Judge Perry could have summarily put this 30 days on him right then and there, but he gets it two years later and it's fully reviewed by the Supreme Court. How could he complain?

Q Well, I suppose he could complain that he never had a chance to deny it and he says he never said it. He never had a chance to say that. The whole premise is that the judge, in fact heard it and then he didn't say it.

A My premise is this, Mr. Justice Brennan, that whether or not he heard it, and he said he heard it, but if he heard it it was direct; if he did not hear it it was constructive.

Q Yes, but I gather whether direct or indirect, there was no contempt unless he said it.

A Unless he said it.

Q Unless he said what he is accused of saying.

A Contumacious --

Q And I gather he's saying: "I have never

had a chance to be heard on whether I said it or not."

A I can only get back to this: they have never even intimated that this contempt did not transpire.

Q Counsel, in the appendix or anywhere else, do we have any record, any account of what took place when Johnson failed to appear in response to the first order to show cause as you say he failed to appear?

A In fact I think you --

Q Would the failure to appear in response to an order to show cause at a fixed time and place be, in itself, a contempt under Mississippi law?

A Would it be what, sir?

Q Would that, in itself, be a contempt, failure to appear in response to an order?

A Well --

Q Well, what happened was there was a petition for removal to the District Court in response to the first order to show cause, was there not? To the Federal Court. Do I misunderstand that?

A That, as I understood it --

Q That's what happened. And that could hardly be contemptuous?

A No, sir.

Q No; there was a petition for removal of the case to the United States District Court and the Court held

that petition for a matter of several months, as I understand it, and then remanded it to the State Judge. And then there followed the second order to show cause; wasn't that it? And then they came into court in response to that and, according to what this record shows they asked for a hearing and they were denied a hearing.

Aren't those the facts? If not, what are they?

A Well, why remove the matter to the Federal Court?

Q Well --

A Why not defend yourself, Your Honor, huh?

Q You wouldn't think that's contempt to remove a case to the Federal Court --

A When you had such a complete review by the State Supreme Court on any conviction --

Q Well, it is true that the Court said that they could not consider disqualification of a trial judge when it's done in his presence. That's what the Mississippi Supreme Court said. Whereas, if it had been tried before another judge you could have -- Petitioner could have sought to disqualify.

A Well, that's what they said.

Q Well, isn't that an additional reason why he should have gone to another judge?

A Well, as I say, Mr. Justice Marshall, we all have our different ways of doing things --

and this Judge could have said, "Mr. Sheriff, take this man outside and give him 30 days -- take him up to the jail." Either way it gave him a show cause hearing, or an opportunity, but he didn't --

Q Well, I don't -- well, what about a show cause order that says you can't do anything?

A He didn't say it at the first --

Q Well, I don't know what happened at the first hearing.

A They moved the hearing to the Federal Court.

Q I mean, we don't know what happened at the first hearing.

A Nothing, because this Petitioner removed the thing to the Federal Court.

Q Well, he had a perfect right to do it.

A He had a perfect right to do it but --

MR. CHIEF JUSTICE BURGER: Do you have anything further, Counsel?

MR. PORTER: No, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, Mr. Porter. Thank you, Mr. Lyell. The case is submitted.

(Whereupon, at 1:55 o'clock p.m. the oral argument in the above-entitled matter was concluded)