In the

Supreme Court of the United States

DOMINICK CODSPOTI and HERBERT LANGNES,

Petitioners

v.

PENNSYLVANIA

Docket No. 73-5615

Pages 1 thru 48

Washington, D. C.
March 25, 1974

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v.	:	No. 73-5615
PENNSYLVANIA	:	

Washington, D.C.

Monday, March 25, 1974

The above-entitled matter came on for argument at 1:39 o'clock p.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:

JOHN J. DEAN, ESQ., Chief, Appellate Division, Office of the Public Defender of Allegheny County, Pennsylvania, Pittsburgh, Pennsylvania 15219 For Petitioners

ROBERT L. EBERHARDT, ESQ., Assistant District Attorney of Allegheny County, Pennsylvania, Pittsburgh, Pennsylvania 15219 For 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. 73-5615, Dominick Codispoti and Herbert Langnes v. Pennsylvania.

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

ORAL ARGUMENT OF JOHN J. DEAN, ESQ.,

ON BEHALF OF PETITIONERS

MR. DEAN: Thank you, sir.

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

Once again there is before this Court the relatively troublesome problem of the right of a defendant charged with direct criminal contempt of court to have a jury of his peers decide the issue of guilt or innocence.

Procedurally, this case is relatively confused. However, the issues are easily framed and quite clear.

Dominick Codispoti together with Herbert Langnes and Richard O. J. Mayberry, came on for trial in Pittsburgh, Pennsylvania back in November of 1966 on charges of prison breach and holding a hostage in a penal institution.

The trial lasted approximately six weeks and was marked by repeated altercations between the trial judge and between the defendants.

The defendants were found guilty and were given a 15 to 30-year sentence on one charge, a consecutive 5 to 10 sentence on another charge and immediately at the end of the

trial, the trial judge summoned them up and sentenced them anywhere from 11 to 22 years for contempt of court for the various statements that had been made in the presence of the Court.

They then appealed to the Pennsylvania Supreme Court and the Pennsylvania Supreme Court affirmed their conviction with several justices dissenting upon the theory of cruel and unusual punishment and, since this case had antedated the Baldwin decision, perhaps on a right to a jury trial.

QUESTION: Do you think that the Court was under Illinois against Allen, could have bound and gagged these defendants, as we said they could in Illinois against Allen and then appoint counsel for them, without regard to what they felt about counsel? Or appointing, alternatively, counsel as friends of the court to act for them?

MR. DEAN: Your Honor, "count advisers," as our court called them in '66, were appointed to help these people who were representing themselves as their own counsel.

Whether or not, factually, their disturbances were so tumultuous that they would require an Allen type of gagging, I am not really prepared to say because I wasn't there. I have the record there. The record is in somewhat of a contention as to exactly what was the genesis of this confrontation between the defendants and the judge.

QUESTION: Did you say it took six weeks to try this?

MR. DEAN: I think it took about six and a half weeks, sir, yes. The trial started in November of '66 and concluded on, I think, about December the 12th of 1966 and I think that there were a few days that the Court took off for procedural matters on another issue. But, essentially, it was a six weeks trial.

QUESTION: Not the contempt trial?

MR. DEAN: Not the contempt trial. This was -- as I said, the cases were procedurally confused. They were originally before the court on a prison breach and holding a hostage in a penal institution. During that trial in '66 --

QUESTION: They committed several contempts.

MR. DEAN: Contempts -- these are the contempts that are currently before this Court.

QUESTION: And we are involved in this case only with the contempt trial, aren't we?

MR. DEAN: That is right, only with the contempt trial. What then happened was that they appealed to the Supreme Court of Pennsylvania, which affirmed the conviction. They petitioned this Court for a Writ of Certiorari which was granted.

This Court heard the case and in January of 1971, in an opinion by Mr. Justice Douglas, remanded the case back

to Pennsylvania"for a public trial," were the words that were used.

The case lay dormant --

QUESTION: Now, was that only Mayberry? That earlier case?

MR. DEAN: Mayberry was the only petitioner really before the Court directly, although he, under the order, seemed to drag in Codispoti and Langnes with him. That makes the case confusing. Now that Mayberry is no longer here, it is just Langnes and Codispoti.

QUESTION: And what happened to Mayberry?

MR. DEAN: Mr. Mayberry chose not to go to this Court. I can't really offer you a rational explanation of that action, but we now --

QUESTION: Is he a party to the case?

MR. DEAN: No, he is not, your Honor.

QUESTION: He was to --

QUESTION: He was the sole party in the other case.

MR. DEAN: Yes, your Honor, in the first case that was had, he was the sole party.

QUESTION: Well, what about this contempt proceeding? Was he involved in this?

MR. DEAN: Yes, your Honor. What then happened was, when the case was remanded back in January of '71, Judge Fiok, who was the trial judge in '66 against whom the

original contempts were leveled, in -- on December 7th of 1971, almost a year later, issued a citation which was to be served by registered mail upon the three defendants, scheduling a hearing -- separate hearings for each of the defendants on anywhere from December 12th to December 17th.

Mr. Mayberry went to trial first in front of Judge Van der Voort, then Mr. Codispoti went to trial and then Mr. Langnes went to trial. They had separate individual individual trials or hearings, depending on how you are going to characterize it.

QUESTION: And Mayberry was again convicted, was he?

MR. DEAN: Mayberry was again adjudicated in contempt of court and sentenced.

QUESTION: And a sentence comparable to the one that first --

MR. DEAN: No, your Honor, what occurred in that case was, that by the expedient of giving a six months sentence and by making them consecutive, Mayberry was again convicted on all of the charges that he was originally cited for by Judge Fiok and given an 11 to 22-year sentence but Mr. Mayberry came up with something like a -- I think a four-year, two months sentence as his sentence.

QUESTION: And he didn't seek review of that?

MR. DEAN: He again appealed that sentence, as

did the other ones, to the Pennsylvania Supreme Court, which this time affirmed Per Curiam in the judgment of contempt.

However, the judges did dissent, based upon the United States versus Seale rationale. At that point, Codispoti and Langnes petitioned this Court for a Writ of Certiorari, which was granted, which is why we are now here in front of this particular Court.

QUESTION: But Mayberry will serve his four years and two months, whatever it is?

MR. DEAN: Evidently, your Honor.

QUESTION: And he didn't seek review.

MR. DEAN: I'm his court-appointed counsel. Mr. Mayberry has refused to talk to me during some of these proceedings, so I am somewhat hard-pressed to give you a viable rationale.

QUESTION: Well, in any event, he is not here.

MR. DEAN: He is not in front of the Court. At this time all we have are Codispoti and Langnes.

It is important, perhaps, to get into some of the facts of this particular case. Because of the arguments advanced, all of the trials of Mayberry, Codispoti and Langnes were exactly similar. In other words, I don't think there was a substantial difference between one or the other.

Mr. Langnes had -- or Mr. Codispoti, excuse me, had come in and requested that counsel of his own choice

be there to represent him. The Court said, "Well, where is your counsel," and the counsel was from Philadelphia and Judge Van der Voort said, "Well, he's not in the courtroom now. You have a public defender. Go proceed with him."

Mr. Codispoti had said that he didn't have any notice of this hearing, really, until he was brought into Pittsburgh, Pennsylvania the morning of the trial, that he had written the trial judge, Judge Fiok, twice after the remand saying "What are your going to do?" or words to that effect and had received no reply.

Mr. Codispoti then requested a jury trial and in exactly similar language that the Court had used for Langnes and Mayberry, said the Court, "I regard this issue, Mr. Codispoti, as an issue between the Court, not any particular judge, but between the Court and you and I think the record should speak for the Court and you can speak for yourself. I am going to refuse your motion for a jury trial."

Evidently these people had some idea because they had known what had gone on before. Mr. Codispoti then said, "Well, I would like some defense witnesses who were present during the original altercation between Judge Fiok and myself present to testify in my behalf."

At the second hearing he was denied under these words of the Court, "I am going to refuse your motion to subpoena witnesses for the reasons that I have told you. I

think that this is an issue between the Court and you and the record will speak for the Court and you and your counsel can speak for yourself." And this is what has happened in every single trial that came along so with those words, they were denied the right to a jury trial. They were denied the right to present defense witnesses and they were entitled to speak for themselves. The record would speak for the Court.

They weren't even permitted to call the trial judge, who simply resided maybe 50 or 65 feet in a courtroom immediately adjacent to the court from where the trial was being held.

That brings us to the issue here. They were found and adjudicated guilty on all of these contempts of court. On one of them, they received two months and on one of the contempt charges, they had received a sentence of six months.

Mr. Codispoti, for some reason that is not quite apparent to me, was sentenced to a year for one contempt and the Court, as set out in the Appendix, had simply said, "We sentence you to a year for citation number 5,"or whatever it was.

Approximately a month later, the Court revised this "rough draft sentencing" to make it down into six months. All of the sentences ran consecutively and therefore, they were imprisoned approximately from two to three years, give

or take a few months one way or the other and that brings us, somewhat in a circuitous route, but in order to appreciate the issues here, to the question of whether, when there is a single trial for multiple contempts that have occurred during a particular trial, does the person's right to a jury trial depend upon the aggregate sentence received, in this case, several years,or does it depend upon the individual sentences received, namely, a six-months sentence which is aggregated into a three-year sentence?

We would suggest to this Court that when there is one single trial, that the appropriate remedy is to look at the penalty imposed in the total because it makes little difference to the man who is sitting in jail to say, oh, you are only in jail for six months, but you are in jail for six months ten times," than to say that, "You are in jail for five years."

It makes absolutely no difference to him in regards to the length of his incarceration.

QUESTION: Mr. Dean, when the case was here before in Mr. Mayberry's behalf, we were talking about 20 to 22 years then, weren't we?

MR. DEAN: We were talking about 11 to 22 years, sir. He was given a one to two year sentence on each contempt.

QUESTION: And did the opinion devote itself at

all to jury trials on this issue?

MR. DEAN: No, your Honor, not directly. The concluding words of Mr. Justice Douglas were that it was to be remanded back for a public trial. There was some discussion in the lower court whether the words "public trial" were to be interpreted as to mean jury trial. The trial judge, Judge Van der Voort, decided that it did not mean a jury trial.

QUESTION: Do you think there is any significance in our failure to discuss it at all?

MR. DEAN: Your Honor, I think it would be presumptuous of me to try to impute a reason to this Court as to why they did a particular action in a particular case. I don't think it does -- to answer your question, however, I don't think it has any direct significance because I don't think the problem was centrally before this Court. I would like to think that the words "public trial" meant a trial by jury and that the Court did not believe that all of a sudden these people were not to have a jury trial on the contempt charges.

QUESTION: Incidentally, were there any further contempt citations during the contempt trial?

MR. DEAN: There was one, your Honor. They were somewhat obstreperous and one of the defendants was given a chance to recant and he cast, in polite language, aspersions upon the competency of Judge Fiok and the Judge asked him --

Judge Van der Voort asked him if he wanted to recant as to the mental ability of Judge Fiok. He did that by saying that he found somebody of perhaps less mental ability than Judge Fiok, which was the present trial judge.

I don't think that was really the recantation that he expected and he received another six months' sentence for that slight outburst.

QUESTION: Well, I was looking at the material on page 48 and so forth of the record, but there was no formal contempt to your man Codispoti?

MR. DEAN: Yes, your Honor, he was sentenced to six -- I believe it was Codispoti was sentenced to six months or to Langnes. I am really not certain which because the trials were so similar, outbursts occurred. To my knowledge, and I wasn't present at those trials, or most of those trials, only one of them was given an additional sentence.

You see, your Honor, in some senses, as Mr. Codispoti said, he had been up there and he had requested very politely these and then, it's on page 5 of our brief, after he had been denied his --

QUESTION: Where did he make the request politely? On what page?

MR. DEAN: You mean, within here, sir? The request politely?

QUESTION: Yes.

MR. DEAN: You mean for a jury trial and so forth?

QUESTION: Well, any request that he made politely.

MR. DEAN: All right, on page four of the brief, your Honor, are the -- I'm sorry, Appendix 43, excuse me, is where in the Appendix it would be, for Mr. Codispoti, he starts up here -- I would say, it would be reasonably polite as a trial lawyer. He had requested a jury trial and the Court said no, you can't have it. He had then, around pages 45, approximately the middle of the case, said that according to Baldwin versus New York and Bloom versus Illinois and Duncan that he would like a jury trial and that he had been given 14 years and he thinks that it was a relatively serious crime.

At that particular point, the Court said that it is just between you and the Court. He then asked for witnesses and I assume that that was a relatively polite request. It appeared nothing out of the ordinary to me, at least nothing that would certainly shock the conscience of the Court or disrupt its procedures.

What then did occur is -- well, we have the evaluation of the trial judge, at least, that he had been polite because on page 47, Mr. Codispoti states to the Court --

QUESTION: Going back to 43, where you said his conduct was polite, do you regard it as polite conduct when

he suggests to the Court that the judge and the prison authorities are engaged in a conspiracy to railroad him? At the bottom of 43?

MR. DEAN: Well, your Honor, perhaps -- all right, I won't say that is the most polite way. Polite, I meant, in response to your question, the failure to use obscene language.

QUESTION: Oh, I see.

MR. DEAN: The language got to be a little bit -- it would probably make a stevedore blush after awhile.

QUESTION: Yes, we observed that.

MR. DEAN: But in any event, he does state here on page 47 -- there is one thing -- Mr. Codispoti saying and this is after he has been denied these: "There is one thing I want to make clear. I came in this courtroom trying to be respectful. Right?" And the trial judge answers, "You have been," which is up to that point, Mr. Codispoti's behavior, though, perhaps, not within the standards of conduct one would expect from an attorney, had not been the obstreperousness that had attended these other litigations in court and he says, "Now you know that I have 90 years." And, really, another 10 to 20 years on top of a 90-year sentence, the words are to the effect, is not going to certainly sway him one way or the other.

I think it is important to understand --

QUESTION: What about the bottom of page 47? Let's skip it, read it and then skip it.

MR. DEAN: Yes, sir. That's what I meant by saying that he was relatively polite in the beginning. Unfortunately, that language did attend most of these proceedings. This gentleman, I think, has spent, I would say conservatively, 25 years in prison and perhaps -- in some sense this is strange. This entire group has started out rebelling against prison authorities. Mayberry was incarcerated age 12 for being a dependent, neglected child and has never escaped from the penal authorities since. He has been engaged in one continuing altercation after another.

In some senses, trying these people for a contempt of court case would almost be like beating a masochist with whips for punishment. I mean, you bring these people into a courtroom and, unfortunately, you are giving them an opportunity to go on and do things which they don't really have --

QUESTION: Well, are you suggesting that they should not have been brought into a courtroom?

MR. DEAN: Your Honor, if you want my personal opinion, I feel they are very sick individuals. I don't think that their conduct is in any way justifiable. I don't think it is really the conduct that one would expect of a rational human being. I think these people have an extreme problem. I don't think the legal system is really, within the system

of punishment and imprisonment, the way to effectively handle these individuals.

QUESTION: That is what I had in mind when I was reading pages 46, 47 and 48 in that area when I asked you whether the judge, if you'd care to say, would have been justified in binding and gagging them and then having a lawyer go ahead and conduct the proceedings on the basis of the prior record.

MR. DEAN: In the Judge Van der Voort proceedings is what you are talking about. I thought you were originally talking about the Judge Fiok proceedings.

QUESTION: No.

MR. DEAN: I am sorry, your Honor. Eventually, the defendants were excluded from the courtroom, in the course of these trials.

QUESTION: Did the judge have any other choice under Illinois against Allen?

Did the Court rely on Illinois against Allen, by the way?

MR. DEAN: Not to my direct knowledge, your Honor, no. I am somewhat hazy on the rationale that Judge Van der Voort did use to determine whether or not he could exclude the defendants but, effectively, he did exclude them. He had them placed in an anteroom with a loudspeaker so they could hear what was going on for the entire proceedings.

But if I might, the situation that we would like to say is that under situations such as this particular case, that where people do receive a cumulative sentence, that there are several strong policy reasons why this Court should demand a jury trial in an aggregated sentence.

Generally, the reasons for petty cases not being required to have a jury trial is maybe that they are too small to really worry about, that a couple of days we can't worry about judicial economy. We have to make sure the court schedule flows well.

But as I suggested to the Court earlier, that has a relatively hollow ring to a man incarcerated for three years.

There is also the problem that generally the power of the Court to punish direct criminal contempt that occurred in front of it can be grounded in a prophylactic rule, that at least it will begin to restore order to the courtroom in an obstreperous situation, because of the immediacy of punishment, it is to act as a deterrent of future conduct.

But in this particular case, or in any case, where the individual contempt problems are accumulated and then tried subsequent, or at the termination of the main judicial proceedings, that prophylactic rationale has no longer any viability.

Finally, the real problem in this is the problem of judicial abuse. I was sitting down talking with some lawyers and they stated to me that ours is probably the only profession in the world where a trial lawyer can be put in jail for being late for work because to come late before the court is well within the competency of the judge to put you in jail and there is probably no other single profession where that penalty is imposed for being late.

QUESTION: Except in the military.

MR. DEAN: Perhaps on the military. But oftentimes, you are not in the military voluntarily, or at least, you haven't been in the past. It was not a matter of choice, being in there.

QUESTION: Most of them are now.

MR. DEAN: That is probably true at this point, at least most of them are. However, once they are in, they can't necessarily get out at their discretion.

But the problem was that these people viewed, Codispoti, Mayberry and Langness, have viewed the prison authorities, as you stated, Mr. Chief Justice, of working together, of being in league against them, that what they want is some appearance of impartiality and as the Court can tell from the way that these proceedings went, Codispoti's frustration was obviously eminent in the language that we read from the Appendix 47, that his problem was that he

wanted a fair trial and exactly the same thing happened in everybody's trial. They asked for the jury. It was denied. They asked for witnesses. It was denied. They asked for counsel. It is denied. They are told to go to trial with appointed counsel right now and at least -- I'm not saying that a jury may have arrived at a different determination than the trial judge did. I don't think that is really a central issue here. It is not a question legitimately before this Court. But what the problem is, that at least if there was a jury interposed between the judiciary who happens to be not only the prosecutor, not only the person who presented the charges, not only the trier of facts but also the imposer of sentence, to at least get a third party in there in the fact-finding position, has a lot to recommend it.

And also, it is very difficult to insulate one judge who has worked with another judge, say, for 20 years, and say that he is going to be the completely impartial arbiter, dispenser of justice that our American legal system tends to look upon the judiciary.

QUESTION: Well, but didn't you argue in Mayberry that that was what should be done there, send it back for trial before another judge?

MR. DEAN: Yes, your Honor. I did not argue Mayberry originally before this Court but it is my understanding that was argued and that is what was done. It was

sent back for trial in front of another judge, which was done in this particular case.

What I am suggesting, however --

QUESTION: You want another judge and a jury?

MR. DEAN: Another judge and a jury is what we would like in this particular instance.

There is another question --

QUESTION: Did the Mayberry opinion say anything about this issue?

MR. DEAN: Now, which Mayberry opinion are you referring to?

QUESTION: Well, I am talking about the opinion in our Court, the Court opinion in our Court --

MR. DEAN: Say anything about --

QUESTION: -- remanded it for a trial before another judge, a judge other than the judge who tried the original criminal trial.

MR. DEAN: Yes, your Honor.

QUESTION: And a public trial. Did it say anything at all about --

MR. DEAN: A jury trial?

QUESTION: A jury trial.

MR. DEAN: No, your Honor.

QUESTION: One way or the other.

MR. DEAN: No, not to my knowledge. They did

not say that there was --

QUESTION: That's my recollection.

MR. DEAN: -- or was not to be a jury trial.

QUESTION: I take it, Mr. Dean, that if your view were to prevail, the other judge would be in a position, if he had multiple counts in the citation, almost inevitably of having to have a jury trial because his only alternative would be then and there to side with however many of the counts resulted in guilty convictions. No sentence would be more than six months and all sentences would be concurrent, wouldn't they?

MR. DEAN: I am sorry. I am not sure I understand the exact question or questions.

QUESTION: Well, I gather, basically you say, because by imposing consecutive sentences on a number of counts you get in excess of six months without a jury trial and, Constitutionally, that can't be done. Is that a fact?

MR. DEAN: Yes, that is right, your Honor.

QUESTION: And what I am suggesting is, when the other judge gets as he did here, a citation with multiple counts -- what were there, 11 here or something?

MR. DEAN: Yes, well, they varied among the individuals.

QUESTION: Well, whatever the number was. Isn't his choice whether to have a jury trial going to require him

then and there to decide that, no, I won't give a jury trial because what I'll do, if I find guilty on any count is to impose not more than a six months' sentence on any count and make all sentences concurrent.

MR. DEAN: Your Honor, he can do that. I don't think that is a rationale that we want to encourage.

QUESTION: But do you suggest he could not do that and deny a jury trial if he decided that he was going --

MR. DEAN: Obviously, he could do that, your Honor.

QUESTION: Well --

MR. DEAN: I mean, there is no two ways. The problem of the six months aggregation rule is that you have one maybe very serious contempt charge weighted with several minor charges and the court, instead of affording a jury trial on the serious contempt charge, can allocate the total sentence into six month pieces of pie and thereby effectively deprive a person of a jury trial.

I do not think the judiciary should be encouraged, the lower court judiciary should be encouraged to deprive people of jury trials through the manipulative use of consecutive or concurring sentence.

QUESTION: Well, what I am suggesting, Mr. Dean, is I would think, sitting as a trial judge, that I have to say to myself when I have got 10 or 11 counts in the citation,

I'd better have a jury trial since, obviously, if he is guilty on any substantial number of them, six months may not be enough -- or say to myself, well, I won't have a jury trial because I'll decide now that however many counts I find him guilty, I'll impose concurrent sentences, none in excess of six months.

MR. DEAN: I would think that would be an unacceptable approach to the problem.

Your Honor, if I can, I'd like to reserve my time --

QUESTION: I think the subject came up in the Mayberry case, but I've forgotten the answer. Does Pennsylvania have a statute on obstruction of justice by way of conduct of this kind?

MR. DEAN: Not at that particular time, no, your Honor. There is no applicable statute governing that on obstruction of justice.

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

Mr. Eberhardt.

ORAL ARGUMENT OF ROBERT L. EBERHARDT, ESQ.,

ON BEHALF OF RESPONDENT

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

First, I would like to thank the Court for the opportunity to argue this cause before the Court by special

leave.

I, too, would like to first go into some of the factual background, if I may. The original contempts in this case occurred in 1966 during a five or six weeks trial on prison breach charges in which the three defendants, Mayberry, Codispoti and Langnes committed -- Mr. Mayberry committed 11 contemptuous acts by citation of the trial judge, Mr. Codispoti, by citation, five or six contempts and Mr. Langnes a total of seven contempts.

As counsel for the Petitioner has stated, this was in 1966. There was an appeal to the Pennsylvania Supreme Court and affirmance, Mr. Mayberry's pro se petition to this Court and the final decision by this Court in January of 1971.

Now, we have set forth in our brief the relevant, we think, language from that decision as directions to the lower court and that language, if I may quote, the Court states that "Our conclusion is that the Defendant -- " to paraphrase --

QUESTION: What page are you on?

MR. EBERHARDT: On my brief it is on page 4 and 5 of the Commonwealth's brief. The Court, through Mr. Justice Douglas, states, "Our conclusion is that by reason of the due process clause of the 14th Amendment, a defendant in a criminal contempt proceeding must be given a public trial

before a judge other than the one reviled by the contemnor," citing In Re Oliver.

"In the present case, that requirement can be satisfied only if the judgment of contempt is vacated so that on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, sits in judgment on the conduct of the petitioner as shown by the record."

I quote that because it is very important to the actions that the judge -- the second judge took when this case was remanded to the Court of Common Pleas of Allegheny County.

QUESTION: Of course, that was written after this Court's decisions in Baldwin and Duncan and Bloom and --

MR.EBERHARDT: Yes.

QUESTION: And against the precedent of those decisions.

MR. EBERHARDT: Right and I would indicate to the Court that the reason I bring this out also is the fact that this case arose prior to many of the decisions that are argued in our brief and those decisions being the Baldwin decision and the Seale decision and other decisions that have come regarding contempts.

The trial judge at the trial for the prison breach charges was acting only on -- the only decision that

had come down from this Court had been the Cheff decision and the trial judge felt that he was acting fully within his powers in sentencing one to two years.

Now, that sentence was reversed by this Court, was vacated and the new sentence was imposed by another judge.

Now, Judge Van der Voort, who imposed the six months sentences, no sentence ultimately was longer than six months against either of these two petitioners, relied upon the prior decisions of this Court and I might add the Seale decision had not been decided at the time of the sentencing of the six months sentences.

Now, on remand, these sentences were imposed and as the Court has observed, the Petitioners again engaged in conduct which I would personally categorize as contemptuous and in the record, on page 76, probably the most violent act was recorded when Petitioner Langnes, after being told by the trial judge that he was holding him in contempt of court for his language, directed at the Court -- threw a microphone at the Court. Fortunately, it did not hit the trial judge but that indicates somewhat, I think, the type of defendant that is involved in this case.

But that is not relevant --

QUESTION: That is an assault. It is a criminal and a separate crime. Why didn't he try him for assault?

MR. EBERHARDT: I don't know the rationale of the trial judge in this case. He did not, at that moment, sentence him for that act of throwing a microphone. He was sentencing him for contempt for his language directed at the Court.

Continuing with the history of the case, the case then went up on appeal to the Pennsylvania Supreme Court and finally to this Court. Several reasons were alleged in the petition for cert, but this Court limited its grant of the petition to two questions, the first being whether or not the sentences that were given to these petitioners should be aggregated in order to determine the right to a jury trial.

The basis for this is that all of these offenses are somewhat linked as a single offense. The Commonwealth would point out some of the factual things in this record to show that there were several offenses involved here.

The trial, as I indicated, did occur over a period of five to six weeks. The contempts occurred on various times during that six weeks period and were not continuous, but they were occasional throughout this period. Co-Defendant Mayberry, of course, committed the 11 acts, but the petitioners here, one committed six acts, the other committed seven acts.

They occurred over a period of six weeks. It is the Commonwealth's position in this matter that they are

identifiable as separate defenses and are not part of one continuous act and we have indicated in our brief that we do not look upon the acts of these petitioners as Judge Cummings did in the Seale case, where the defendant in that case based most of his contemptuous conduct on the fact that he was deprived of his right to counsel during the trial, the particular counsel that he wanted, and that all of the actions of the defendant in the Seale case were premised upon that fact.

Here, the petitioners engaged in several different acts of contempt directed toward the Court and based on various things that they found to be objectionable during the trial.

I would point also to this Court's prior opinion in the Mayberry case for a solution to the question of impartiality. The trial judge in the original prison breach trial against whom the contempts were directed was found by this Court to be not capable of being impartial because of the acts the Defendant committed and aimed at the trial judge.

We have a proceeding on remand before another trial judge. That trial judge cannot be said to have been affected by the acts of the petitioners and although the transcript of the Mayberry proceedings are not before this Court, in the hearing on the Mayberry contempts, Mr. Mayberry, being very knowledgeable of the opinion written by this

Court in his case, informed the Court after he had committed another contemptuous act before Judge Van der Voort that he motioned the judge, Judge Van der Voort, to now disqualify himself from sitting in judgment of Mr. Mayberry because he was now -- had been the object of the scorn of Mr. Mayberry and therefore he now must disqualify himself from hearing it.

QUESTION: This could go on for quite awhile, couldn't it?

MR. EBERHARDT: We could have a continuous operation with knowledgeable defendants knowing by their own acts directed at the Court they could prejudice the Court in the eyes of an appellate court and require another hearing. We could have hearings continuing and continuing on forever, I would submit.

QUESTION: Did the Mayberry opinion undertake to carve out any time zones on the contempt?

MR. EBERHARDT: You mean factually?

QUESTION: Yes.

MR. EBERHARDT: No, I only can point to the record to show you that citations presented by the trial judge indicate the different days and times throughout the trial that these occurred.

I attempted to completely read the original prison breach transcript that goes over a period of 3,000-some pages and my belief is that this is a series -- not a series

of offenses, but a group of individual offenses as based upon the length of trial, the periods during which the trial continued on without interruption and all of a sudden there would be an action by one of the defendants.

I would like to address myself to the Seale decision for a minute. The petitioners base their argument on the first issue presented to this Court on the rationale of the Court in Seale. I would like to point out several basic fallacies with that rationale, the first being that the Court in Seale seems to assume that the trial judge is going to abuse contempt power.

It seems to me that that opinion is based upon the fact that the trial judge, if given the power to summarily sentence a defendant for contemptuous acts, direct criminal contemptuous acts, that that trial judge will abuse that discretion. I take exception with that and would argue that the traditional appellate review of abuse of discretion is available to a defendant and that the courts can find those abuses and correct them.

I think it is a very bad basis for the decision in Seale that a trial judge is assumed to be subject to abusing his discretion.

As far as the second issue is concerned, the Commonwealth first of all would take some exception to the phrasing of the issue. The issue is phrased in terms of a

substantial term of imprisonment.

The Pennsylvania contempt statutes do not provide for a maximum sentence. Theoretically, I suppose, it could be argued that the defendant could subject himself by a direct criminal contemptuous act to an unknown sentence, the maximum for which is not provided by statute.

QUESTION: Well, I take it, there is no issue here -- let's assume that there had been one sentence for contempt -- only one count of contempt and a sentence of two years for it. Would he have been entitled to a jury trial?

MR. EBERHARDT: Yes, I think so.

QUESTION: Because the second trial took place after Bloom?

MR. EBERHARDT: Well, the first trial -- the first trial occurred --

QUESTION: In '66.

MR. EBERHARDT: We have submitted for the Court's consideration and argument in our brief, based upon your rationale in the case of Jenkins v. Delaware, the rationale there was that the Miranda decision should not be applied to retrials.

QUESTION: Well, it's a different -- a jury trial is a question about the procedures at trial, not about the procedures before trial.

MR. EBERHARDT: That is true. That is true and

of course, the Constitutional question of the right to jury trial is an important question. However, we would submit that the Commonwealth in this case proceeded under the case laws then existing.

QUESTION: In '66.

MR. EBERHARDT: In '66 but the trial judge in sentencing at the end of trial, I don't know what all went through his mind at that time. He could have cited him for contempt during trial and apparently under the Seale decision,that would have been all right to sentence him to six months and another contempt, another six months, another contempt, another six months and be consecutive and that would be fine.

But by waiting to the end of trial, the Seale decision and the argument of the petitioners, they would seem to indicate that they had to accumulate.

QUESTION: Well, were the defendants tried twice for contempt?

MR. EBERHARDT: I --

QUESTION: Was their first sentence set aside? Was the first trial?

MR. EBERHARDT: The opinion of this Court and the order of this Court was vacated and remanded.

QUESTION: And it went back to thetrial court?

MR. EBERHARDT: It went back to another judge,

the presiding judge.

QUESTION: And so that was a new proceeding to -- the judgment had been vacated?

MR. EBERHARDT: I say that the sentence was vacated because this Court --

QUESTION: The judgment was vacated.

MR. EBERHARDT: The sentence in Pennsylvania and I suppose in most other jurisdictions, the appeal in a criminal case is from the judgment of sentence, not from --

QUESTION: Well, I would suppose that the judgment was vacted.

MR. EBERHARDT: Right.

QUESTION: The judgment of his conviction was vacated.

MR. EBERHARDT: The sentence that was imposed is the appealable -- once the sentence is imposed, the appeal time starts to run.

QUESTION: No, but the new judge had to find whether, again, he had to make the determination again whether he had been held -- whether he had committed contempt.

MR. EBERHARDT: Right and he did so on the basis of the record.

QUESTION: So that was a new trial court proceedings?

MR. EBERHARDT: Well, he did make a new finding

of guilt of contempt.

QUESTION: And at that point, the Bloom against Illinois had been decided? Prior to that?

MR. EBERHARDT: At that point, Bloom had been decided.

QUESTION: And the question was then, in carrying out this proceeding, must I proceed consistently with Bloom?

MR. EBERHARDT: Correct.

QUESTION: And your contention is, he needn't have a jury trial because no particular contempt drew more than a six months sentence.

MR. EBERHARDT: That is our basic position.

QUESTION: Yes.

QUESTION: Well, may I ask also, Mr. Eberhardt, your Supreme Court on the first appeal in the Mayberry case before the case came here, relying on our DeStefano that Bloom was prospective only sustained the consecutive sentences initially imposed on Mayberry. Now, when, after the second trial, it went back to the Supreme Court of Pennsylvania, I noticed that there is a one-sentence per curiam. The judgments of contempt are affirmed.

Now, did you argue before the State Supreme Court that the same rationale that Bloom was not retroactive required affirmance of those convictions?

MR. EBERHARDT: We did argue that among other

things.

QUESTION: And we have no way of knowing, I see, that Judge Manderino was the only dissenter, whereas in the first trial, at least Mr. Justice Roberts and I think Mr. Justice O'Brien --

MR. EBERHARDT: Right.

QUESTION: Took the view that they concurred only because Bloom was not retroactive.

MR. EBERHARDT: Correct.

QUESTION: But how are we to read the judgments of contempt that are affirmed in the second go-around?

MR. EBERHARDT: I wish I had an opinion to present to the Court. It would have helped me considerably and have helped the Court.

QUESTION: But you did, in any event, argue, that for the same reasons --

MR. EBERHARDT: Yes, we did and I have a copy of the brief that we submitted before the Pennsylvania Court.

QUESTION: And you repeat that argument here, as I read page 15 of your brief, don't you?

MR. EBERHARDT: Yes, we do. And I would submit that the Pennsylvania statute, although it is open-ended, I believe that the decisions of this Court that look to the actual sentence imposed and I think that the Court should continue to do so and I would finally suggest to the Court

that when the trial judge does decide to proceed non-jury, without a jury, on a contempt or several contempts, where he waits till the end of trial, I believe that he is indicating to the defendant and and his counsel constructively that he is not going to consider these from reading of the citations. He is not going to consider these contempts as serious, but as petty and under six months sentence or six months sentence or less is all that he will consider to be imposed and that the second issue that is presented by the petitioners, that there is a strong possibility or substantial possibility of a long term of imprisonment, I don't believe it is so except that the fact that a defendant by himself creates a number of contemptuous acts, separate contemptuous acts and the mere fact that they are tried together by the Court may subject him to a substantial term of imprisonment, that being over six months.

But the fact that they are tried together I don't believe has any bearing upon the fact that they are individual offenses and not one continuous act.

QUESTION: Do you think there is anything in Mayberry or the cases prior to Mayberry that are discussed here that would prevent a citation for each individual episode of contempt to be tried separately, whether it was embraced within a day or one episode? And then in the case of 11 contempts, on 11 separate days, to try him serriatim,

one after another, for each contempt without a jury on summary proceedings and give him six months on each one and if the judges, the new judges that wanted to make them consecutive, do go ahead and do so?

Do you see anything in Mayberry that would preclude that? Or in the other cases?

MR. EBERHARDT: No, I don't. Mayberry itself speaks to the impartiality of the judge and the decision in Mayberry, I think, assists the trial courts in determining whether or not the trial judge who is -- to whom the contemptuous acts are directed and personally directed, must disqualify himself.

QUESTION: Do you think you would have to get a new judge, then, for each case under Mayberry?

MR. EBERHARDT: Well, under Mayberry I believe that that is -- the direct decision in Mayberry was --

QUESTION: At least it implies that that might be necessary.

MR. EBERHARDT: It might be but I think it talks more in terms of waiting till the end of trial. That is another point that we dispute, the Seale rationale making a difference between the end of trial and during trial, petitioner makes an argument regarding the abuse that can occur at the end of trial stronger than the abuse that can occur by citing and sentencing during trial.

QUESTION: Isn't there an important reason why the contempt proceeding is deferred until the end of the trial, whether it is directed against the defendant or against his lawyer?

MR. EBERHARDT: Well, in the case of an attorney, it is very important not to prejudice the defendant in the eyes of the jury by citing an attorney representing a defendant for contemptuous acts during that trial.

In this case, the defendants were acting as their own counsel and the trial judge may have felt that he would be prejudicing the defendants in the minds of the jurors by citing and sentencing them during trial and that he deferred that until the end of trial so as not to prejudice their defense or to enhance the Commonwealth case before the jury.

I think the distinction between during trial and end of trial, citing the sentencing, there are reasons for doing it during trial and there are reasons for doing it at the end of trial and I think each individual case demands review and I think appellate review is available and abuses of discretion --

QUESTION: Mr. Eberhardt, did I hear that at one point they put him out of the room, put him out of the courtroom?

MR. EBERHARDT: During the prison breach trial

in which he committed the contempts? Yes.

QUESTION: Well, isn't that one way of solving the problem rather than giving him 100 years?

MR. EBERHARDT: I believe that is. The trial judge, of course, at this time was acting without the benefit of the Court's opinion in Allen.

QUESTION: So did the judge in Allen.

MR. EBERHARDT: True. True.

QUESTION: But suppose the man curses the judge three times? Is that three contempts?

You know, you keep saying you are going to add on these contempts. I just wanted to know, you are in contempt of court. Once you get in contempt of court, you are in contempt of court.

MR. EBERHARDT: This is true, but I think that appellate courts have to look at the record and determine -- the same court that decided the Seale case decided In Re Chase and indicated in that opinion that even when a trial judge cites and sentences during trial, the appellate court may have to look to determine whether or not the trial judge has --

QUESTION: You say that in one trial, it is possible for a man to get 20 six-months sentences, 10 years?

MR. EBERHARDT: If he commits individual acts of contempt that are not a series of events of one type but are so continuous and contiguous in time and place and things like

that, that they can be identified as one continuing act.

QUESTION: And he could end up with 10 years, 20 years?

MR. EBERHARDT: I think the defendant himself --

QUESTION: You are on treason before we get through, without a jury. This is a man going to serve 20 years without a jury.

MR. EBERHARDT: Well, I think the Court's interposition of a right to a jury trial is very important to the defendants. Where to draw the line, I am not sure, but I think in making a general --

QUESTION: Well, would you mind drawing it at 20 years?

MR. EBERHARDT: If I was the defendant, I might want to draw it in a little less than that. I think --

QUESTION: Mr. Eberhardt, does it depend in part on the facts, do you think? Suppose this trial went along for two days and then for good reasons, was recessed for three and the contemptuous cursing of the court, if you will, took place at the first segment and then, again, at the second. Does it disturb your sense of justice that that might be two separate contempts?

MR. EBERHARDT: Somewhat,. But I would indicate that making a very strong per se rule for the trial judge to handle contemptuous acts would be very detrimental.I think

that the trial judge has to have some discretion that should impart to a judge a use of discretion. The Chase opinion that I referred to from the circuit court indicated that appellate courts must and can look to whether or not the trial judge has, by his own actions, developed a series of what he identifies as contemptuous acts.

QUESTION: Does Pennsylvania have judge sentencing or jury sentencing in substantive criminal offenses?

MR. EBERHARDT: It is judge sentencing.

I may indicated to the Court, just for the information of the Court that Pennsylvania does have an indirect criminal contempt statute which provides for a jury trial and it does have a maximum sentence of 15 days and/or a $100 fine. In the indirect situation, of course, you have an act being committed outside the presence of the Court and determination by the legislature of Pennsylvania, apparently, and that is a very old statute, was that a jury would be best to determine whether or not the court's order had been violated.

QUESTION: Don't you think the Allen case is going to help in the future? In cases like this.

MR. EBERHARDT: I think the Allen case probably is the best solution for contempt, like this.

QUESTION: To get them out of there.

MR. EBERHARDT: The trial judge did, on remand of this case, when Codispoti indicated that he was no longer going to abide by the decorum of the court, he was taken into an antechamber of the courtroom and a microphone and loudspeaker provided for him.

QUESTION: Because a primary importance is to protect the dignity and decorum of the courtroom, not any individual involved. That is our primary responsibility.

MR. EBERHARDT: Primary and a secondary responsibility is to prevent further acts of contempt.

QUESTION: What is the longest sentence that can be imposed for a misdemeanor assault type of case in Pennsylvania, without a jury trial?

MR. EBERHARDT: Without a jury trial?

QUESTION: Yes. Up to six months?

MR. EBERHARDT: Up to six months, I believe, in Pennsylvania.

QUESTION: Suppose the same gentleman, being put out with the whole system of justice, should meet the judge on 10 successive days and hit him over the head with a baseball bat on each of those 10 successive days. Would it offend your sense of justice if he were charged with 10 separate assaults?

MR. EBERHARDT: No, it wouldn't. No, not one bit.

QUESTION: And these verbal assaults to the

dignity of the court extended over a period of six weeks, or six and a half weeks, did you say?

MR. EBERHARDT: Five and a half to six weeks.

I believe that the Commonwealth would argue against any adoption of a so-called single transaction test in the contempt area and I would further point out one additional case that Commonwealth has found in its research, two additional cases that are not cited in this brief, one being Ahren v. State, 284 Southern 2nd, 673 in which the --

QUESTION: 673?

MR. EBERHARDT: 673.

QUESTION: Which state?

MR. EBERHARDT: This is Florida and the Florida court looked to its procedural rules on criminal contempt and ruled against cumulation of fines, $500 fines to determine the right to jury trial and another case that Commonwealth would point out is In Re Puerto Rico Newspaper Guild, local 225, which is found at 476 Fed 2nd 856. It's a First Circuit case. That case --

QUESTION: What was that, Puerto Rican crime?

MR. EBERHARDT: No, it was a labor dispute.

QUESTION: Oh, labor.

MR. EBERHARDT: And a violation of a court order, an indirect contempt case, but it does indicate non-accumulation. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Dean, do you have anything further?

REBUTTAL ARGUMENT OF JOHN J. DEAN, ESQ.

MR. DEAN: Yes, your Honor. I think that what this shows is the somewhat chimerical characterization that can attend a contempt analysis here because one thing that I think has emerged in regard to both the presentations here today is that when this case originally came up to the court, the Chief Justice of the Pennsylvania Supreme Court had termed his conduct outrageous.

Mr. Justice Douglas of this Court termed the conduct of the defendant, "A shock to those raised in the Western tradition of justice."

He had received an 11-to-22-year sentence and all of a sudden when he comes back for a trial, what has become, at least according to the characterizations of the original trial judge, the Chief Justice of the Pennsylvania Supreme Court and a justice of this Court as outrageous, has been transformed into a petty contempt.

I feel that that type of labeling, putting on these crimes, is what brings to the fore the problem of looking solely to the actual sentence received on each crime, rather than the aggregate sentence because by looking at the aggregate sentence, the effectiveness, the total problem that gets up here is well before the Court.

QUESTION: Mr. Dean, what do you think of this one-line affirmance of the Supreme Court after, as I understand your colleague, it had been urged that the nonretroactivity of Bloom required or permitted, in any event, affirmance of the consecutive sentences?

MR. DEAN: I argued the case, your Honor, in front of the Court. That issue was raised. I cited the Court previous opinions of two of the justices who were currently on the Court in both instances and I can give you no possible explanation.

QUESTION: If that were the basis of the affirmance, have you any comment?

MR. DEAN: That Bloom was not retroactive?

QUESTION: Yes.

MR. DEAN: I just don't think that is a correct legal reasoning.

QUESTION: Why?

MR. DEAN: I think it has to be retroactive because it goes to such a fundamental right.

QUESTION: But DeStefano held it was not retroactive.

MR. DEAN: Well, let me say this. I used the wrong choice of words there. I don't think retroactivity is a real problem, first of all, because the trial is occurring subsequent to that. I don't think retroactivity

really gets into this issue but even assuming retroactivity did get into the issue, the tests that this Court has used to see whether a Constitutional right shall be applied retroactively are usually, would it result in changes in the police procedures? Would it result in considerable disruption? Would it result in releasing other criminals or things like this. And I don't think any of the tests under the Linkletter approach have any negative value to stop this from being applied, if you want to use that characterization, retroactively. I think it easily could be applied retroactively.

It is my understanding of Pennsylvania law that we require jury trial for all crimes. We just have a new felony code. Before we had felonies and misdemeanors. We now have them graded felonies and graded misdemeanors. Any misdemeanor requires a jury trial in our court.

QUESTION: Do you still have an open-ended -- is it still open-ended on contempt?

MR. DEAN: There is absolutely no maximum sentence on contempt of court.

QUESTION: And even if you prevail here, I take it, the judge would still impose the sentence for the contempt that the jury found to have been committed?

MR. DEAN: Yes, the judge is the one who has absolute discretion over the sentencing and absent of very

clear use of discretion, our appellate courts will not review a sentencing judge's determination.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:40 o'clock p.m., the case was submitted.]