In the

Supreme Court of the United States

United States Of America

Petitioner,

v.

No. 73-1162

Thomas Joseph Wilson and
Bobby Antonio Bryan,

Respondents.

Washington, D. C.
December 17, 1974

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UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 73-1162
THOMAS JOSEPH WILSON and BOBBY ANTONIO BRYAN, Respondents.	:	

Washington, D. C.

Tuesday, December 17, 1974

The above-entitled matter came on for argument at 1:09 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:

GERALD P. NORTON, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner

SHEILA M. GINSBERG, ESQ., The Legal Aid Society, Federal Defender Services Unit, 509 United States Court House, Foley, Square, New York, N.Y. 10007 for the Respondent Joseph Wilson

JOHN S. MARTIN, JR., ESQ., Martin, Obermaier & Morvillo, 1290 Avenue of the Americas, New York, New York 10019, for the Respondent Bobby Antonio Bryan.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-1162, United States against Thomas Joseph Wilson and Bobby Antonio Bryan.

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

ORAL ARGUMENT OF GERALD P. NORTON

ON BEHALF OF THE PETITIONER

MR. NORTON: Mr. Chief Justice, and may it please the Court: This case is here on writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of that court reversing the convictions of respondents Wilson and Bryan for criminal contempt of court in the United States District Court for the Southern District of New York. Each was provisionally sentenced to serve six months in prison.

The question presented is whether a trial witness who refuses to obey a court order to testify may be held in criminal contempt pursuant to the summary procedures of Rule 42(a) of the Federal Rules of Criminal Procedure, rather than the notice and hearing requirements of Rule 42(b).

Our primary submission is that the district courts have the authority and the discretion to use summary contempt proceedings in those circumstances. We also contend that in any event in the particular facts of this case, summary contempt procedures were properly used.

Respondents Wilson and Bryan both refused to obey the orders of the district court that they testify at the trial of one Robert Anderson on charges involving two bank robberies. One of them the Nanuet Bank and the other the Empire Bank.

Prior to the trial Bryan had been indicted for robbery and assault with a dangerous weapon concerning the Nanuet robbery. Wilson had been similarly indicted concerning the Empire robbery. Bryan had pled guilty to the assault charge and Wilson to the robbery charges against him, and in both cases the other charges were dismissed.

Shortly before the Anderson trial was to begin, Bryan had been sentenced by Judge Cooper, 18 U.S. Code 4208(b), which provides for a study of the defendants and a resentencing after a period of three months, but which requires initially the maximum sentence be imposed, in this case 25 years.

Before the trial began, Judge Lasker, who was assigned the Anderson case, had been told that it would probably take about two and a half days. In the course of the trial, eventually Bryan was called as a Government witness to testify concerning the Nanuet robbery, and Wilson was called to testify concerning the Empire robbery. At this time both were incarcerated, Bryan on his sentence on the assault conviction, Wilson awaiting sentence on his robbery conviction.

Now, there is a common pattern of events concerning

both contempts. First, all proceedings occurred in open court with the jury absent. Each one was asked questions by the prosecutor concerning Anderson and the respective robberies, beginning with did they know Anderson. They refused to answer any questions.

The district court granted them immunity pursuant to 18 U.S. Code 6003 and explained the consequences of that grant of immunity. He said that he would hold them in contempt if they refused to answer.

Each again refused. The district judge directed them to answer and said he would hold them in contempt if they refused. They again refused, and he held them in contempt.

The court had already received arguments from the attorneys for Wilson and Bryan as to their grounds for refusing to testify. At this time the court heard additional arguments concerning the sentencing of both Wilson and Bryan, what alternatives the court could consider and what their motivations and reasoning might have been.

Wilson's attorney specifically acknowledged that his motivation was to save a friend.

The court then gave Wilson and Bryan each the opportunity to be heard and each declined to speak. Judge Lasker then sentenced each of them to six months at this time, as he put it, but he made it clear that this was a provisional sentence subject to revision and that he would consider an

application for reduction. He made it consecutive to the sentences they were or would be serving for their other convictions in order to give the sentence reality and said otherwise there would be no point to it. And he specifically noted in sentencing Bryan, who was the first of the two to be sentenced, that a purpose of the sentence was to persuade Bryan to change his mind and to testify. And he said he would reduce the sentence to nothing if he did.

Later the same day both sides rested the case against Anderson.

There are certain facts before I go into the consequences of their refusals that are peculiar to each of the respondents, and I will note them briefly, although we don't believe they are material to the central question presented.

Though notice of the Government's intention to call Bryan as a witness, Bryan's original attorney had been unable to attend the Anderson trial. He did submit a document setting forth some arguments as to why he thought Bryan should not be required to testify. At the court's request,Wilson's attorney, who was in court prepared to address a similar problem concerning Wilson, agreed to represent Bryan.

In the course of the proceedings against Bryan it had been argued that one reason they declined to testify was a fear that it might affect their sentencing, in Bryan's case his eventual resentencing by Judge Cooper. Now, this is a baseless

fear in this case because in pleading guilty and in discussing the case with the probation officer in connection with the presentence investigation, they had already been required to make and did make admissions concerning their involvement, although in the course of that Wilson declined to identify his accomplice.

In any event, in order to avoid any basis for such a claim of possible effect on sentencing, in Wilson's case Judge Lasker decided he would try to sentence him then before he testified. The court heard the probation officer report on what he would have included in his presentence investigation report, which included an admission of Wilson's involvement in the robbery,and also heard a presentation by Wilson's attorney as to Wilson's background, his family problems, and the substance of the report by a doctor in which the doctor referred to Wilson as having an adolescent loyalty to defendant Anderson.

Now, in making this effort to sentence Wilson the judge stressed that he thought that a delay in Anderson's trial and others scheduled to follow it was undesirable and he noted particularly the fact that Anderson was in jail.

Finally, however, Judge Lasker concluded that he would rather defer the sentencing of Wilson who was, after all, facing the potential sentence of 20 years on a very serious charge, and at a later time he sentenced him to treatment under the Youth Corrections Act.

Neither Wilson nor Bryan took advantage of the opportunity to reconsider their refusal and to testify, although it was admittedly a limited opportunity of several hours that day before the Government rested its case.

As a direct result of their disobedience of the court orders that they testify, the administration of justice was seriously obstructed in this case. Acknowledging that the Government's case against Anderson concerning the Nanuet robbery had been substantially weakened by Bryan's refusal to testify, Judge Lasker granted Anderson's motion for judgment of acquittal at the end of the Government's case. That case was irrevocably lost.

Now, as to the Empire robbery, Judge Lasker noted that while Wilson's testimony was not perhaps essential in the sense that it was a prima facie sufficient to send the case to the jury, it was not cumulative either. So the case went to the jury, the jury disagreed, and as a result of the a hung jury, there had to be a second trial with consequent cost to judicial and other resources. At that second trial as it turned out Anderson was convicted concerning the Empire robbery, but one can safely assume that if Wilson had testified at the first trial, we might never have had a second trial.

On appeals by Wilson and Bryan, the Court of Appeals reversed. It held first that neither one of them had any

legal basis for refusing to testify once they had been granted immunity. And the court noted in passing that if they had been simply concerned about the effect of their testimony on sentencing, there were other and better remedies to deal with that problem such as sealing the transcript or asking that they be sentenced by a different judge. Their remedy of refusing to obey the court's order to testify, the court of appeals said was a wholly improper approach to that problem.

The ground for the reversal of the convictions was that the Court of Appeals concluded that the use of summary procedure of Rule 42(a) is improper in the case of an orderly refusal of the witness to comply with a court order that they testify even if the witness is represented by counsel and even if the witness has an opportunity to be heard. The court felt that this result was compelled by its decision in an earlier case, the Marra case, in which it had said that if it were looking at the question on a clean slate, it would uphold the use of summary procedure in those circumstances, but it felt disabled to do so by what it thought was the teaching of this Court's decision in Harris v. United States, to which I will return shortly.

As we note in our brief at page 23, other courts of appeals have sustained convictions pursuant to Rule 42(a) in similar circumstances, and it disagreed in effect with the Second Circuit's analysis in this case.

Now, criminal contempt comprehends a spectrum of offenses of varied types and degrees of seriousness. Therefore, it is important to focus precisely on the question here. This case presents no claim of abuse of the summary contempt power by a judge embroiled in a heated controversy with a witness or a party or an attorney. Nor is there any claim of a right to a jury trial since the sentence in this case, the maximum sentence here being six months. Nor do we have here a staged recreation in the presence of the court of a contempt that was actually or originally committed elsewhere.

The question here is simply whether a so-called respectful refusal of a witness to obey the Court's order to testify or to give evidence at trial can be punished summarily as a criminal contempt.

QUESTION: Mr. Norton, was there any formal objection to the use of the summary procedure?

MR. NORTON: There was not, Mr. Justice Blackmun. Before the court had granted immunity to the witnesses there was a passing comment by Wilson's attorney to the effect that she wanted more time to consider or research the privilege question which they were then discussing. But that issue evaporated from the case once the court granted the witnesses immunity, and there was no objection raised to the summary procedure as to either witness.

Now, the question -- this Court has not previously

directly resolved the question in this case, although it did in dictum in the Yates case approve the procedure that was followed by Judge Lasker here. Now, 18 U.S. Code 401 authorizes Federal courts to punish by imprisonment various contempts, one of which is disobedience of its lawful orders. It's not disputed here that the refusals of Wilson and Bryan to obey Judge Lasker's order that they testify constitutes criminal contempt punishable under 401. Incidentally, I should note that although the district court docket entries recite conviction under 18 U.S.C. 402, it is clear that the court intended and the parties here understood that it was a conviction under 18 401. Section 402 is by its terms plainly inapplicable.

Now, that a refusal to testify may be punishable under these circumstances as criminal contempt is clear from this Court's decision in Harris and other cases. It is also clear that disobedience of a court order to testify is a serious type of contempt. This Court said in the Shillitani case that the power of a court to compel a witness to testify is essential to the administration of justice. In Calandra it noted that every citizen owes his Government the basic obligation to testify when so ordered.

Now, the reason that the public has a right to every man's evidence, as the Court said in the Nixon case is that the integrity of the judicial system depends upon full

disclosure so that innocent persons do not suffer nor the guilty escape.

It is important to note in this regard that the principle we contend for her is inherently mutual in operation. It does not necessarily favor the prosecution, although in this case it might. The same question would arise if a defense witness refused to testify when ordered to do so by the court. In such circumstances the consequence of recalcitrance might not be limited to the extended incarceration of a defendant, but rather could result in a conviction of an innocent person.

The central issue here is whether the summary procedures of Rule 42(a) of the Federal Rules of Criminal Procedure were properly used in this case. The case is squarely within the terms of Rule 42(a) in that Judge Lasker saw and heard the contemptuous conduct and it occurred in the actual presence of the court. Moreover, summary disposition in this case is consistent with the purpose of Rule 42 in distinguishing between those contempts which should be subject to the notice and hearing requirements of Rule 42(b) and those covered by 42(a) where summary disposition is appropriate.

The use of the summary contempt power is justified in part by the fact that contemptuous conduct often disrupts ongoing proceedings. There is therefore a need for swift adjudication of whether the conduct is justified and lawful

and whether it should be punished so as to end the disruption. The need for dispatch is perhaps especially great with a recalcitrant witness, trial witness, in a criminal case, particularly a jury trial, whether it's a prosecution witness or a defense witness. The defendant has a right to a speedy trial. The courts and prosecutors have obligations to proceed promptly. Defendant may well be incarcerated, so that any delay in the trial for a side excursion on the contempt proceedings, as in this case, for retrial because of a hung jury, puts a penalty on the defendant. If a defendant is ultimately acquitted there is no way to recoup that lost liberty. Also, where a jury trial is involved a suspension of the proceedings to comply with the notice and hearing requirements of 42(b) creates additional difficulties and expense.

Now, where the contempt consists of refusal in the court's presence to obey an order to give evidence at trial, there is no need for a formal hearing required by 42(b), the primary purpose of which is to gain facts and to resolve factual disputes. The essential facts are known to the judge. In many such cases, as here, the reasonsfor the contempt will also be known, the circumstances leading up to the original refusal to give evidence and the order to testify. If there are relevant facts which are not known to the judge or other matters that might bear on whether the defendant or the witness

should be held in contempt or the question of sentencing, they can be brought to the court's attention afterwards. As the Court noted in Groppi and again in Taylor v. Hayes, courts commonly modify contempt judgments on the basis of subsequent presentations or developments. In this case, Wilson and Bryan had more than Rule 42(a) would entitle them to. They had opportunities to explain their positions before they were ordered to testify and before and after they were held in contempt. They had counsel to advise and assist them and they had the substance of a hearing.

Moreover, since conviction, neither one has made any effort to make any presentation to the district court of any matter that might have borne on whether they should be held in contempt or whether the provisional six months sentence was appropriate. They have not sought any kind of reconsideration or additional hearing or tendered any matters of any kind, beyond offering speculations as to what might have happened had there been a fuller hearing than they in fact had.

In cases that are indisputably subject to the summary contempt power, there is likely to be a greater basis for speculating that a hearing might have been useful. In such cases there has been no prior opportunity, as here, to make some explanation of why you are doing what you are doing, and in many of those cases the conduct where the witness or the defendant throws a chair or somehow is abusive to the court

there is greater reason for thinking that there is some background causative factor that deserves some further exploration, yet summary contempt is properly upheld. And if the mere speculative possibility of some kind of extenuating circumstances were to be accepted as sufficient reason not to use summary contempt, there might never be a case where a court could safely exercise the power that all concede it has.

Now, the summary imposition of the contempt in this case is consistent with the propositions that the court should, in the contempt area, use the least power adequate to the needs of the occasion and should resort to criminal contempt only if civil contempt would not be efficacious. As Judge Lasker knew, civil contempt in this case could be effective only for a brief period. There were only a matter of hours remaining in the trial. One could reasonably assume that Wilson and Bryan would be willing to spend those hours to save a friend.

QUESTION: Were they then incarcerated or --

MR. NORTON: They were, and that's my next observation that -- first, in any trial there is not likely to be a long period of potential coercive confinement. But in this case, in addition, they were both incarcerated already so that any additional incarceration or confinement in civil contempt would have been superfluous.

QUESTION: It would have been just confinement in a different place.

MR. NORTON: That's true. That's true. As Judge Lasker recognized in making the contempt sentence run consecutively to their sentences on their convictions, this he could not do with civil contempt.

Now, in a case where civil contempt might be appropriate because there is a sufficiently long period of confinement, a grand jury witness would be a good example, and the witness is already incarcerated, you might have a different situation because in some such cases, at least if it was a prisoner serving an adult sentence imposed by the same court, it might be possible for the district court to suspend the execution of that ongoing sentence for the period of the confinement on civil contempt. This is a novel approach recently sustained by the D.C. Circuit Liddy case and by the Seventh Circuit in Anklin case.

However, this was not an option that was a feasible one in this case because there were only a couple of hours left in the last day of the trial.

On the other hand, the deferral of contempt proceedings required by 42(b) is not entirely satisfactory here either. That approach tends to forego the opportunity to coerce compliance during the period that might be meaningful. It's almost totally punitive. Judge Lasker recognized here that summary imposition of criminal contempt had a possibility of coercing these people to change their minds and testify.

They had to face the likelihood not only that if they had not been in jail they would have to serve some time, but if they didn't purge their contempt, they would have to serve whatever full sentence was imposed.

Let me turn now to the question whether the district court's approach in this case is foreclosed by this Court's decision in Harris. The question presented in Harris is whether a grand jury witness disobeyed a court order to testify was properly held in criminal contempt pursuant to the summary procedures in 42(a) where the original refusal occurred in the grand jury room out of the presence of the court and it was recreated in the presence of the court. Also, unlike this case, the witness had unsuccessfully requested an adjournment and opportunity to present witnesses. In a five to four decision reversing its earlier decision in the Brown case this Court held that although the refusal constituted criminal contempt, it should have been proceeded against under the notice of hearing and requirements of Rule 42(b) since the real contempt was not in the presence of the court.

The dicta relied upon by respondents in the court of appeals, the majority indicated that Rule 42(a) was reserved for exceptional cases involving this behavior of various sorts. Even so, the Court indicated that it was not holding 42(a) inapplicable to a case like this because it's expressly assumed that 42(a) may at times apply to testimonial episodes.

We have addressed in our brief the historical argument as to whether summary contempt power can ever be applied to disobedience of court orders as distinguished from misbehavior, and I will not address that further here. I note simply that a witness' refusal to obey a court order to testify or to give evidence is likely to create, as here, a far greater obstruction to court proceedings than many of the types of misbehavior for which summary contempt power is unquestioned.

Now, the contempt in Harris involved a grand jury witness, and here we have witnesses at a trial. There is far greater need for speedy action at a trial because a grand jury can last 18 months or more and civil contempt may be summarily imposed.

QUESTION: Mr. Norton, don't you think the court that decided Harris would probably decide this case against you?

MR. NORTON: I would not think so. It's not necessarily compelled by Harris. We don't have here the problem of kind of staging the contempt in the presence of the court in order to come within the terms of Rule 42(a).

QUESTION: On the other hand, the court that decided Brown a plesheri?, would decide this case in your favor.

MR. NORTON: No question.

QUESTION: Well, the difference in Harris was that you don't have 12 jurors and witnesses and the whole mechanism

of the Court standing by waiting. As you pointed out, a grand jury could take the matter up 30 days or 60 days later. But a petit jury would be difficult to hold -- a petit jury trial would be difficult to hold intact.

MR. NORTON: That's right. Most trials only take a few days. The statistics for 1974 in the administrative office of the U.S. Court show that 84 percent of all cases take 3 days or less, and even 73 percent of criminal jury trials take 3 days or less. And indeed, more than 50 percent of all trials take one day or less. So that summary -- the interruption or delay of proceedings to comply with Rule 42(b) would have no coercive possibilities.

In short, we don't believe that Harris compels the reversal of the convictions in this case and that if it is regarded as barring those convictions, it should be limited or overruled as necessary.

I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Miss Ginsberg.

ORAL ARGUMENT OF SHEILA M. GINSBERG

ON BEHALF OF RESPONDENT THOMAS JOSEPH WILSON

MISS GINSBERG: Mr. Chief Justice, may it please the Court: In this case without valid justification therefor the Government asks this Court to approve a criminal conviction and six months sentence without an opportunity to defend

against that imposition.

There are a few facts surrounding the contempt in this case that I would like to emphasize. First, that the contempt -- forgive me, the refusal to testify at all times was orderly and respectful. The witness was called to testify before the same judge -- this is respondent Wilson -- was called to testify before the same judge who was to eventually sentence him on the underlying bank robbery charge.

QUESTION: Well, on the question of his being respectful or disrespectful or otherwise, what difference does that make in terms of holding up a trial of a jury case where you have 12 or possibly 14 jurors, with alternates standing by and witnesses standing by and approaching the end?

MISS GINSBERG: Well, your Honor, I believe the distinction is that the purpose of summary power is not just to move the trial along, but to preserve the authority and the dignity of the court.

QUESTION: How do you distinguish the two? You think the two are not linked together?

MISS GINSBERG: Well, there may be some links, but I might add that precipitous summary action may well do more to infringe upon the authority and dignity of the court than the short adjournment of perhaps 24 hours so that a hearing can be held to allow the accused condemner an opportunity to defend. I mean, in answer to what I perceive to be your Honor's

concerns during the assistant's argument, trials are frequently adjourned for short periods of time without the calamity befalling the system that the Government now suggests. Adjournments are granted in criminal trials for much less consequential reasons.

The point is that in fact adjudications of criminal contempt are not exempt from procedural due process and in this case there was no reason, no valid reason for not affording respondent Wilson the opportunity to defend against the charge.

Now, when respondent refused to testify, he did so on the grounds that even the grant of immunity would not protect him from use of his testimony against him at the time of sentence.

I would like to point out at this juncture that there was other liability within the context of this testimony, because had he testified, he would have been subject to cross-examination by defense counsel. And he was just not subject to liability as to the facts of this crime, but there were other areas perhaps, and I don't suggest that they definitely exit here, but there is a possibility that he would be subjected to greater liability by the cross-examination of defense counsel.

QUESTION: What kind of liability are you referring to? I'm not quite clear.

MISS GINSBERG: Well, on cross-examination, for example, the defense counsel would ask Mr. Wilson to impeach

his credibility about the commission of other crimes.

QUESTION: How would that injure him? He could only impeach him with convictions that were of record, as a matter of public record, isn't that so?

MISS GINSBERG: Well, that is so, but whether or not they were known to the probation department withoug Mr. Wilson's testimony is another question. I have to hasten to add that I don't suggest that there were those other crimes committed here, but there is that possibility.

QUESTION: Miss Ginsberg, I asked Government counsel as to whether there was an objection made to the summary procedure here. Was there? Do you feel there was sufficient objection there?

MISS GINSBERG: Yes, your Honor, I feel there was and the Second Circuit specifically held that there was. Counsel not only objected -- or requested, rather, continuance to enable time to research the legal issues. She specifically, and I believe it's at page 5 of the appendix, specifically objected to the hasty determination of this issue which subjected respondent Wilson to heavy criminal penalty.

QUESTION: Let me ask you another question now that I have you interrupted. Are you here, are you bottoming your position in the case on due process on the constitutional ground or on the supervisory power of this Court?

MISS GINSBERG: Well, your Honor, I argue, of course,

that there is a due process right to a hearing and I would also rely on the supervisory powers of the court to preclude from the ambit of Rule 42(a) an orderly, respectful refusal to testify.

QUESTION: This is a Federal case. The next one might be a State case and our supervisory power might not exist in the State case. Hence, I was wondering whether you were reaching for a constitutional ground.

MISS GINSBERG: Well, as I said --

QUESTION: Don't you think Harris was just a construction of a rule?

MISS GINSBERG: Well --

QUESTION: That's all you need, isn't it?

MISS GINSBERG: It's all that I need, yes, sir.

QUESTION: But it isn't all that the next case needs coming out from the State side.

MISS GINSBERG: No, that's true.

In any case, Judge Lasker, recognizing the viability of respondent's claims attempted to sentence him before acquiring his testimony. However, after hearing the probation officer and defense counsel, the judge concluded that he did not have sufficient information, particularly of a psychiatric nature, to adequately sentence the respondent on the bank robbery. He then determined that respondent's Fifth Amendment rights did not extend to protect him from use of his testimony

at the time of sentence for the bank robbery, and he ordered respondent to testify. When he refused, he immediately held him in contempt and sentenced him to six months in prison.

We contend clearly that this was error. The adjudication of criminal contempt is not exempt from due process considerations of notice and a hearing. In Harris this Court specifically held that Rule 42(b) and the notice and hearing provision therein provided the general or the normal procedure for dealing with contempt in the Federal regime. Harris went on to say that this would give the accused condemner an opportunity to present legal defenses to the charge of contempt and also to present facts in litigation of the charge or the penalty.

Now, in this case had counsel been given that opportunity, there was much that she could have done by way of defense for Wilson. In the first instance, as I just noted, there was some indication in the record of psychiatric problems. Now, the Government tries to dismiss this as of little consequence, but the fact remains that Judge Lasker was convinced that there was some need for psychiatric treatment and he specifically indicated his intent to incorporate that psychiatric treatment within the sentence for the bank robbery. Clearly psychiatric problems are relevant to determining Wilson's responsibility for refusing to testify, and if not that far, they certainly are relevant in mitigation of the

sentence.

Moreover, there was a real --

QUESTION: ... contempt require mens rea?

MISS GINSBERG: I believe it does, your Honor.

QUESTION: Do you have authority for that proposition?

MISS GINSBERG: I believe there is a per curiam on a decision of this Court. The name of the case, however escapes me. I can submit it at a later date.

QUESTION: There is a per curiam involving a contempt in a Federal court. It may be the case you are thinking about, Long ... in which there was a lot of very gross and conspicuous misconduct by one of the defendants in the case. It was suggested that he might have been insane, might not have been competent, and this Court remanded to canvass that issue, which would suggest that contempt does require mens rea, because if it were only the objective conduct, then I suppose an insane person could have been equally guilty of contempt. But if it requires -- but if only a competent person could be found in contempt, which is the implicit holding of that case, then I suppose the answer would be it requires mens rea.

QUESTION: Aren't these all matters that the court can take into account at a subsequent point?

MISS GINSBERG: No, your Honor, I don't think that they are.

QUESTION: Aren't you aware that the vast majority of contempt citation penalties are reduced after their original imposition?

MISS GINSBERG: Well, that may well be, your Honor, but I think that as a general principle of law and as it applies in this case, a Rule 35 motion is insufficient to compensate for the deficiencies of this procedure. Firstly, a Rule 35 motion does not go to the imposition of the criminal conviction. And, secondly, I think that what that procedure countenances is the imposition of a final sentence based on inadequate information. It places the respondent in a position of coming into court and convincing the judge that his initial decision was incorrect.

QUESTION: I can understand your position about his possible mental condition if he had engaged in disruptive conduct, as in the case that Mr. Justice Stewart referred to. Here he was casting his refusal on strictly legal grounds, was he not? And there was no disruption of the courtroom.

MISS GINSBERG: True, there was no disruption of the courtroom, but --

QUESTION: No misconduct of any kind.

MISS GINSBERG: None. No misbehavior.

QUESTION: Except the refusal in itself.

MISS GINSBERG: But clearly there are levels of or brands of incompetence which go to the witness' inability to

comprehend the obligation to testify that would seem -- and in fact, the per curiam that I was thinking of, if my memory serves me correctly, deals with a refusal to testify, of testimony before a grand jury in any case.

It would seem to me that there are certain varieties of incompetence that would certainly go to that.

There were other facts here which clearly counsel could have presented at a hearing had she been given the opportunity. First of all, there was a confusion as to the extent of Wilson's Fifth Amendment privilege, how far it would protect him. Judge Lasker and the prosecutor were both laboring under the misconception that his Fifth Amendment privilege did not extend to the sentence. Judge Lasker believed that there was no way to protect Wilson from having a sentence and the judge use his testimony. And in fact he didn't have the right to protect the sentencing judge from doing that. The Second Circuit, in fact, in its opinion set forth the procedure whereby Wilson could have been protected; had counsel been given the opportunity she requested of a continuance. It's entirely possible that she would have come up with this procedure and thereby obviated the whole need for the hearing.

QUESTION: Is that a statutory procedure or one worked out in the Second Circuit?

MISS GINSBERG: I believe it was one worked out in

the Second Circuit, but not just on this appeal. They rely in their opinion on United States v. Goldberg which was the case the prosecutor handed up to the judge during this hearing. But everything was done with such haste and, with all due respect to Judge Lasker, in such a cursory fashion that it was never -- the procedure was never thought through and nobody ever realized, or at least articulated at the hearing, that Wilson could be protected by testifying, having the record sealed, and then having his sentence transferred to another judge.

QUESTION: And that protection is not against self-incrimination but against reprisals in the penitentiary and so on, isn't it?

MISS GINSBERG: No, your Honor, it's a Fifth Amendment --

QUESTION: But I am talking about the protection procedure that's been worked out.

MISS GINSBERG: Well, no, it's to insure protection or to insure that the sentencing judge does not use the substance of the testimony to increase the underlying sentence, in this case for the bank robbery.

QUESTION: To insure you get a neutral judge in the sentencing, isn't that the theory of it?

MISS GINSBERG: Exactly.

QUESTION: And the sealed testimony also serves

the same function, does it?

MISS GINSBERG: Yes.

QUESTION: The sealing of the testimony.

MISS GINSBERG: Exactly.

I would like to quickly get to the Government's justification for the summary proceeding. They claim that despite the language of Harris, which makes it very clear that summary proceedings under Rule 42(a) are only to be used in exceptional circumstances. And Harris defines those exceptional circumstances as acts in court, acts of misbehavior which threaten the judge or obstruct the proceeding or the courtroom, obstruct the courtroom.

The Government argues that the justification in this case was to compel testimony. Now, first of all, I must point out that if the record is clear about anything, it is clear about the fact that Judge Lasker did not intend to coerce Mr. Wilson's testimony by sentencing him for criminal contempt.

QUESTION: It was punishing him for his refusal to answer, wasn't it?

MISS GINSBERG: That's correct. But it was not intended to coerce the testimony, this punishment. The judge stayed the sentence pending appeal, and he specifically told Mr. Wilson that there was no need for him to concern himself about the sentence at this time.

QUESTION: Isn't part of it the deterrence of that kind of conduct with respect to other witnesses in other cases?

MISS GINSBERG: Well, if in fact that is one of the purposes, it doesn't seem that purpose would be thwarted by notice of 24 hours and a short hearing.

I would also like to say that the use of criminal contempt to coerce testimony is violative of the whole concept of criminal contempt. Criminal contempt, as your Honor points out, is to punish, not to coerce. It's the civil contempt sanction --

QUESTION: You are taking issue with Rule 42(a) are you?

MISS GINSBERG: No, sir. No, I'm not. I'm just saying that criminal contempt should not, was not intended to have as its primary purpose coercion,but punishment.

MR. CHIEF JUSTICE BURGER: Mr. Martin.

ORAL ARGUMENT OF JOHN S. MARTIN, JR.

ON BEHALF OF RESPONDENT BOBBY ANTONIO BRYAN

MR. MARTIN: Mr. Chief Justice, and may it please the Court: I think that the issue posed in this case is one that is fundamental to our system of justice. That is, what rights, procedural rights, do we give a citizen of this country before we sentence him to serve six months in jail.

I think that the issue is muddied somewhat by the

procedural context in which this case arises, and I think gives rise to some of the questions which Mr. Justice Blackmun raised as to whether this is a due process requirement or rather a requirement of Rule 42. It seems to me that the respondents here were afforded a hearing that was not a Rule 42(a) hearing, but at the same time they were not given a 42(b) hearing. And I would suggest very respectfully that in determining whether or not summary contempt power may be used in the case of a witness who respectfully refuses to testify, we have to look at the summary contempt power that is contempated in Ex Parte Terry. Summary contempt power authorizes the district judge or the trial judge to impose a sentence of imprisonment without affording the respondent the right to counsel or the right to say anything in his own defense. And it seems to me that the consistent teaching of this Court is that that type of deviation from what we normally consider the due process rights of a criminal defendant can only be justified by the most extraordinary need to protect the dignity of the Court. And it seems to me that in this case that great need to protect the dignity of the court is not present to justify a departure from the more traditional procedures which due process encompasses.

It seems to me we have a case where these two men, for different reasons perhaps and in different circumstances, refused to testify. I think one of the compelling facts

concerning the client I represent, Mr. Bryan, in this procedure is that he was forced to go forward in the absence of his own counsel. Counsel was simply assigned to him on that morning. That may not seem like a terribly significant fact, but it seems to me my experience in representing assigned counsel, representing assigned defendants, is that it takes some time for a lawyer assigned by the court to develop a rapport with his client. The rapport that comes naturally if a man has sought you out to be his counsel does not exist when you are suddenly thrust upon a defendant. And it seems to me that fact here takes away the ability of the counsel to on the spur of the moment really meaningfully advise the client of his rights. And it seems to me the issue here is whether or not these respondents should have had the right to counsel before geing sentenced to the maximum sentence possible in the circumstances, a sentence of more than six months could not have been imposed.

QUESTION: One of the consequences of this conduct was quite serious, was it not, in terms of the results of one of the trials?

MR. MARTIN: It certainly was, Mr. Chief Justice, and all I am suggesting is not that the punishment was not proper, and indeed I think an argument could be made by the Government at some future time that in a situation like this it might be appropriate to impanel a jury so that a more severe

It seems to me that once the sentence is imposed, "Well, that's what I've got to serve," and ... A witness who is confronted with a situation where he is told that, "I am sentencing you -- I am letting the marshal take you into custody and holding you in civil contempt. I'm going to set this matter down for a hearing to determine if you should be held in criminal contempt and a sentence to be imposed at that time," a witness in that situation is more likely to come back the following day and say, "I've thought about it and I will testify," than one who has had the final sentence imposed on him. So that I don't think that the remedy that the Government suggests is the most effective way to bring about the testimony that they seek to compel here.

It seems to me that the consistent teaching of this Court has been that summary contempt power is reserved for the very extreme case, and it is our submission here that this is not that extreme a case. There was no disrespect manifest to the court that called for the court to vindicate its authority right then without waiting for a moment so that people would know that the court's authority exists. This is not the situation such as existed in Terry where there was a violent outburst in the courtroom and the court there set fine. There the dignity of the court was affronted and it must be able to control the procedures in its own courtroom. And that was, I think, the rationale set forth in Cooke v.

United States those outburst distinctions quite clearly.

QUESTION: There is, Mr. Martin, for me at least one difficulty that we are dealing here really with the specific language of the Federal Rules of Criminal Procedure, are we not? Unless you are suggesting that there is something constitutionally deficient about the language of 42(a).

MR. MARTIN: I am. I am suggesting, Mr. Justice Stewart, that it is constitutionally deficient, it is a violation of due process to use summary contempt power in the situation before the Court.

QUESTION: I see.

MR. MARTIN: What I am suggesting is that --

QUESTION: But you do concede that the language of 42(a) would permit summary contempt power in the circumstances of this case.

MR. MARTIN: I do, and this is really what I am addressing myself to at the outset, the fact that really you have the procedure used here was not 42(a), it was not 42(b). It was something in the middle. And I think it was something in the middle because the district judge recognized that there were certain limited due process rights that should attach before you send a man to jail for six months.

QUESTION: The judge was well aware, was he not, that the trial was virtually coming to a close very shortly?

MR. MARTIN: I think that that is true. It was clearly

going to be a very short trial, and he was aware of that. But as Miss Ginsberg pointed out, there is nothing in the court's action -- indeed, the court's action totally contradicts the fact that he was seeking by his order to compel testimony right then and there, because he stayed the effectiveness. He said, "Listen, I will consider this again after the appellate courts have passed on it." So there is no element here of using this criminal contempt power to force right then and there the witness to change his mind about the testimony.

QUESTION: Your submission requires you, I take it, to either say that 42(a) is constitutionally flawed or else this is not a 42(a) case.

MR. MARTIN: I think it requires the Court to say that 42(a) is constitutionally flawed in the circumstances of this case. I think Terry indicates that obviously there are situations where you can impose contempt without giving the respondent any right to reply. But I think what the Court has consistently held from the time Terry was decided to date is that to justify that radical departure from due process, you need very strong and compelling reasons showing that the demoralization of the court's authority would occur. And what I am really submitting is that our system of justice is not so fragile that it would collapse if people like --

QUESTION: I go back to the consequences on the other

trial. They were rather --

MR. MARTIN: I think it is true that it disrupts the trial. It has consequences. But those consequences followed even though criminal contempt was imposed here.

QUESTION: I am speaking also of the suggestion of the Solicitor General that there was a serious miscarriage of justice by the directed acquittal. It was directed --

MR. MARTIN: That's right. They dismissed the three counts involving the bank robbery in which my client was involved. And I don't mean to denigrate the seriousness of that. And as I said before, I might, if I were back in the Solicitor General's office, be prepared to argue that you could impanel a jury and impose a substantial sentence more than is imposed here.

All I am suggesting, Mr. Chief Justice, is that when you impose a sentence as much as six months on an individual, that you have to afford him some basic due process rights, a right to notice, an opportunity to present, as the Court said in Cooke, evidence in either exculpation or mitigation.

QUESTION: And was the sentence imposed on the one defendant who was found guilty -- was it a new trial?

MR. MARTIN: Anderson? Ultimate sentence? I must say I just don't know, Mr. Chief Justice.

MR. MARTIN: A bank robbery so it can be seen it's

a very substantial sentence.

MR. MARTIN: Most serious. My client was sentenced to ten years for the bank robbery. It's a substantial crime. And as I say, I don't denigrate the seriousness of what was done here. I'm just simply suggesting that given the substantial sentence -- six months is a substantial sentence. I have seen men cry when they have been sentenced to three months in jail.

QUESTION: But conduct that leads to the acquittal of a man guilty apparently of a 10-year offense?

MR. MARTIN: No, sir, I'm not saying it is out of order with the magnitude of the disruption. All I am saying is that before you impose a sentence of that magnitude, you should give certain minimal due process rights to allow the respondent to have an opportunity to present to the Court any facts in mitigation and exculpation. Having had that right, I am not saying it would have been inappropriate to sentence him to six months --

QUESTION: Your alternative argument was that it should give him -- or perhaps it was your colleague's argument -- give him time to think it over until the next day and he might change his mind. Does that mean that every time a court is confronted with a recalcitrant witness, you stop all the proceedings and give him 24 hours to think it over to see if he is going to --

MR. MARTIN: Well, I think in most instances that probably is not going to be necessary. Mr. Norton's statistics certainly are not in conformity with my experience in the Southern District of New York where practice primarily, it seems to me in most cases, you are going to be able to proceed with other witnesses or other aspects of the trial.

But adjournments of 24 hours are not unusual. If you have a juror with the flu,we adjourn cases for 24 hours. So that I don't see it as a disruption.

QUESTION: What did he need a lawyer for?

MR. MARTIN: What did he need a lawyer for? I think he needed a lawyer, one, to advise him of the serious nature of the charges, to present to the court -- take the litigation here, Mr. Justice White, factors concerning the defendant himself, also factors as to perhaps even introduce evidence to show that the refusal to testify was not one that was simply based on a greater loyalty to a friend, but a real belief that the constitutional grant of immunity was not coextensive with the privilege.

It seems to me if a man refuses to answer because he really believes the district court's rule is in error, that that is a relevant factor to be considered in imposing sentence. It seems to me a manwho believes that the court is wrong, that his constitutional rights, he wants to protect them, doesn't deserve the maximum sentence possible.

QUESTION: Your point is that the constitutional privilege against compulsory self-incrimination has got subtleties and nuances that a person can't decide upon by himself but needs a lawyer to help him decide. Is that it?

MR. MARTIN: That's correct. And also whether or not to go forward and testify is a decision in those circumstances where -- this is the point I was trying to make before -- that the witness has to have some faith in the lawyer. And I think that's one of the things that bothers me here is that my client was asked to make all these decisions and go forward with a brand new lawyer assigned to him that morning.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

You have about five minutes left, if you have anything further.

REBUTTAL ARGUMENT OF GERALD P. NORTON

ON BEHALF OF THE PETITIONER

MR. NORTON: The suggestion that there was no intention here to give Mr. Bryan and Mr. Wilson an opportunity to purjure their contempt I think is rebutted by the statement of Judge Lasker, at page 32 of the appendix, where he specifically referred to imposing a sentence for a period of time subject to elimination or reduction of it to nothing should Mr. Bryan care to testify and answer the questions. That was plainly his intention and everyone understood it.

They chose not to do so.

As for the possibility --

QUESTION: Where are you reading from?

MR. NORTON: Page 32 of the appendix, the middle of the page.

QUESTION: Beginning, "My suggestion is that I am" --

MR. NORTON: Yes.

At other points he said he was making this/a provisional sentence in both cases subject to reduction or reconsideration.

Now, the suggestion that Mr. Wilson's refusal was based on some legal issue as to the effectiveness of the immunity to protect him, I think is also rebutted by the fact that when counsel said, to consider the motivation for what Mr. Wilson has done, Judge Lasker said, "To save a friend," Counsel: "Yes." It is very clear what was happening here. This was not someone standing on some legal principle to preserve the issue. This was someone who simply didn't want to talk to save a friend. That's all there was to it.

QUESTION: It wasn't clear to him what immunity he was getting, was it?

MR. NORTON: It was. Judge Lasker explained that and explained that the consequences of immunity, what he said could not be used against him and that he had to answer questions put to him.

QUESTION: And did he say that it couldn't be used

by the sentencing judge?

MR. NORTON: I don't believe he specifically said that.

QUESTION: Well, there were some things that were left open that this man didn't understand.

MR. NORTON: In this case, your Honor, both Wilson and Bryan had admitted their complicity in the offense. There has never been any suggestion that what happened here, if they testified it could have been used against them.

QUESTION: I'm talking about the grant of immunity, period. Could he possibly understand it without getting advice, thinking it over?

MR. NORTON: Mr. Wilson had his attorney present and Mr. Bryan was represented by Mr. Wilson's attorney.

QUESTION: Wait a minute. He had somebody else's lawyer.

MR. NORTON: Yes. That's right. Someone else whose client had the identical problem and was prepared to address it that day.

QUESTION: Witness the fact that they are so identical that one of them said that lawyer couldn't represent him in this Court. That's how identical they are. Until this day they are not identical.

MR. NORTON: Well, I can't speak to the --

QUESTION: That's what the record shows in this

Court.

MR. NORTON: Well, they have different factual situations and they prefer to make different arguments.

QUESTION: So they are not identical.

MR. NORTON: Well, they were identical as far as the question of whether they could be held in contempt when they refused to obey a court order, they were in the identical situation.

QUESTION: I am not -- did they have an identical situation as to immunity? Did the fact that one and his lawyer understood immunity mean that the other one understood the full parameters of the immunity?

MR. NORTON: If Mr. Bryan's refusal to testify was based on some misapprehension as to the scope of the immunity, then that is a fact that could have been presented to Judge Lasker at any time in the 20 months or so since these confictions were entered.

QUESTION: I would assume that anybody convicted for murder can bring habeas corpus 50 years later. But that doesn't make the original conviction legal.

MR. NORTON: Contempt is an unusual creature in that regard and the Chief Justice indicated criminal contempts are frequently revised after further presentation.

On the question of notice, counsel seemed to assume that one day would be sufficient. Now, whether that's so or

not is an open question. Some courts of appeals have said that five days notice is required where notice is necessary. A five-day interruption of the trial would be something very different indeed and that would be longer than the trial itself took.

The question of whether sentence under 42(a) has any coercive effect, I think is clear that the summary exercise of the contempt power is inherently coercive. That is why the courts are permitted to exercise it. It is to address immediately some conduct which obstructs or casts in a bad light the administration of justice. If the only purpose were punishment, 42(b) would be sufficient. It is the need to deal immediately that justifies a summary disposition.

And finally on the mens rea question, I note simply that first 402 is not required, that the action be willful as 402 does, and that in this case the defendant had entered his guilty plea with no suggestion that he was not competent to stand trial. The difficulties in sentencing a youthful offender on a 20-year maximum burglary count are very different indeed from determining whether he has legitimately refused to answer a question.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

Mr. Martin, you appeared by appointment to the Court,

and on behalf of the Court we thank you for your assistance to us and, of course, your assistance to the client.

Thank you.

[Whereupon, at 2:14 p.m., the argument in the above-entitled matter was concluded.]