In the

Supreme Court of the United States

DANIEL T. TAYLOR, III,

Petitioner

vs

JOHN P. HAYES, JUDGE,
JEFFERSON CIRCUIT COURT,
CRIMINAL BRANCH,
SECOND DIVISION

No. 73-473

Washington, D. C.
March 18, 1974

Pages 1 thru 40

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 73-473
JOHN P. HAYES, JUDGE, JEFFERSON CIRCUIT COURT, CRIMINAL BRANCH, SECOND DIVISION	:	

Washington, D.C.

Monday, March 18, 1974

The above-entitled matter came on for argument at 10:55 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT ALLEN SEDLER, ESQ., Box 862, University Station, Lexington, Kentucky 40506
For the Petitioner

HENRY A. TRIPLETT, ESQ., 231 S. Fifth Street, Third Floor, Louisville, Kentucky 40202
For the Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-473, Taylor versus Hayes.

Mr. Sedler, you may proceed when you are ready.

ORAL ARGUMENT OF ROBERT ALLEN SEDLER, ESQ.,

ON BEHALF OF THE PETITIONER

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

There are two basic parts to this case. One, going to the exercise of the summary contempt power, the other going to the right to trial by jury in cases of criminal contempt.

With respect to the first part, the Petitioner contends that this Court should hold that even if the trial judge is going to be allowed to proceed summarily, there is a minimal entitlement to a hearing, notice of the charge, opportunity to respond and judgment.

Secondly, we contend that in the circumstances of this case, the trial judge, the Respondent here, was so personally embroiled in controversy with the Petitioner that he could not impartially sit in judgment on the multiple contempt charges that he leveled against him.

We would also ask this Court to consider, the issue having been briefed by the parties, whether the summary contempt power itself is unconstitutional. If the

Court is going to hold --

QUESTION: Was that raised in the Kentucky Court of Appeals?

MR. SEDLER: Your Honor, not specifically. The -- where it was specifically raised as such was in the Petition for Certiorari.

It seemed to me that as we were developing these arguments before the Court, it was impossible to separate the inherent unfairness in the exercise of the summary contempt power from questions such as the right to a hearing, the embroilment of a particular judge.

If I may draw an analogy, it seems that long ago this Court has recognized that the summary contempt power is arbitrary in its nature and is subject to reviews and over the years, it has worked out various refinements. For example, under Federal Rule 42(a), the charges must be specified. It has developed a doctrine of embroilment and controversy, of bias.

Now we are asking the Court to come up with still another correction on the doctrine, such as to make it clear that there is the right to a hearing and it seems to me that the Court, in so doing, is merely treating symptoms and that the Court might wish to consider in this case going to the disease itself and the disease, we feel, is the summary contempt power which combines in it the inherently

inconsistent functions of prosecutor, judge and jury in the same individual who is necessarily involved in the events leading up to the charge and this is why --

QUESTION: How would the judge maintain decorum?

MR. SEDLER: Pardon?

QUESTION: How would the judge maintain decorum in his courtroom?

MR. SEDLER: By citing the offending lawyer or party for contempt.

QUESTION: You think that is enough?

MR. SEDLER: I think, your Honor, that that should be a sufficient deterrent in all but the most serious cases of persistent obstruction which all the empirical evidence indicates is virtually nonexistent.

QUESTION: Well, aren't you biting off a pretty big hunk? You don't need that for this, do you?

MR. SEDLER: This is true, your Honor. We do not need it for this case but I honestly feel the problem will remain, the problem of the embroiled judge. The problem of the non-embroiled judge, who may try as best as he or she can impartially to sit in judgment still cannot separate his role from prosecuting judge, from trial judge.

I think that it is necessary to -- if I may say so -- in order to ensure proper respect for the administration of justice in this country, we must put the

responsibility where it lies and that responsibility is on the court itself.

The summary contempt power, I would submit, produces far more disrespect for the administration of justice than any act a disruptive client or a lawyer could do and I think the exercise of that power in the case at Bar shows the disrespect that can result. While I do --

QUESTION: Are you suggesting that the existence of this summary contempt power in some way explains or excuses the conduct of this lawyer in this case?

MR. SEDLER: Well, your Honor, I --

QUESTION: That this would have provoked him to act that way?

MR. SEDLER: I would take the position, going back one step before, in the first place, I would respectfully dispute there was any improper conduct on the part of the present Petitioner. The Court did not grant certiorari on the issues of whether the conduct constituted criminal contempt. But I would submit that the Petitioner here did nothing more than vigorously defend, to the best of his ability, his client charged with a capital offense.

But armed with the summary contempt power, the Respondent in this case could proceed as an activist seeking combat, knowing that at any time he got the worst of the exchange, he could always invoke the summary contempt power.

I think that comes out most clearly on Contempt Number 3, where the trial judge had said to the Petitioner and counsel for the other defendant, "You may have this blackboard in the courtroom and you may write on the blackboard the inconsistent statements that the case of the key prosecution witness showed," and counsel and counsel for the co-defendant did so.

At the end of this, the trial judge suddenly says, "Mr. Sheriff, remove the blackboard from the room." Petitioner files an objection. The trial judge overrules him with sarcastic comment -- right in front of the jury -- "The time to argue your case is at the close of the evidence." The Petitioner responded in kind, "I'll certainly keep that in mind, your Honor."

The trial judge, though, had the summary contempt power and he says, "Contempt, six months in prison."

Now, this, I submit, is just fundamentally unfair. It is also interesting to note that the case that I think sparked this concern about so-called "courtroom disruption," the so-called "Chicago 7" case, when it was tried before a judge appointed by your Honor, who was not, certainly, personally involved -- embroiled in controversy -- this judge found that every act of the lawyer defendants and every act of the non-lawyer defendants except coming into court with judicial robes, that he found contemptuous, was a

response, albeit an excessive one, to preemptory action on behalf of the judge.

I think the danger of the existence of the summary contempt power may be threefold. It encourages judges to act arbitrarily and tyrannically, knowing that they can always come down with the summary contempt power on a lawyer.

Secondly, it inhibits, it has a chilling effect on vigorous and effective advocacy because if the lawyer is found by the trial judge to have overstepped the line, the trial judge doesn't have to warn him or anything, the trial judge, as the trial judge did in this case, can just say "contempt."

This causes a lawyer to pull his punches.

Thirdly, I think that the exercise of the summary contempt power causes the public to lose confidence in the administration of justice. When the public sees a judge sitting up there as judge, jury and prosecutor and reading out sentences totalling four and a half years. This, I do think, brings across the notion, well, what kind of justice is there if the judge can do this? And so I think it is in the interest of the administration of justice that the summary contempt power with its inherent unfairness be given a well-deserved interment by this Court.

QUESTION: Mr. Sedler, you say that the summary contempt power makes a lawyer tend to pull his punches. I

I take it if the judge is going to retain any control of the proceeding, there has got to be something that makes counsel for each side pull his punches on occasion after the Court has indicated their particular line of questioning will be prohibit or something like that.

MR. SEDLER: Well, I think that the -- as the study, "Disorder in Court" indicates, the judge does this by maintaining control over the proceedings as the judge. If the lawyer --

QUESTION: But how does he maintain that control?

MR. SEDLER: By ruling on --

QUESTION: But what if counsel doesn't follow his rules?

MR. SEDLER: Then the judge can say, "Counsel, I've heard enough argument on this point. Let us proceed."

QUESTION: Well, and what if counsel continues to argue?

MR. SEDLER: At that point, the judge has the power, and should have the power -- we don't dispute that -- to cite the counsel for contempt. There is no challenge to criminal contempt.

QUESTION: But no punishment can be meted out during the course of those proceedings.

MR. SEDLER: [Overriding]: On the spot. On the spot and I would submit that, just as any other social --

anti-social conduct is considered deterred by the possibility of punishment at a later date, the same should be true of lawyer misconduct.

In other words, the judge will have cited the lawyer for contempt. The lawyer knows that as a result of that citation, he will face a criminal charge of contempt with possible imprisonment and possible Bar disciplinary proceedings.

QUESTION: Doesn't he know that when he is admitted to the Bar?

MR. SEDLER: Well, he's aware --

QUESTION: Isn't he?

MR. SEDLER: He doesn't have much choice. I mean, the summary contempt power exists.

QUESTION: I mean, when he takes his oath.

MR. SEDLER: When he takes his oath, he is aware --

QUESTION: He knows that if he gets out of line, he is going to be punished.

MR. SEDLER: And punished summarily.

QUESTION: No, I didn't say that. I said he knows he is going to be punished.

MR. SEDLER: Or can be punished.

QUESTION: So you say, by putting additional on, he is saying, "We'll try you later." So now he has got two warnings. How many more are you going to give him?

MR. SEDLER: I think that that would be enough. What frightens me, your Honor --

QUESTION: The two warnings would be enough. The first one isn't enough.

MR. SEDLER: Well, I think the problem is not so much a question of one. I may say with all due respect, I think we've focused on the wrong person. We've focused on the lawyer. I would respectfully suggest --

QUESTION: Do you want the lawyer to hold the judge in contempt?

MR. SEDLER: Well, there is an inherent --

QUESTION: Do you want to give him that job?

MR. SEDLER: I think that the problem is that judges can act arbitrarily without any realistic sanction whatsoever and I don't think we ought to allow them the summary contempt power which just simply encourages them to act arbitrary and the rare judges that will do so, one of the things that all the empirical evidence shows is that the summary contempt power is very rarely used by judges.

Most judges can maintain order and decorum in the courtroom without any resort to the summary contempt power at all. But the legitimate interest, the obviously compelling interest, if you will, in maintaining courtroom order, can adequately be maintained by citing the lawyer for contempt.

Now, in the extremely rare case where a lawyer is engaged on a course of persistent disruption, finding him guilty of contempt isn't going to do any good, either. By that time the trial will have turned into a shambles and the court should declare a mistrial.

It is very interesting in this case, is that while the Respondent castigates the conduct of the Petitioner and says in his brief that it surely must have prejudiced his client's right to a fair trial, the Respondent not only did not declare a mistrial, but when counsel for the co-defendant claimed that the Petitioner's conduct prejudiced their client's right to a fair trial, the trial judge rejected that contention and of course, that decision was affirmed by the Kentucky Court of Appeals.

QUESTION: Well, didn't your client move for a mistrial?

MR. SEDLER: He moved for a mistrial on numerous grounds.

QUESTION: On this ground.

MR. SEDLER: No, because my client, I would submit, and I think the record would reveal, was trying to vigorously defend his client in a highly emotionally charged situation. He was coming up against a very hostile trial judge who gave -- I think the record will reveal -- the prosecution a great deal of leeway. The prosecution's case

took four days. When the case for both defendants came up, it only took a matter of three days and the trial judge kept saying, "Let's move along. Let's get it over. You can't call this witness. He has nothing to add. Let's get it on. Let's move it over." Six of the eight contempts occurred during the defense part of the case. This is the time of the case where the attorney is most vulnerable, where the attorney has to do everything that he can to protect his client, to present his case to the jury, all the while battling with the trial judge, so to speak.

It is in this part of the case that the lawyer is most apt to step over that line, the line where permissable advocacy may constitute obstruction of justice.

QUESTION: Well, Mr. Sedler, I think the way many of us learned to practice law was that if the trial judge was unfair to you or you felt was hostile to you, you felt you had to abide his rulings, your remedy was by appeal, that you could get that reversed on appeal.

MR. SEDLER: Your Honor, when you take an appeal, you run into the problem of substantial error. The dynamics of the trial show that what may seem an egregious error at the time, when viewed by the appellate court in context with a presumption of validity of a conviction, will frequently be found to be harmless error and the dynamics of the trial require that the lawyer vigorously defend his client against

what he believes the hostile actions of the trial judge.

Now, again, we are not saying that the lawyer cannot be punished for criminal contempt. When the lawyer's conduct is contemptuous, he can and should be punished for criminal contempt.

All we say is that this should occur in accordance with the time-tested requirements of due process of law, that the trial judge should not be able to proceed summarily, that no matter how he tries, he cannot divorce himself from the fact that he is involved in the events leading up to the trial.

Moreover, in a criminal proceeding in which the accused faced originally four and a half years imprisonment and now is cut down to six months so as to defeat the claim of the jury trial, you have the trial judge performing the necessarily inconsistent functions of prosecutor, jury and judge. I think that is one of the crucial things that is wrong with the criminal conempt power.

Our system of criminal procedure is adversary and accusatory. The judge, jury and prosecutor each have a well-defined role to play in the process. We suddenly, for this shibboleth of preventing disruption, combine it into a single individual who is necessarily involved in the events leading up to the charge and I think that no matter how you put it, it is just fundamentally unfair and that in light of

contemporary standards of due process as recognized by this Court, the summary contempt power should be declared invalid.

Certainly, at a minimum in this case, the Court should hold that there is a right to a hearing. By hearing, I mean a separation, even if it's on the spot, a separation of the contempt proceedings from the other events involved in the trial.

The lawyer has to be defending the interests of his client. He can't put his own interest in front.

QUESTION: Suppose a lawyer is contemptuous to the Supreme Court of the state, what court would sit on that one?

MR. SEDLER: I fail to see, your Honor -- well, let's assume that the lawyer filed a false brief or pleadings or something of that sort --

QUESTION: No. No, he stood up in an open court and did all the things you and I know can possibly be done.

MR. SEDLER: Well, assume --

QUESTION: In absolute contempt of the court. You say some other court should do it. Now, what other court?

MR. SEDLER: Assuming --

QUESTION: What?

MR. SEDLER: -- in Kentucky, we have a procedure by which when all of the judges of the Court of Appeals are disqualified from hearing a case because of interest or

involvement, the Governor can appoint pro tem, special judges to hear that contempt.

QUESTION: And that would be the protection that the Supreme Court would get?

MR. SEDLER: Well, the terms of protection --

QUESTION: Well, suppose somebody is contemptuous in his court. Now, what court will operate then?

All I am talking about, why do you say that all summary contempts must be washed out with one stroke of the pen? Why all?

MR. SEDLER: Well, I guess that the best answer that I would give to your Honor is that the exercise of the summary contempt power is inconsistent with those time-tested principles of due process because it does combine the inherently inconsistent functions of prosecutor, jury and judge in the same person and it also is the person who is necessarily involved in the event.

QUESTION: You said that. Well, that is the only answer you have.

MR. SEDLER: And the other answer that I would give is that the Court has long held that judicial power must be exercised by the means -- not the least adequate but the least extreme means that are necessary to achieve the objective, but that would indicate, in answer to your Honor's question, that maybe there would be no choice but that the

Supreme Court or an appellate court, would have to exercise summary contempt power.

But that is not where the problem arises. That is not where the cases come up. The cases come up from trial courts and so I would say that the means -- the power must be the least adequate to deal with the problems presented, then this would justify holding that the summary contempt power is unconstitutional when exercised by the trial judge. Necessity justifies the power if at all, necessity should impose its limits.

QUESTION: I suppose, to that extent, your position, if accepted, would invalidate Rule 42(a), would it not?

MR. SEDLER: Yes, your Honor.

QUESTION: And also the underlying statute.

MR. SEDLER: Well, I don't believe that the underlying statute -- well, we are not challenging criminal contempt. In other words, we are not challenging the federal or state statutes that provide for criminal contempt. All we are saying is --

QUESTION: But I thought the federal statute dealt by definition, doesn't it, with what is a criminal contempt?

MR. SEDLER: Yes. We are not questioning what is a criminal contempt. All we are saying, your Honor, is that

criminal contempt should not be punished primarily.

QUESTION: So what you are saying is, you would invalidate only 42(a).

MR. SEDLER: 42(a).

QUESTION: And all contempt process would be under 42(b).

MR. SEDLER: Under 42(b) or, preferably, with a jury and this, I think, moves up into the second issue in this case and here, again --

QUESTION: Mr. Sedler, before you get there, just as a matter of curiosity, is your client, Mr. Taylor, a member of the Bar of Kentucky?

MR. SEDLER: Yes, your Honor.

QUESTION: This wasn't a pro haec vise case?

MR. SEDLER: Oh, no. Mr. Taylor has long been a member of the Kentucky Bar and defended some 100 capital cases, extremely well-known to the trial judges. This is not a --

QUESTION: If this conviction holds up, is he likely to be disbarred?

MR. SEDLER: He certainly will be subject to disciplinary action which could reach disbarment proportions. I think that this is one of the reasons which shows why criminal contempt is a serious offense whenever a lawyer is involved and -- but --

QUESTION: Excuse me, Mr. Sedler, if you follow a

rule 42, if that is what you say constitutionally would be required, 42(b) procedure, whether state or federal, what issues would be determined at the hearing?

MR. SEDLER: Whether the conduct constituted criminal contempt.

QUESTION: I see. The judge in whose presence the conduct was committed could not say, that is contempt and --

MR. SEDLER: [Overriding] In other words, he would cite and specify --

QUESTION: He wouldn't cite just for punishment. He would cite for a determination --

MR. SEDLER: For guilt as well. It is somewhat analagous to a grand jury indictment.

QUESTION: Right and you would have a -- you are coming now, you would say that the Constitution would also require a jury trial.

MR. SEDLER: Well, depending on the view that the Court takes. The point that I -- the submission that I would make is that contempt of court, as defined by recent decisions of this Court such as the Little case, necessarily constitutes a serious offense within the meaning of the trial by jury guarantee because it is the kind of offense, it is material, intentional obstruction to the administration of justice that is likely to be regarded as contrary to the

ethics of the community and, secondly, there are some subsidiary arguments. Many of the criminal contempt cases involve lawyers. Lawyers do suffer collateral consequences which should be taken into account. Moreover, the Court itself, is sitting in judgment on a contempt charge. If justice must serve the appearance of justice, there is something, again, seriously questionable about a court sitting in judgment on the charge of contempt of court.

But I think that those are subsidiary arguments. I think the major argument is that contempt is a serious offense because it is so regarded by the society as a whole and I think in this regard it is because criminal contempt has been defined by this Court not merely to include so-called "disrespect for the person of the trial judge," but as requiring an actual, intentional, material obstruction to the administration of justice.

At least the Court should hold that where there is the possibility of substantial imprisonment, let's say beyond the 10 days approved in the Dyke case, that contempt should be --

QUESTION: Don't you think that 10 days should be substantial imprisonment for a lawyer?

MR. SEDLER: Well, I would argue, your Honor, in light of Argersinger, that any imprisonment --

QUESTION: I would think so.

MR. SEDLER: -- makes the charge a serious one within the meaning of the Fifth Amendment's guarantee of right to trial by jury.

It seems to me, going on to that point, that the Sixth Amendment speaks in clear terms of all criminal prosecution and just as the Court has held that an attorney -- I'm sorry, an attorney is required in all criminal prosecutions, so, too, a jury trial should be required. The only difference is the historical genealogy of the right to trial by jury but when the Court has been dealing with the 7th Amendment right to trial by jury in civil cases, it has disregarded historical practice, even though, under the Kleinoff Doctrine, in actions the law is historically equitable, the court could award damages without a jury.

This Court has held that every time there is a claim for damages, there must be the right to trial by jury. It seems to me that the terms of the Sixth Amendment are just as clear and that, regardless of the historical practice, the clear thrust of the Sixth Amendment is to require the right to trial by jury in every case where any imprisonment is involved and, obviously --

QUESTION: We are, though, with the 14th Amendment, aren't we? Wasn't this a state trial?

MR. SEDLER: Yes, your Honor, but as I read Duncan, it holds that the same standards apply -- same jury

standards apply to the state courts.

QUESTION: Yes, but the Court has never held that the 14th Amendment incorporates or absorbs or whatever the figure of speech may be, the right to jury trial to be found in the Seventh Amendment.

MR. SEDLER: In civil actions, no, your Honor.

QUESTION: No.

MR. SEDLER: Your Honor, I have reserved rebuttal time.

QUESTION: Mr. Sedler, let me go back to a response you gave to Mr. Justice Rehnquist. If I followed you, what you said was that the right to appeal is not a genuine and meaningful remedy, if the court has overreached. You did not fill in beyond that. Am I to take it that your view is that since the right to appeal for the overreaching or arbitrariness of the judge is not a meaningful remedy, that then the lawyer is free to try to outshout the judge?

MR. SEDLER: No.

QUESTION: Well, then, what are the alternatives?

MR. SEDLER: Well, I think if I were to be put -- I was answering Mr. Justice Rehnquist's question in regard to Chilling Effect, into the fact that the lawyer who must try to protect the rights of his client may be chilled in his efforts to protest trial errors at the time that they occur and my point was that merely because he has a right to appeal

trial errors doesn't mean that he can ignore the trial errors at the time that they have occurred. His duty to his client requires him to try to correct the trial error before the judge because those errors cumulatively could have an impact on the trial even though, taken by themselves, they might not constitute substantial and reversible error.

QUESTION: Would you think it is not contempt if, after a judge -- the trial judge has ruled and announced his ruling, that the lawyer insists upon continuing argument of the ruling which has been closed?

MR. SEDLER: I think that the line is drawn where the trial judge says, "Counsel, I have heard enough argument on this point. Proceed."

See, one of the things that I think appears from the record in this case, your Honor, was at no time did the trial judge say during this trial, "Mr. Taylor, I want you to stop this behavior. I want you to stop this line of argument. You are heading towards the line where advocacy becomes contempt." It was sort of as if the judge was waiting and waiting and then either something hit him personally or he thought the line was crossed and pounced down, as he put it in his tirade from the bench, "I have you. Nine counts of contempt." And I think that during the course of the trial, yes, there comes a time when the trial judge must be able to say to the lawyer, "Argument is stopped

on this point. If you have any further thing you want to say to the Appellate Court, say it in the record, for I want to leave this matter and get on to something else," and I think at that point, if the lawyer proceeds, he could be cited for contempt and although this Court has not granted certiorari on the substance of contempt charges, I think a cursory examination of the charges almost on their face will reveal that they do not constitute criminal contempt under the standards promulgated by the Court.

Thank you, your Honor, I've reserved rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Sedler.

Mr. Triplett.

ORAL ARGUMENT OF HENRY A. TRIPLETT, ESQ.,

ON BEHALF OF THE RESPONDENT

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

With the Court's permission, I will deal first with the question raised in this petition as to whether or not the Petitioner Taylor was given a right to be heard during the proceedings that resulted in his conviction for criminal contempt.

It is our position, and we think the record completely sustains it, that all during the trial and at each time the Petitioner was cited for contempt by Judge Hayes, that he was, indeed, given a reasonable opportunity to be

heard and, in most instances, he took it. So it is our position here that this is really not a question of law but a question of fact as to whether or not this 15-volume transcript sustains the position that Taylor was, indeed, given the chance to be heard on the contempt and whether or not he was given the right to state the mitigating factors which, if elocution does exist, in a summary contempt proceedings, he would be entitled to give.

It is our contention that the record does, indeed, show that each instance that he gave a mitigating circumstance of which he was aware, these included a marriage, a funeral, working without pay, long hours and being tired.

So, first, it is our position that the record sustains a hearing.

QUESTION: I missed what you said a moment ago. Working without pay, long hours and being tired and what?

MR. TRIPLETT: A marriage, a funeral and that sort of thing, things that caused him to be tired and things that --

QUESTION: Who? Who was tired?

MR. TRIPLETT: Mr. Taylor. And keeping in mind Mr. Taylor was there, there were two or three other lawyers representing the co-defendant in the trial and of course the court would be the principals involved in this case. So we say the record is replete with that.

Second, we say that not only do we say that the record does sustain that he was heard, as we understand, the decisions of this Court, starting with Terry and all the discussions that have occurred since Terry about the validity of Terry, it nevertheless remains that in Terry, this was the case where David Terry knocked a marshal down after the marshal started to eject his wife from the court-room and in afirming or, rather, refusing to grant a writ of habeas corpus, this Court said that there was a right of instant apprehension and imprisonment with no elocution.

Coming forward to the case involving Judge Medina, the Sacher case, although this Court took that case solely on the question of the bias of Judge Medina and his qualification to hear the contempts involving the Attorney Sacher, the premise of the case was that there was no elocution as it is explicitly stated in the Federal Rules, that is, the right to speak at the time of the sentencing.

However, in Sacher, the same kind of elocution occurred as occurred here. Throughout the nine months trial, there was continual dialogue between Judge Medina and the lawyers involved and there couldn't be much doubt that every-body was pretty aware of what was transpiring and this Court did not set aside that conviction because of a right -- because of no hearing. And this seems to have been the procedure all through in the Sarafite case, the Ungar-Sarafite

case, again, there was a lot of dialogue in the trial between Judge Sarafite and Ungar, who was on the witness stand during the trial of Hulynjack? and I think the hearing took place two days after the trial.

Ungar appeared with a lawyer, the lawyer moved for a continuance. When the judge wouldn't give him a continuance he withdrew from the case and then Ungar, all he said, was "I'm not feeling well. I'd like a continuance," and that was the elocution in that case and this Court held that conviction sufficient.

Now, next, I would like to return very quickly to the right of a trial by jury in this case. The Petitioner stands convicted of criminal contempt. The highest court in the Commonwealth of Kentucky has said that his ultimate sentence to be served is six months.

We say, taking the literal language in the Bloom against Illinois case, where the petitioner got 24 months for offering a will alleged to be forged and which was reversed by this case and keeping in mind that the Bloom against Illinois case, the opinion was released on May 20th, 1968 the same date as Duncan against Louisiana.

It is said, under the rule in Chapman, when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as to

the best evidence of the seriousness of the offense.

QUESTION: Mr. Triplett, I am a little curious. I realize the Kentucky Court of Appeals has spoken in this case but apart from that, under Kentucky law, would the sentences initially imposed be consecutive or concurrent?

MR. TRIPLETT: As they were initially imposed by Judge Hayes, they were consecutive.

QUESTION: Consecutive.

MR. TRIPLETT: After they were imposed, Judge Hayes corrected his judgment with the Court of Appeals of Kentucky's permission and eliminated the requirement of consecutiveness and it was the ultimate judgment of the Court of Appeals that this meant six months.

Although we briefed the question of the right of the trial court and of the Court of Appeals to submit this correction, and of Judge Hayes to do it, this point is conceded by Petitioner on page 21 of his brief when he says, "In addition, the Respondent makes much of the fact that an appellate court has the power to modify sentences, this Petitioner does not dispute."

QUESTION: In that connection, do you have Appellate review of sentences in Kentucky?

MR. TRIPLETT: Yes, sir. The right to modify and eliminate and reduce contempt sentences in my mind is really not open to serious question.

QUESTION: When the Bar Association considers this case, will they consider it as one six months or --

MR. TRIPLETT: One six months, Mr. Justice Marshall.

QUESTION: How many counts?

MR. TRIPLETT: On eight counts.

QUESTION: Well, he'll be considered as guilty on all eight counts.

MR. TRIPLETT: Yes, sir. The Court of Appeals of Kentucky has affirmed it. This Court has refused to grant cert on that question and if the Bar Association does do it, they haven't yet, I don't know that they will, they would have the right to do it, but if they do do it, you are exactly correct that they would consider the eight findings of contempt as bearing on any disciplinary action that might ultimately be taken. I think I would have to state that to you fairly.

QUESTION: Well, what you are saying there, really, is no more than that they would act on the whole record.

MR. TRIPLETT: That is correct, sir. That is correct, Mr. Chief Justice. Now --

QUESTION: Mr. Triplett, is there any limitation in Kentucky law as to the sentence that can be given by a trial judge for criminal contempt?

MR. TRIPLETT: No, Mr. Justice Stewart, there was not. This was somewhat up in the air, although the trend was away from it, but the Court of Appeals case of Taylor against Hayes declared the limiting statute unconstitutional, as being abridgement on the Court's power to function.

So at this point in time, Mr. Justice, there is limitation. We used to have the 30-hour or $30 rule --

QUESTION: Right.

MR. TRIPLETT: -- that began to be eroded some years back and they turned it off completely in this case.

QUESTION: So now, so far, at least as theoretical power goes, a trial judge could send somebody to be locked up for the rest of his life for criminal contempt.

MR. TRIPLETT: Theoretically, that was true. It was true in Bloom against Illinois, yes, sir.

QUESTION: Mr. Triplett, let me go back a little bit to something you touched on in response to a question partly from Mr. Justice Stewart. At what stage and as to which of the particular episodes did Mr. Taylor respond saying that his conduct was accounted for by the fact that there had been a funeral or a wedding and a lot of other things? Were you drawing together a whole series of things?

MR. TRIPLETT: I was drawing a series of things, isolated portions of it. It was all wrapped up in his final argument to the jury when he said this, and this is --

QUESTION: Where are you now?

MR. TRIPLETT: On page 119 of the transcript, Mr. Chief Justice, where Petitioner says this, "I want to try to close. I want to apologize to the Court if I have been intemperate and state to the Court that it would have only been because of the desire to see justice done and the clear conviction and belief that my client is innocent. I want to tell you that life has moved on since this case began. There has been a wedding in my family, a funeral of a dear friend of mine --" and those things are interspersed throughout the trial, Mr. Chief Justice and we think that all of this, for example, Petitioner at one point during the trial, asked to be excused on a Saturday afternoon, and the transcript will support this, so he could go to this wedding. A relative was flying in, and we also contend that the transcript shows a great deal of consideration toward Petitioner's problems by the trial court.

Wrapping up this jury matter very quickly, in Frank versus the United States in '69, this Court affirmed the judgment where Mr. Frank got a three-year suspended sentence for a stock fraud case.

In the Cheff against Schnackenberg case of '66, this was where Mr. Cheff violated a cease and desist order and three judges of the Seventh Circuit tried him and gave him six months. This Court held that it was a petty offense.

So we think that what happened here is well within the decisions of this Court.

Now, Mr. Chief Justice and may it please the Court, I would like to turn to what I consider the third phase of this case as I understand the questions upon which this Court granted certiorari and that relates to the alleged bias ans hostility of Judge Hayes as to render him unqualified to pass judgment on these contempts.

We start with Mayberry. Nothing similar to Mayberry occurred here. There was no vilification by Taylor of Judge Hayes. There were no epithets hurled at Judge Hayes.

Second, we come to Offutt. There is nothing similar to what occurred in Offutt here.

QUESTION: What about-- aha, now I got you.

MR. TRIPLETT: I beg your pardon, Mr. Justice, I didn't hear you.

QUESTION: What about the judge saying, "Aha, now I got you"?

MR. TRIPLETT: We say that that occurred after the judgments of contempt had been -- wait a minute, sir, I don't recall anything in this trial or this transcript that says where Judge Hayes said to Taylor, "Now I've got you."

QUESTION: That may not be exact words, but it is close to it.

MR. TRIPLETT: I dispute that, Mr. Justice Marshall.

I dispute that Judge Hayes said that.

QUESTION: Well, I'll have to find it.

MR. TRIPLETT: All right, sir.

Now, let me be very clear and honest. At the time he imposed the sentences, there was language in there, he says, "I have got you on nine contempts."

QUESTION: Well, that is what I was talking about.

MR. TRIPLETT: Well, I read that in a different context, Mr. Justice Marshall, as saying, "Now, I've got you."

QUESTION: Well, "Now I've got you on nine counts."

MR. TRIPLETT: That is correct, sir.

QUESTION: I stand corrected. I stand corrected.

MR. TRIPLETT: I don't mean to be argumentative.

QUESTION: I stand corrected. All right, sir, nine counts instead of one.

MR. TRIPLETT: That is correct, sir. That is exactly what he said. Now, it is our position, Mr. Justice, and may it please the Court, that at the time of sentence, the trial had occurred on the matter of contempt and at some point, in imposing punishment, a judge must have the last say and the last word. The right to be heard, we say, had occurred. The reason for mitigation and defense had

occurred.

It is not uncommon for judges at the end of a trial -- and I am not speaking only of lawyers at this point, I am speaking of a defendant. Suppose a judge hears a particularly aggravated case that just shocks the conscience of any human being. It is not uncommon for state and federal judges, and I have heard them both do it, to just absolutely take the defendant apart when he imposes sentence.

Otherwise, there wouldn't be much reason for the disparity in some of the sentences that are imposed. With the sentencing power in the federal courts, certainly the aggravating circumstances of a particular crime or a set of circumstances will cause a federal district judge to impose a larger sentence or even to probate and we say that just because a judge comes down hard on a defendant at the time he imposes a sentence is not a predisposition of hostility, particularly when we claim that the bias or claim bias throughout this 15-volume record is just absolutely not present and that is absolutely what we feel about it.

Let me address myself, if I may, just for a moment -- excuse me, sir -- if I may, to this proposition that whenever a summary contempt occurs, that the trial judge must recuse himself and allow it to be heard by another judge.

Let's take a very practical question and Mr. Justice Marshall alluded to it in a question to Mr. Sedler

when he asked which court would hear this?

Let's take Father Groppi's case in Michigan, where the people were led through the legislature and let's assume that the Michigan General Assembly was in joint session, the Senate and the House. They cite Father Groppi for contempt.

Now, the fact that they saw this or they heard this, which legislative body is going to try that contempt?

Let's assume that if a trial judge is going to have to excuse himself in other cases, let's see now who is going to do that. Is it going to be his brother trial judge in the same district or the same circuit or the same state? Must it go outside the state? Is it going to occur as it occurred in Cauda-Speidi? case which I understand is going to be heard here next week? Cauda-Speidi got his second judge and what he said to the second judge is about as bad as what he said -- excuse me, sir.

QUESTION: In the Groppi case, that was Wisconsin, not Michigan.

MR. TRIPLETT: Yes, sir. Excuse me, I'm sorry, Mr. Chief Justice.

QUESTION: In the Groppi case, I think the opinion indicated rather clearly that had they seized him immediately and proceeded with contempt, there might have been a different result. It was because Groppi went away

and then without notice to him --

MR. TRIPLETT: He was in jail for disorderly conduct and two days later, without the present hearing, notice or papers, they imposed the punishment.

QUESTION: Right.

MR. TRIPLETT: That is exactly right, Mr. Chief Justice. But would the bias or the disqualification be any less because Father Groppi led the group past the Wisconsin Legislature, you see, than the contempt occurring before a trial judge?

We think not and we think that this displays some fallacy in the proposition that they must be heard by another judge or by some other form and perhaps that can be dealt with in this case.

We think that the most important fact, and the most important protection of a judge and of a lawyer involved in a criminal contempt case is that it appears on the transcript. There is a record that an appellate court can view and this is somewhat followed by -- stated by the Weiss-Burr case out in the Ninth Circuit, that when these things appear on the record, this prevents a judge without any court reporter, without any witnesses, must do it in public, prevents any abuse in that respect.

Bringing my argument to an end, here, we think that for a two-week period and including the ultimate part

here, Judge Hayes did a pretty good job in this trial. If he had imposed the punishments on Taylor at the time of contempts heard -- were heard -- he could claim a psychological disadvantage to hurt his client.

If he didn't cite him for contempt and did nothing, then there would be claim that he discreetly searched the record after all this occurred.

What he did was at the time they occurred, was to cite him, permit him to be heard in practically all instances and then at the end of the trial, he imposed the punishments that he thought proper and then he corrected them, as the Petitioner has conceded, he had a right to do.

We think that it is highly necessary for the integrity of the judiciary which protects the freedom of us all, that this judgment be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Triplett.

You have a few minutes left, Mr. Sedler.

REBUTTAL ARGUMENT OF ROBERT ALLEN SEDLER, ESQ.,
ON BEHALF OF PETITIONER

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

I think I ought to comment on two points. Mr. Triplett says that the Petitioner had the right to respond. The record, of course, to which Mr. Triplett

refers, shows that this simply was not so.

More importantly, what we are in agreement on is that there was no hearing insofar as the Petitioner had a chance to respond. It was only on counts 2 and 3. The response was strictly for the record and it occurred at a time when the Petitioner was required to argue substantive questions to protect the interests of his client. At least, the Court should hold that due process requires a hearing in the sense that the summary contempt that the summary contempt, if this Court is going to allow it go go on, be separated from the other events in the case, that the trial judge specify the charge, which never occurred here. He didn't specify the charges until three months later -- specify the charges, listen objectively to argument, the matters in defense for mitigation, and then make a ruling.

With respect to the matter of embroilment, what the Respondent says is, ignore my remarks at the time of sentencing. But there is no comment about everything else that occurred during and after the trial.

Of course, it is a burden to prove embroilment. Here, the Respondent was not very subtle. He says to the Petitioner before the jury, I am going to make an example of you. I am going to do something the Bar Association should have done years ago.

It is true that there were no epithets hurled at

the judge by the Petitioner, but it was just the reverse. When the Petitioner argued, "I may have four or five months of my life tied up in this case,"the judge said acidly, "Before it is over, you might have a lot more than that, provoking, all the time, you are putting on a show, I don't like your antics."

Then he said, "You have accused me of rigging the jury." All of this occurs very early and throughout the trial and then there is the axe of the judge where he says, "You can't practice in my court any more." He refused to hold a bail hearing. He refused to admit the Petitioner to bail.

Now, if this does not show embroilment, then what I think the Court must be saying is that there is no such concept of being embroiled in controversy, but it does raise the question of the -- what I call the inherent unfairness of the exercise of the summary contempt power.

This case does present both narrow and broad issues. The Petitioner has not only argued his own case and has not limited himself to the narrow issue that would result in a reversal of the Petitioner's conviction.

The Petitioner believes that the issues presented in this case go far beyond the present Petitioner and the present Respondent and have deep implications for the administration of justice itself.

Petitioner would ask this Court to reverse his conviction.

Thank you, Mr. Chief Justice.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 11:45 o'clock a.m., the case was submitted.]